

IN THE MATTER of the Gambling Act 2003

AND an appeal by **BLUESKY
COMMUNITY TRUST** against
refusal to amend its class 4
operator's licence

BEFORE THE GAMBLING COMMISSION

Members: S W Hughes KC (Chief Gambling Commissioner)
S C L Pearson
W A Acton
S T Shaw
C M Risk

Date of Appeal: 23 June 2024

Date of Decision: 8 November 2024

Date of Notification of Decision: 19 November 2024

**DECISION ON AN APPEAL BY BLUESKY COMMUNITY TRUST AGAINST REFUSAL TO
AMEND ITS CLASS 4 OPERATOR'S LICENCE**

Introduction

1. BlueSky Community Trust ("**BlueSky**") appealed to the Gambling Commission against a decision by the Secretary for Internal Affairs ("**Secretary**") to refuse to amend its class 4 operator's licence in the form of approving amendments to its Policy for Identifying Problem Gamblers ("**PGIP**") and its statement on how it proposed to minimise the risk of problem and underage gambling at its venues.

Background

Regulatory Change

2. Section 316 of the Gambling Act 2003 ("**Act**", all statutory references are to this Act, unless otherwise specified) provides for the making of regulations relating to the exclusion of problem gamblers. Section 316(1)(a) expressly provides for regulations "to enable a venue manager, the holder of a class 4 operator's licence or the holder of a casino operator's licence, or a person acting on behalf of any of those persons, to identify problem gamblers (including the sources of information that must or may be considered or sought to assist in identifying problem gamblers)".
3. The Gambling (Harm Prevention and Minimisation) Regulations 2004 ("**Regulations**") were made under section 316. In 2023, the Regulations were amended, in respect of class 4 gambling, to impose new training obligations for problem gambling awareness, restrictions

on the location of ATMs and the visibility of gaming machines, and obligations to undertake periodic “sweeps” (being staff observations of player behaviour) at least 3 times per hour (but no less than 10 minutes apart), to look for signs of harm, to have conversations, to maintain records of those activities and to review those records periodically. Of the 2023 regulatory changes, the following new regulations, which took effect from 1 December 2023, led to the application to amend BlueSky’s class 4 operator’s licence:

15 Venue manager must ensure that venue personnel consider whether player is exhibiting signs of harm

(1) The venue manager must ensure that venue personnel consider whether any player is exhibiting any of the signs of harm, including those described in the Schedule.

(2) The venue manager must ensure that venue personnel, after identifying that a player is exhibiting 1 or more of the signs of harm (including any of those described in the Schedule), have a conversation with that player to assist with identifying whether the player is a problem gambler.

16 Records relating to gambling area sweeps and signs of harm

(1) The venue manager must maintain records for the purposes of recording the information required by subclauses (2) to (6).

(2) The venue manager must ensure that venue personnel record the following information in relation to a gambling area sweep:

- (a) identification of the venue personnel who conducted the gambling area sweep:
- (b) the date and time that the venue personnel conducted the gambling area sweep:
- (c) how many players were present in the gambling area during the gambling area sweep:
- (d) evidence of the steps taken by the venue personnel to monitor and identify whether players have been gambling during consecutive gambling area sweeps:
- (e) if a gambling area sweep is not conducted because venue personnel could verify through other means that the gambling area was unoccupied by players,—
- (i) the method by which venue personnel verified that the gambling area was unoccupied by players; and
- (ii) the date and time that the gambling area sweep was not conducted.

(3) The venue manager must ensure that venue personnel record the following information in relation to each sign of harm identified:

- (a) the name of the venue personnel who identified the sign of harm:
- (b) the date and time that the venue personnel identified the sign of harm:
- (c) information that would help venue personnel to identify a player who displayed the sign of harm (for example, their name, if known, or a general description of their appearance):
- (d) which sign of harm was identified:
- (e) the name of the venue personnel who talked to the player as required by regulation 15(2):
- (f) the date and time that the venue personnel talked to the player:
- (g) a summary of the conversation with the player:
- (h) any further action taken in respect of the player.

(4) The venue manager must review, or ensure that a person reviews on their behalf, the records for at least the previous 7 days at least once each week to—

(a) assess whether venue personnel have taken appropriate action following the identification of 1 or more signs of harm in a player; and

(b) assess whether further action is required in respect of a player; and

(c) determine whether there are any players who the venue manager, or the person acting on their behalf, has reasonable grounds to believe are problem gamblers.

(5) The venue manager, or the person acting on their behalf, after reviewing the records in accordance with subclause (4), must record—

(a) the date of the review; and

(b) any further action taken as a result of the review.

(6) The venue operator must ensure that information recorded is retained for a period of 3 years after the date on which it was recorded.

4. A new Schedule to the Regulations set out a non-exhaustive list of “signs of harm”, as follows:

(a) withdrawing, or attempting to withdraw, cash from an automatic teller machine or EFTPOS device on 2 or more occasions in 1 day to use for gambling at the venue:

(b) gambling during 9 or more consecutive gambling area sweeps:

(c) attempting to borrow money from venue personnel or other venue customers to use for gambling:

(d) leaving children in a car or otherwise unattended at the venue:

(e) waiting to gamble as soon as the venue opens:

(f) refusing to stop gambling at the venue when the venue is closing, or otherwise appearing unable to stop gambling:

(g) appearing visibly distressed or angry either during or after gambling (for example, crying, holding their head in their hands, or hitting a machine).

