

IN THE MATTER of the Gambling Act 2003

AND on an application by **SKYCITY AUCKLAND LIMITED** for approval of construction and design changes to create a smoking balcony capable of deploying gaming machines

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
L M Hansen

Date of Application: 11 February 2011

Date of Decision: 15 April 2011, 13 May 2011

Date of Notification
of Decision: 22 June 2011

**DECISION ON AN APPLICATION BY SKYCITY AUCKLAND LIMITED
FOR APPROVAL OF CONSTRUCTION AND DESIGN CHANGES
TO CREATE A SMOKING BALCONY CAPABLE OF DEPLOYING GAMING MACHINES**

Introduction

1. SKYCITY Auckland Limited ("**SCAL**") applied to the Commission, under conditions 6 and 7 of SCAL's venue licence, for approval of construction and design changes to develop an outdoor gaming area on level 2 where patrons will be able to smoke and play gaming machines.
2. The Commission first considered this matter at its April 2011 meeting, but adjourned the application to seek additional information on whether gambling activity from the proposed area would be visible from outside the casino. The Commission used the adjournment as an opportunity to seek submissions on the proposal from Problem Gambling Foundation ("**PGF**"), Gambling Helpline, Salvation Army ("**SA**") and Ministry of Health. The Commission received submissions from PGF and SA.

Licence conditions

3. The relevant licence conditions are:

SCAL's venue licence

6. The Licence Holder must obtain the approval of the Commission prior to:

- (a) construction or design changes to Level 1 of the Casino Venue, including the Gambling Area;
- (b) the construction or relocation outside the Gambling Area and within the Casino Venue of bank facilities available to the public excluding ATMs, EFTPOS and like devices;
- (c) the addition or alteration of signage relating to the casino business on the exterior of the Casino Venue.

The process by which the Licence Holder may obtain approval for construction or design changes to Level 1 of the Casino Venue, (paragraph (a) above) is set out in condition 7. The Commission will determine any application for approval under 6(b) and (c).

7. The Licence Holder must notify the Executive Director of any proposed changes to the construction or design of Level 1 of the Casino Venue. Notification must be accompanied by relevant drawings and an assessment of any impacts the alterations may have on:
- (a) the integrity and fairness of games;
 - (b) the effectiveness of security and surveillance;
 - (c) harm prevention, harm minimisation and responsible gambling;
 - (d) potential access to the Gambling Area by persons under 20 years of age; and
 - (e) compliance by any person with the Act, including section 11 of the Act.

The Executive Director may approve the proposed changes to the construction or design if he or she is satisfied that there are no adverse impacts in relation to the matters specified in (a)-(e) above. If the Executive Director is not satisfied, he or she will refer the proposal to the Commission for determination.

8. The Licence Holder shall ensure that:
- (a) gambling activity is not visible from the street or other public areas outside the Casino Venue;

Initial submissions by SCML

4. SCML submitted, in summary, as follows:
- (a) It wants to redevelop the north end of the Diamond facility into an outdoor gaming area where smoking is permitted. The area is currently enclosed but has previously been an outdoor dining area. Its application follows on from the appeal by The Lion Foundation in relation to the Kilbirnie Tavern in Wellington.
 - (b) The proposed new outdoor area will be framed by glass louvres to provide some protection from the elements but will conform with the requirements of an "open area" as set out in the Smoke-free Environments Act 1990 (the "**Smoke-free Act**").

- (c) The affected area has already received Commission approval as an alternative Gambling Area, but the design change to enable it to be used for outdoor gaming requires Commission approval in terms of conditions 6 and 7 of its venue licence.
- (d) It is required to provide an assessment of any impacts the alterations may have on the matters specified in condition 7. Its assessment of those matters is as follows:
- (i) the integrity and fairness of games – no impact;
 - (ii) the effectiveness of security and surveillance – no impact;
 - (iii) harm prevention, harm minimisation and responsible gambling – In decision GC31/10, the Commission considered whether the imposition of a licence condition relating to the Kilbirnie Tavern, which prohibited gaming machines from being played by people who are in areas of that venue where smoking is permitted, would have the intended benefit of minimising harm. The Commission found that such a condition was unlikely to have any material beneficial effect on the risk of problem gambling at the venue.