(“Schedule”)

5. On 2 November 2023, the Department of Internal Affairs (“**Department**”) released its Gambling Harm Prevention and Minimisation Guidance (“**Guidance**”), being a general guide to assist with the implementation of the new requirements of the 2023 amendments to the Regulations. The Guidance was intended to be read in conjunction with the Act and the Regulations.

Proposed changes to BlueSky’s policy

6. BlueSky is a non-profit incorporated society that operates gaming machines to raise funds for the community. BlueSky currently holds a class 4 operator’s licence under the Act. As a class 4 operator, BlueSky also holds class 4 venue licences in respect of the venues in which it operates.

7. On 18 April 2024, BlueSky applied to the Secretary to amend its class 4 venue operator's licence by proposing changes to its problem gambling policy documents. By way of background, applicants for a class 4 operator's licence are required to lodge, with the licence application form, "a statement ... of how it intends to minimise the risk of problem gambling (including the corporate society's policy for identifying problem gamblers)"¹. The proposed amendments concerned steps intended to achieve compliance with the 2023 regulatory changes.
8. By letter of 24 April 2024, the Department, acting for the Secretary, proposed to refuse to amend BlueSky's licence as proposed, on the grounds that the proposed policy documents would not achieve compliance with the Regulations following the 2023 amendments.
9. On 7 May 2024, BlueSky made written submissions addressing the issues raised in the proposal letter and, on 9 May 2024, submitted an updated and revised statement and PGIP.
10. By letter of 21 June 2024, the Department gave notice of the Secretary's decision to refuse to amend BlueSky's operator's licence as proposed.
11. On 23 June 2024, BlueSky filed a notice of appeal against the decision to refuse to amend the licence.

Jurisdiction

12. From an initial review of the appeal documents, it was not obvious to the Commission that it had jurisdiction to hear the appeal because the application to amend did not appear to propose any specific amendments to the operator's licence and the appeal submissions from the parties did not address the question of jurisdiction.
13. By way of further background, in addition to the obligation to lodge a problem gambling statement and PGIP when applying for a licence, sections 308 and 309 of the Act require licence holders to have and use a PGIP, the material parts of which are as follows:

308 Requirement to develop policy for identifying problem gamblers

(1) The following persons must develop a policy for identifying problem gamblers:

(a) every holder of a class 4 venue licence

(2) The policy must include any procedures prescribed by regulations made under section 316....

(4) A venue manager or the holder of a casino operator's licence, or a person acting on behalf of either of those persons, must take all reasonable steps to ensure that the policy is used to identify actual or potential problem gamblers....

¹ Section 50(2)(c).

(6) A venue manager or the holder of a casino operator's licence, or a person acting on behalf of either of those persons, who contravenes subsection (4) commits an offence and is liable on conviction to a fine not exceeding \$5,000.

309 Exclusion order may be issued to problem gambler identified under section 308

(1) The venue manager or the holder of a casino operator's licence, or a person acting on behalf of either of those persons, must, after identifying a person under section 308(4) who he, she, or it has reasonable grounds to believe is a problem gambler, approach the person and offer information or advice to the person about problem gambling.

(2) The information or advice offered under subsection (1) must include a description of—

(a) the self-exclusion procedure available under section 310; and

(b) any procedures prescribed by regulations made under section 316.

(3) A venue manager or the holder of a casino operator's licence, or a person acting on behalf of either of those persons, may, after offering advice or information to a person under subsection (1), issue an exclusion order to the person that prohibits the person from entering the gambling area of the class 4 venue or casino venue (as the case may be) for a period of up to 2 years.

(4) If an exclusion order is issued under this section, the venue manager or holder of the casino operator's licence, or a person acting on behalf of either of those persons, may require the person to whom it is issued, as a condition of re-entry, to participate, during the period of exclusion, in a procedure prescribed by regulations made under section 316(1)(e).

14. The Commission has routinely set out in detail the correct approach to the interpretation and application of the foregoing sections (including the meaning of the terms “problem gambler”, and “actual or potential problem gambler”) in its decisions on casino Host Responsibility Programme (“HRP”) reviews, the most recent of which was decision GC04/24.²
15. Although section 50(2)(c) requires that an application for a class 4 operator's licence be accompanied by “a statement by the applicant of how it proposes to minimise the risk of problem gambling (including the corporate society's policy for identifying problem gamblers)”, the operator's licence issued to BlueSky contained no reference to any such statement or policy. While BlueSky is required to have, and to use, a PGIP, and to provide a copy as part of its harm methodology statement when applying for its licence, those requirements are imposed by the Act. They are not the subject of an express licence condition concerning their identity or content.
16. BlueSky applied to amend its operator's licence, without proposing any specific amendments. While the application sought approval of a policy, it did not specify any amendment to the licence.
17. Section 53 governs the content and conditions of a class 4 operator's licence. It relevantly provides:

² See Decision GC04/24, paragraphs 17 to 19.

53 Content and conditions of class 4 operator's licence

- (1) A class 4 operator's licence must include the following information and conditions:
- (a) the name of the corporate society that holds the licence; and
 - (b) the commencement date and expiry date of the licence; and
 - (c) a specific description of the authorised purposes to or for which net proceeds from the class 4 gambling are intended to be applied or distributed; and
 - (d) any other information or conditions added by the Secretary....
- (2) The conditions that the Secretary may add to a class 4 licence include –
- (a) conditions intended to minimise the risk of problem gambling;
 - (b) conditions concerning the management of the gambling, including the records that must be maintained and reporting requirements;
 - (c) conditions concerning the management, application and distribution of funds derived from gambling and from the investment of those funds;
 - (d) conditions that restrict the authorised purposes to or for which net proceeds from class 4 gambling may be applied or distributed;
 - (e) conditions requiring the corporate society to inform players of the odds of winning, and specifying how that information is to be displayed or provided;
 - (f) conditions encouraging responsible gambling;
 - (g) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act.

18. In addition, pursuant to section 53(3), the Secretary may amend or revoke a condition of a class 4 operator's licence or add a new condition; in the event of doing so, the Secretary must notify the corporate society of the right to appeal and the appeal process under section 61.
19. Without reference to the presence of any licence condition regarding a PGIP or harm minimisation statement, section 57(1) requires a corporate society to apply to amend to its operator's licence if it proposes, among other things, to change its "problem gambling policies", a term not defined in the Act. Section 57 provides:

57 Amending class 4 operator's licence

- (1) A corporate society must apply to the Secretary to amend its class 4 operator's licence if the corporate society proposes to—
- (a) change the authorised purpose to or for which net proceeds from the class 4 gambling will be applied or distributed; or
 - (b) change its problem gambling policies; or
 - (c) change its methods, systems, or policies for the consideration of applications for the distribution of net proceeds from the class 4 gambling; or
 - (d) add a new key person; or
 - (e) make any other change that impacts on its ability to comply with this Act or the licence.
- (2) An application must be on the relevant standard form and be accompanied by—

(a) any items listed in section 50 that the Secretary requests in order to consider the application and effect the amendment; and

(b) if applicable, any items necessary to effect an application for a class 4 venue licence.

(3) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.

(4) Sections 51 and 52 apply to an application for amendment as if it were an application for a class 4 operator's licence.

(5) The Secretary must refuse to amend a class 4 operator's licence if—

(a) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 52; or

(b) the Secretary is not satisfied that the applicant complies with section 53A; or

(c) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, including the obligations set out in section 53A, minimum standards, game rules, *Gazette* notices, and licence conditions.

20. If the licence had contained a condition referring to an identified problem gambling policy (as section 53(2)(a) permitted, but did not require), the nature of the required amendment would have been obvious. That is not the case if the licence contains no reference to a problem gambling policy.
21. Section 59 sets out the procedure required if the Secretary refuses to amend a class 4 operator's licence. It includes notification of the proposal to refuse to amend, the reason for the proposal, and the corporate society's rights and the procedure to be followed, as a result of the refusal. Provision is made for written submissions by the society and their consideration before the decision is notified. Notification of the decision must include notice of the right to appeal and the process to be followed under section 61.
22. Section 61(1)(d) provides jurisdiction for an appeal against a decision of the Secretary to refuse to amend a class 4 operator's licence held by the corporate society, although that commonly involves a specific proposed amendment to the licence.

Submissions on jurisdiction

23. As a result, the Commission asked the parties for additional submissions on the Commission's jurisdiction to hear the appeal. The specific questions asked were:
- (a) While section 57(1)(b) requires a licence amendment application, what do the parties say is the nature of the amendment required by the section (and why)?
- (b) How do the changes sought constitute amendment to the licence to bring it within the Commission's appeal powers?
- (c) What do the parties say is the consequence of refusing the proposed amendment?
- (d) Does it affect the ongoing validity of the licence? If so, why, and how?

24. The jurisdiction submissions received from BlueSky may be summarised as follows:
- (a) The Commission has jurisdiction to hear the appeal under section 61(1)(d), as the result of a refusal to amend under section 57. It cannot have been Parliament's intention to require a formal licence amendment application to be made, to require the Secretary to formally notify the society of the right to appeal the decision and for there to be no appeal right.
 - (b) The effect of the Secretary refusing to approve the proposed policy is that BlueSky is required to conduct its gambling in accordance with the original harm minimisation policy. That policy now conflicts with its obligations under the Regulations as amended in 2023.
 - (c) One way of treating the request for approval of the proposed policy as an amendment to the licence is to treat the original policy submitted as producing an implied condition of the licence. Both parties agree that a society cannot operate under a new policy until the new policy has been submitted and approved.
 - (d) An alternative means of treating the request for approval as an amendment would be to treat it as a proposal to add an express condition identifying the new policy as that now applicable for identifying problem gamblers.
25. The jurisdiction submissions from the Secretary may be summarised as follows:
- (a) Parliament must have intended the harm minimisation policy to form part of the licence because section 57 requires societies to apply to amend their licences if they propose to change their policies. Not all aspects of an operator's licence are recorded on the physical licence; for example, addition of key persons requires a society to apply to amend the licence under section 57, even if the licence records nothing about key persons. A refusal to approve a policy is therefore a refusal to amend the licence (in respect of an unstated obligation which forms part of the licence) with a right of appeal under section 61.
 - (b) By refusing to amend the policy, the operator will not have an authorised policy to use which will achieve compliance with the 2023 amendments to the Regulations. In that event, the Secretary may take further action such as refusing to renew or cancelling the licence. However, refusal to amend will not necessarily result in further action as often it will just mean that the licence is not changed.
 - (c) Contrary to BlueSky's suggestion, the Secretary considers that an amendment to the licence to add a licence condition expressly identifying an applicable policy is

not permitted as the result of the decision in *Appeal by Hardy's Bar (2014) Limited*³ which held that a lawful licence condition must do more than duplicate a requirement already imposed by law.

26. In reply, BlueSky submitted that it was possible to impose a licence condition identifying an applicable policy and that the *Hardy's Bar* decision would not prevent the addition of such a condition because the terms of the policy are highly detailed and specific and go beyond obligations already imposed by the Act and Regulations.