The Commission's assessment of the potential benefits and detriments of such a condition was primarily by reference to the venue itself. However much of the commentary in that decision is relevant to an assessment of any impacts the proposed alterations may have on issues relating to harm at the Auckland casino.

The Gambling Act 2003 (the "**Act**") did not seek to prohibit smoking while gambling and the Smoke-free Act specifically provides for the possibility of smoking while gambling in open areas of the casino venue.

It is argued that interrupting game play helps in reducing problem gambling. Irrespective of the perceived benefits of breaks in play, it has no evidence to indicate that at-risk gamblers who smoke would be more likely to take breaks if prevented from smoking while gambling. Like all other gaming machine players, they will be subject to interruptions at regular intervals as a consequence of the PIDs initiative.

Prior to the introduction of the Smoke-free Act, a number of its customers chose to smoke while gambling and there is still likely to be a demand to combine both activities.

The floor layout for the affected area has yet to be finalised, but it would expect 60 to 70 machines in this location.

It is satisfied that the design change will not contribute to the onset of harm or exacerbate risk, and will not adversely impact its efforts to provide a safe gambling environment and facilitate effective host responsibility.

- (iv) potential access to the Gambling Area by persons under 20 years of age – no impact;
 - (v) compliance by any person with the Act, including section 11 – no impact.
- (e) Open areas of the casino venue have not previously been used for gambling purposes. In February 2004, the Casino Control Authority (“CCA”) approved the construction of seven decks forming part of the Auckland casino subject to applications being made, prior to the decks being utilised, to redesignate the Gambling Area of the casino to exclude the decks. The CCA did not give reasons why the decks should be excluded from the Gambling Area.
- (f) SCAL subsequently applied to the Commission to redesignate the Gambling Area to exclude the decks in accordance with the CCA’s requirements, and understands that all casino operators have since either applied to exclude open decks from the designated Gambling Area, or agreed not to locate gambling products in such areas.
- (g) In the absence of any reason supporting the CCA’s decision, and in the context of its own assessment that the proposed change will not have an adverse impact on the matters highlighted, it asks the Commission to approve this application.
- (h) Under condition 8 of its venue licence, the Licence Holder must ensure that gambling activity is not visible from the street or other public areas outside the casino venue. The proposed outdoor Gambling Area is currently visible from certain parts of Federal, Hobson and Victoria Streets, but SCAL is confident that the glass louvres it will install can be angled to ensure that gambling activity is not visible from those street locations.
- (i) There are a number of high rise buildings surrounding the casino, but they are not public areas in the sense that they do not allow for general admittance.
- (j) It has reviewed decisions setting out the Commission’s approach to the issue of visibility. It notes that exceptions to the visibility rules have been created in

situations where existing building constraints have created a limited potential for visibility. These exceptions are at the Wharf casino and at the Hamilton casino.

- (k) It notes that the Commission declined to provide relief from the visibility requirements for the Dunedin casino when it proposed to construct a restaurant adjacent to the casino. However in all three cases, the areas in question were “public areas outside the casino” in the sense that all members of the public would have the right to access them. The residential apartments and office blocks surrounding the Auckland casino are not public areas in that same sense.
- (l) Whether the interior of gambling venues should not be visible from outside in order to minimise impulse decisions to gamble was considered by the Secretary in 2003. In the consultation document looking at possible regulations to prevent and minimise harm, the Secretary noted that it was difficult to gauge the effectiveness of controls around visibility. The Secretary noted that requiring Class 4 venue redesign could have major cost impacts and that in the absence of stronger evidence that they reduce harm, it would be difficult to argue that they should be required for existing venues.
- (m) In any event, no regulations were introduced to restrict the visibility of gambling in interiors of