Analysis

27. Both parties submitted that the combination of section 57(1)(b) and section 61(1)(d) adequately established the Commission's appeal jurisdiction, notwithstanding that the original licence did not contain a specific term relating to a harm minimisation policy. Both parties agreed that the refusal to amend would have no immediate effect on the licence but considered that BlueSky was not permitted to adopt and act in accordance with the newly proposed policy and, as a result, would likely breach Regulation 15 and face refusal to renew the licence or an application for suspension or cancellation. The parties suggested that the combined effect of section 57(1)(b) was to create an implied licence condition which the granting of approval would amend.
28. It is clear to the Commission that section 57(1)(b) requires an application to amend the licence if the licence holder proposes to change its problem gambling policy and that section 61(1)(d) provides a right of appeal against refusal by the Secretary. The Commission is accordingly satisfied that it has jurisdiction to hear the appeal, irrespective of whether there was an implied licence condition.
29. However, the existence of an implied condition, the nature of the amendment application, the amendment sought and the consequence of refusal are important considerations to the question of the orders which may or should be made on the appeal.
30. While both parties submitted that the amendment sought by the section 57 application was of an implied licence condition (and such an analysis would provide a means of reconciling section 57(1)(b) with the absence of any express licence condition concerning a particular PGIP or harm minimisations statement), the Commission has never previously considered that class 4 licences contain implied conditions. There is no apparent need to invoke conditions by implication as section 53 provides an express power to impose any conditions that the Secretary considers relevant.

³ Decision GC22/15

31. The potential statutory consequences of a breach of a licence condition (suspension or cancellation of the licence) leads the Commission to reject the concept of an implied condition as lacking desirable clarity and with the potential to operate unfairly.⁴ The provisions⁵ which deal with the power to add, revoke and amend licence conditions apparently refer to express conditions, not matters of implication.
32. Adopting the concept of implied conditions would create undesirable uncertainty about the scope of a class 4 operator's legal obligations and the possible basis for its licence being suspended or cancelled. The issue has arisen in this case because the licence does not include reference to all matters for which section 57(1) requires an application to amend, despite section 53 providing for their optional addition to a licence.
33. The alternative means of grounding jurisdiction suggested for BlueSky in the present case would also provide a jurisdictional pathway, if necessary. That would involve treating the amendment application as a proposal to add an express licence condition, identifying the new problem gambling policy as the applicable policy under which BlueSky is required to operate. However, the Commission considers that the combination of sections 57 and 61 confers jurisdiction sufficiently without treating the application as something which it was not and without holding that the licence includes an implied condition relating to problem gambling policies.
34. In the Commission's view, BlueSky's licence is not subject to an implied licence condition requiring it to operate in strict accordance with the policy documents originally submitted. Those documents satisfied the Secretary at the time that the licence could be granted but were not specified as a condition of the licence. At all times, BlueSky must operate its licence lawfully and comply with all relevant statutory and regulatory requirements. It may need to modify its problem gambling policies to address regulatory changes. In that event, section 57 requires an amendment application to be made but it does not follow that there is an implied licence condition which would prevent BlueSky from complying with the Regulations (and the Commission doubts that it would be proper for the Secretary to impose an express condition with that effect). BlueSky is obliged to comply with the Act and the Regulations regardless of what its problem gambling policy documents say and whether proposed changes have been approved by the Secretary.
35. Approval of the proposed changes is an indication of satisfaction by the Secretary with what is proposed. If approval is refused, there is no effect on its licence or its obligations, as the society must comply with all statutory and regulatory obligations. However, refusal is an indication that the Secretary has concerns about the likelihood of its continued compliance

⁴ This was the position advanced by the Secretary in the *Hardy's Bar* decision, GC22/15, discussed below.

⁵ Sections 53(3) and 57

and those concerns may lead to the Secretary later taking further steps, including the addition of licence conditions, suspension or cancellation of the licence or refusal of a future renewal application. Each of those steps is subject to a statutory process and appeal rights.

36. The application of the *Hardy's Bar* decision to the present case is contested by the parties. The Secretary's submission reveals a similar misunderstanding to that which gave rise to the *Hardy's Bar* appeal. One of the issues in the *Hardy's Bar* decision concerned the right to appeal against an obligation which had been imposed and notified (including a reference to future audits) in the letter accompanying a venue licence but was not recorded formally as a licence condition. The Commission held that the failure to record the obligation formally as a condition was not determinative of its status and whether it could be appealed; whether it was a condition (the imposition of which could be appealed) depended on its intended effect. In substance, it was held to be a condition and subject to appeal. In considering whether the obligation **should** be imposed as a condition, it became apparent that the Secretary had not recorded the intended constraints as conditions because of a view, held by both parties, that conditions could not be imposed to reduce the risk of a breach of the Act (but rather the Secretary should simply wait for breaches to occur and take punitive action). However, the Commission held that it was proper and desirable to impose conditions which aimed to avoid statutory breaches and that, importantly, the imposed restrictions went further than the underlying statutory provision, imposing additional specific constraints to reduce the risk of a breach of section 113 (compliance with which involved operational choices) by removing choices otherwise available to achieve compliance.
37. A condition which specifies that a particular problem gambling policy must be followed could be expected to be similar. Its likely effect would be to require the society to act in accordance with a specific detailed policy with the aim of reducing the likelihood of a breach of Regulation 15 (and other problem gambling obligations). It would not be a mere restatement of Regulation 15.

Issues for determination

38. It is a requirement of section 57(5)(a) that the Secretary must refuse to amend a class 4 operator's licence if any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 52. Section 52(1)(f) of the Act states "The Secretary must refuse to grant a class 4 operator's licence unless the Secretary is satisfied that, ... the applicant is able to comply with applicable regulatory requirements...".
39. On 5 August 2024, the parties filed an agreed statement of facts for the appeal. In it, the parties summarised the outstanding issues for determination by the Commission as follows:

- (a) Does the formal assessment conversation need to be repeated on the tenth and subsequent sweeps, when the player returns to the gaming room and continues gambling after an assessment conversation has just been had with them following the previous sweep?
 - (b) Does the formal assessment conversation need to be repeated on the third and subsequent cash withdrawal that is made in the same day?
 - (c) Is more than one formal assessment conversation per player, per day required?
 - (d) Is it appropriate to distinguish between a “conversation” required under Regulation 15(2), and the obligation in section 309 of the Act to approach a player and offer information and advice about problem gambling?
 - (e) Is it appropriate to continue to refer to the signs of harm as general and strong signs?
 - (f) Is the venue statement stating “reasonable grounds to believe a person is a problem gambler” would normally exist if three or more different general signs of harm or one strong sign of harm are observed, inconsistent with regulation 15(2) of the Regulations?
40. BlueSky filed submissions in support of its appeal on 6 August 2024, accompanied by affidavits of Dandan Zhang, a director of BlueSky Community Trust Limited, and Dr Sally Gainsbury, an expert in gambling harm. The Department filed submissions in response on 19 August 2024.

Submissions of the parties

41. The parties’ submissions followed the order of the agreed issues and are summarised below.

When are venue staff required to have a conversation with a player?

42. The first three agreed issues are related. They concern how often an “identifying conversation” (i.e., “a conversation with that player to assist with identifying whether the player is a problem gambler”) required by Regulation 15(2) must take place, namely:
- (a) Is more than one conversation per player, per day required?
 - (b) Does the conversation need to be repeated on the tenth and subsequent sweeps?
 - (c) Does the conversation need to be repeated on the third and subsequent cash withdrawal that is made in the same day?

43. BlueSky made the following arguments in support of no more than one conversation per day being required under the Regulation:
- (a) The meaning of a regulation must be ascertained from its text and in the light of its purpose and its context (s 10 Legislation Act 2019). The text of Regulation 15 refers only to “a conversation” if a player exhibits “1 or more signs”. The plain text of (b) from the schedule in the Regulations confirms that gambling during 9 or more consecutive gambling area sweeps is a sign of harm, requiring an identifying conversation.
 - (b) It is common for a player to return to the gaming room immediately following an assessment conversation; it is also common for a staff member to resume sweep duties soon afterwards (as sweeps are required at least every 20 minutes). It would be “unreasonable and illogical” to require a second conversation on the next sweep so shortly after the first one.
 - (c) A restrictive interpretation is appropriate because it is a criminal provision; a venue manager can acquire a criminal conviction for failing to comply. Breach of Regulation 15 could also be grounds for suspending or cancelling a class 4 venue licence.⁶
 - (d) Making two or more withdrawals in one day (the sign of harm (a) from the Schedule) is described as a single sign of harm. As multiple withdrawals are one sign of harm, only one identifying conversation should be required once that occurs.⁷
 - (e) BlueSky interprets Regulation 15(2) as requiring only one identifying conversation per day, after which the venue staff should continue to monitor and interact with the player in accordance with the general duty in section 53A(e) (“ensure that ...the risks of problem gambling ... are minimised”). The identifying or assessment conversation is referred to in the singular, while the signs of harm are referred to in the plural.
 - (f) The conversation that venue staff are required by BlueSky to have with customers was described in the affidavit of Dandan Zhang as follows:⁸
 - (i) The venue staff member records in the sweep that the player is still gambling during the ninth consecutive sweep.

⁶ BlueSky’s submissions at [22] – [23].

⁷ Above n at [27].

⁸ Affidavit of Dandan Zhang at [3]

- (ii) The staff member returns the sweep book and advises another staff member that they will soon be approaching the player to have an assessment conversation. They may discuss and decide which staff member is best to make the approach.
 - (iii) Once an appropriate staff member has been selected, the staff member will then look for a suitable time to approach the player.
 - (iv) The staff member will then approach the player and ask to speak with the player privately, away from the gaming room. If the machine is on reserve, another staff member may monitor it.
 - (v) The player is taken to a separate, discrete location and usually offered a coffee.
 - (vi) The assessment conversation will begin with gentle opening lines such as “how are the machines treating you today?”
 - (vii) The staff member will then tell the player the sign of harm that has been observed, explaining that an assessment conversation with the player is required by law following the observed sign.
 - (viii) The staff member will then seek the player’s permission to ask some gambling related questions and proceeds to ask them if allowed.
 - (ix) The staff member then returns to the bar, reports back to a colleague and writes up a detailed report on the assessment.
- (g) The expert affidavit by Dr Gainsbury included her view that having further assessment conversations shortly after an earlier assessment conversation would not assist venue personnel to identify whether a player is a problem gambler.

I agree that having a further assessment conversation with a player shortly after the last conversation is not going to help the venue personnel to identify whether the player is a problem gambler. I also agree that having multiple assessment conversations in one day is unlikely to be beneficial.⁹

- (h) Dr Gainsbury also referred to an Australian study which reported instances of venue staff being physically harmed following attempts to interact repeatedly with a player. She noted the importance of venue staff building a rapport with customers and expressed the view that spacing conversations over time can assist with that.

⁹ Above n at [20].

44. The Secretary made the following arguments in support of more than one conversation being required by Regulation 15:
- (a) The conversation requirement under Regulation 15(2) is a “purposefully malleable concept”. The type of discussion that will be appropriate will change depending on the sign(s) of harm observed and the Regulations allow for that by making the content of a conversation discretionary, depending on the situation.¹⁰
 - (b) The content of a conversation does not need to go as far as BlueSky suggests is inherently required in every instance. Approaching “conversation” on its plain meaning would cause many of BlueSky’s concerns (and those of Dr Gainsbury), relating to the effectiveness of identifying problem gambling and abuse of staff, to fall away.¹¹
 - (c) The Department’s November 2023 Gambling Harm Prevention and Minimisation Guidance makes clear that the Health Directorate resources (of which the June 2024 Guide is one) are merely for guidance and are not binding. The best practice recommendations are above and beyond the Regulation’s requirements. If it were intended that the conversation requirements be prescribed and lengthy, that would have been set out in the Regulations.¹²
 - (d) If BlueSky’s interpretation were adopted, players would potentially be able to play continuously for hours after the first conversation, even if multiple signs of harm were shown.¹³
 - (e) The Secretary agrees with BlueSky that, where non-compliance with an obligation amounts to an offence, the obligation needs to be clear, unequivocal and predictable. The obligations will be met by venue staff having conversations with players when signs of harm are observed and by recording the relevant information.
 - (f) The inclusion of the phrase “or more” in the sign of harm in the Schedule, harm (b) means that the sign of harm must continue to exist as long as the player continues to be gambling in consecutive sweeps over and above the ninth sweep. BlueSky’s interpretation would render the inclusion of the words “or more” in the Regulations redundant.

¹⁰ The Secretary’s submissions at [32].

¹¹ Above n at [34]

¹² Above n at [35] – [36].

¹³ Above n at [39].

- (g) BlueSky's preferred interpretation of Schedule, harm (b) limits venue personnel to having a conversation once only at nine consecutive sweeps and then not afterwards. This is contrary to the intent of the 2023 amendments to the Regulations, which is for venue personnel to engage with players displaying a sign or signs of harm more often.¹⁴
- (h) The Australian study which refers to staff being physically harmed for trying to interact with a player is of limited use as it does not compare the harm minimisation policies. If there were abusive behaviour, it would provide reasonable grounds to believe the player is a problem gambler.¹⁵
- (i) The sign of harm in Schedule, harm (a) continues to exist on the third and subsequent cash withdrawal on the same day. The words "twice or more" in the Regulations mean that venue personnel must have a conversation with a player each subsequent time they withdraw or attempt to withdraw cash to gamble at the venue.¹⁶
- (j) A real life example of BlueSky's approach is found in the Barrett case where Mr Barrett would make on average five cash withdrawals a day over a 299 day period. However, the venue did not have adequate procedures in place to ensure these signs of harm were being monitored and acted upon. Under BlueSky's approach, this behaviour would continue to go unchecked beyond one reasonable conversation.¹⁷
- (k) The importance of monitoring this behaviour as a sign of harm is reflected in Regulation 5(2) which requires ATM machines to be in line of sight of staff so that withdrawals can more easily be monitored by those staff.¹⁸

Is it appropriate to distinguish between a "conversation" required under regulation 15(2), and the obligation in section 309 of the Act to approach a player and offer information and advice about problem gambling?

45. In respect of the fourth agreed issue, both parties agreed that there is a need to distinguish between the requirements of Regulation 15(2) and section 309 of the Act.

¹⁴ Above n at [49].

¹⁵ Above n at [51].

¹⁶ Above n at [57].

¹⁷ Above n at [58] – [59].

¹⁸ Above n at [62].

46. BlueSky made the following submission in support of its view:
- (a) The proposed clauses 26 and 27 of the venue statement set out when the more formal process under section 309 is required.¹⁹
 - (b) The Regulations require a conversation even when it is obvious someone is not a problem gambler. For example, a player may get \$20 out, and then 15 minutes later get another \$20 out. This would require a conversation under Regulation 15(2), but it may be obvious to venue staff that the player is not a problem gambler based on their past knowledge of the player.
 - (c) The section 309 intervention obligation is different. It is only required if the venue manager has not only identified a person as an actual or potential problem gambler under the policy for identifying problem gamblers but has reasonable grounds to believe the person is a problem gambler. This was confirmed by the Commission in decision GC04/24 at 19(c).²⁰
47. The Secretary made the following submissions on the point:
- (a) It is appropriate to distinguish between a ‘conversation’ required by the Regulations and the section 309 obligation. The Regulation 15(2) obligation is designed to assist the assessment required by section 309 of the Act. Only a venue manager has an obligation under section 309, whereas all venue staff have an obligation under Regulation 15(2).²¹
 - (b) If either a conversation or a player’s behaviour provides grounds to believe a person is a problem gambler, the Secretary expects that action will be taken.²²

References to General Signs and Strong Signs of Harm

48. The remaining two agreed issues are also related:
- (a) Is it appropriate to continue to refer to the signs of harm as general and strong signs?
 - (b) Is the venue statement which includes “reasonable grounds to believe a person is a problem gambler would normally exist if three or more different general signs of harm or one strong sign of harm are observed,” inconsistent with regulation 15(2) of the Regulations?

¹⁹ BlueSky’s submissions at [48].

²⁰ BlueSky’s submissions at [49].

²¹ The Secretary’s submissions at [64] – [65].

²² Above n at [66].

49. BlueSky made the following submissions in support of the reference to general and strong signs of harm:
- (a) Almost all venues have the Health Promotion Agency material that details the general and strong signs, and venue staff are trained on what is a general sign and what is a strong sign.²³
 - (b) The Commission, in decision GC09/23, reaffirmed the use of the distinction between “general indicators” and “strong indicators” (the equivalent term to “signs of harm” used in casino HRPs).²⁴
 - (c) It is accepted that the amended Regulations do not differentiate between general and strong signs. The purpose of the reference to general and strong signs in cl 17 of the proposed venue statement is to provide guidance to venue managers for assessing whether there are reasonable grounds to believe a person is a problem gambler (therefore engaging section 309 obligations).²⁵
50. The Secretary made the following submissions in opposition to the reference to general and strong signs of harm:
- (a) It is not appropriate to refer to the signs of harm as general and strong signs in the context of the Regulations and the requirement to provide problem gambling information under section 309(1).²⁶
 - (b) Neither the Act, nor the Regulations distinguish between the signs of harm. Allowing the distinction risks creating a sliding scale of seriousness relating to the “harms” and detracts from the overall purpose of the Regulations and the Act which is to minimise the risk of problem gambling.²⁷
 - (c) With reference to the *Barrett* case, the current wording of BlueSky’s policy would see a player have two conversations with staff; one after three hours of play and one with the second withdrawal of cash. As neither are strong signs, they would not trigger the “reasonable grounds” for providing further information under section 309(1) of the Act. If staff were comfortable after the conversations under Regulation 15(2) that no harm was occurring, the player could gamble non-stop for the rest of the day with no further intervention.²⁸

²³ Blue Sky’s submissions at [36].

²⁴ Above n at [37].

²⁵ Above n at [38] – [39].

²⁶ The Secretary’s submissions at [70].

²⁷ Above n at [71].

²⁸ Above n at [73].

Analysis

51. It is apparent from the agreed issues for determination and the correspondence on the Department's file that, with a view to obtaining the Commission's views on a wide variety of issues, the parties have each adopted relatively extreme positions regarding the interpretation and application of Regulation 15. The Secretary's decision to refuse a section 57 application has accordingly resulted in the Commission essentially being asked to provide a form of declaratory relief. The parties have not endeavoured to reach an acceptable and workable accommodation between their views, as the Commission would usually expect, but appear to have maximised the differences in the positions adopted.
52. In the view of the Commission, the consequences of the decision under appeal, to refuse to approve a new harm minimisation and PGIP, are not what the parties submitted:
- (a) BlueSky considers that refusal means that it must operate under its original policy and the result will inevitably be breaches of Regulation 15.
 - (b) The Secretary considers that, while refusal has no immediate effect on the licence, the points of disagreement may result in the Secretary later refusing to renew BlueSky's licence or applying to cancel it for regulatory breaches. That view also appears to assume that, in the absence of an updated and approved policy, BlueSky will be forced to breach Regulation 15.
 - (c) The Commission has already stated its view that refusal does not force BlueSky to breach Regulation 15 and that there is nothing to stop BlueSky complying with Regulation 15. While Regulation 15 creates new venue staff obligations, approved amendment of harm minimisation policies is not a prerequisite for compliance. Irrespective of any policy document, BlueSky must comply with Regulation 15.
53. The Commission does not have a general declaratory jurisdiction. It doubts that it is appropriate to attempt to provide answers to the agreed issues at all and especially without application to established facts. The appeal properly raises a single issue for decision, namely whether the Secretary should have accepted the proposed amendments in all respects. If not, a multitude of reasons may exist for such a conclusion, including the possibility of circumstances not addressed in the submissions.
54. On the appeal, the Commission may confirm, vary or reverse the Secretary's decision (to refuse approval) or refer the matter back to the Secretary with directions to reconsider:
- (a) To confirm the Secretary's decision, it is not necessary for the Commission to accept all of the matters submitted by the Secretary. Refusal to amend is required if any of the circumstances in section 57(5) apply. If there were any respect in

which the proposed amendments did not result in the satisfaction required, refusal would be required. Any reservation at all about the content would suffice. As a result, confirmation of the Secretary's decision would bring the application to an end without necessarily providing the clarity which the parties seek; BlueSky will have complied with section 57(1)(b) by making the application to amend, without any bar to compliance with Regulation 15 in the event of refusal.

- (b) Reversal of the Secretary's decision would be appropriate only if the Commission had no reservations about the matters in section 57(5) in respect of any of the proposed amendments.
- (c) A decision which did not adopt the entire views of either party (about the requirements of Regulation 15 or the originally submitted policy, or about the PGIP guidance to venue managers) could be effected either by amending the policy to the point that it satisfied the Commission and approving the amended policy (variation of the Secretary's decision) or by referring the matter back to the Secretary with directions to reconsider the decision.

- 55. The positions advanced are extreme. The Secretary argues that an identifying conversation is required every time a sign of harm is identified starting as early as when a player is present at opening, after every ATM or EFTPOS withdrawal (from the second in a day) and also on every sweep (which may be only 10 minutes after the last one) after the first 9 sweeps. BlueSky argues that the requirement is for a single identifying conversation per player per day, which could be as early as opening, with no further conversation required, no matter what is said or what other signs appear during the course of the day. The Commission doubts that either position is correct in all circumstances.
- 56. However, the Commission does not consider that it is its proper role to assume the task of drafting a model class 4 problem gambling policy. Neither does it consider that it should provide advice in declaratory form in answer to the agreed issues.
- 57. It has decided to refer the matter back to the Secretary with some limited preliminary comments and observations to assist with further reconsideration.
- 58. The substantive position advanced by the Secretary would be easier to accept if the text of the Regulation had been more explicit in relation to the need to have more than one conversation (such as a reference to plural "conversations" or a reference to "each and every sign of harm"). On its face, the obligation is singular and triggered by staff identification (not occurrence) of "1 or more" signs of harm. The conversation required by Regulation 15 is also expressly for a particular purpose; "to assist with identifying whether the player is a problem gambler". There seem likely to be circumstances in which more

than one conversation a day may assist with identifying a problem gambler without frequent and repeated conversations being of any such assistance.

59. The nature of the expected conversation is also relevant. BlueSky, for arguably prudent reasons, treats the Regulation 15 obligation to have a conversation as involving a serious discussion about the observed conduct and the indication that harm may be occurring, rather than an informal communication that does not address the indicated sign of harm directly (which the Secretary indicates may be all that is required). More than one conversation would arguably be reasonable if their content were as flexible as indicated by the Secretary, but there are difficulties in stating requirements in sufficiently clear and definitive terms for a regulatory obligation with penal or serious licence consequences in what may be varying circumstances:
- (a) If every conversation is not required to follow the course summarised in paragraph 43(f) above, are any of them? If so, which ones?
 - (b) Can a conversation ever lead to a conclusion that the presenting “sign” did not present reasonable grounds to believe that the player is not a problem gambler?
 - (c) Does the need for further conversations depend on what is said earlier? What if a player explains that his preference is to play EGMs with very limited cash and to make frequent visits to an ATM or EFTPOS in order to maintain spending control and force short breaks?
60. On the other hand, the idea that a conversation to assist with identification of problem gambling needed to take place only once a day, irrespective of the number, variety and timing of indicators observed, is not easily reconciled with the express purpose of the conversation obligation, “to assist with identifying whether the player is a problem gambler”.
61. The Commission considers that the issues and arguments raised by the parties often failed to distinguish between the source of the various related problem gambling obligations. Despite agreement that they were separate, there was a tendency to conflate the obligations under Regulation 15 and those under sections 308 and 309. The obligations are distinct, are triggered by different things, fall on different people and require different actions. The former conversation is intended merely to provide information to assist with an assessment the result of which may lead to the second conversation. The observation of “1 or more signs of harm” does not lead necessarily to the conclusion that reasonable grounds exist for concluding that a player is a problem gambler, although it may do so.
62. It is also important to maintain proper perspective between the related obligations. A positive problem gambling assessment may be made without an immediately prior “conversation”. In such cases, the obligations under sections 308 and 309 are engaged,

whether or not a Regulation 15 conversation has just taken place. To put it another way, absence of a Regulation 15 conversation does not excuse breaches of sections 308 and 309. Observations and assessments are an ongoing obligation, whether or not Regulation 15(2) conversations are taking place after every single “sign of harm”. In that regard, “signs of harm” are not synonymous with “harms” and reasonable grounds to believe that a person is a problem gambler (“a person whose gambling causes harm or **may** cause harm”)²⁹ does not necessarily require harm to be suffered.

63. It is also important to have regard to the extensive obligations imposed by Regulation 16 to record details of all signs of harm observed and to review the observations records periodically. Those obligations exist irrespective of the number of conversations which take place. It is certainly not the case that further observed signs of harm may be ignored, unless there have been further conversations, as some submissions implied.
64. As to the Strong Signs and General Signs, it is common ground that the distinction has no application to Regulation 15(2) and the Schedule. The Schedule contains no grading of signs (or indicators) and an identifying conversation is required once one or more signs or indicator are observed, regardless of their seriousness.
65. The issue accordingly is whether such a distinction can assist venue managers in making the assessment which triggers the obligation under section 309. In some respects, the Regulation 15 “conversations” are similar to the continuous play “interactions” required in casino HRPs – a required interactive interruption which may assist with “problem gambler” assessment, as required by section 309.
66. The grading of indicators is well established in the development by the Commission of the standard content of PGIPs required in casinos. It has been broadly recognised that some indicators are stronger than others, such that a single appearance should give cause for concern, whereas other indicators are less conclusive (as they are also observed in players who are not assessed to be problem gamblers) and likely to be of more concern if they occur alongside others or with repetition. The casino HRPs explain the distinction and its purpose.
67. Recognition that not all potential signs or indicators of problem gambling are of equal weight would be consistent with the expert evidence which the Commission has received, including in the course of the Commission’s decision-making regarding casino PGIPs. While the distinction does not affect the application of Regulation 15, it does not follow that such distinctions are of no value in the assessment required by sections 308 and 309.

²⁹ Section 2, “problem gambler”.

68. However, the Commission has carefully avoided endorsing the use of either hard limits or safe harbours in the use of various indicators in casino PGIPs, as the Secretary fears may happen here. One can recognise that some indicators or signs are more serious and less ambiguous than others without endorsing a strict “1 strong or 3 general” rule for assessment outcomes. How such guidance is expressed is important.

Decision

69. For the reasons set out above, the Commission is not prepared to confirm, reverse or vary the decision of the Secretary to refuse to amend BlueSky’s licence by approving the proposed changes to its problem gambling policies. It has decided to refer the matter back to the Secretary with directions to reconsider the decision. Its expectation is that the observations made above will assist the Secretary with that reconsideration and assist BlueSky with its submissions in that process.



Susan Hughes KC
Gambling Commissioner

for and on behalf of the
Gambling Commission

19 November 2024

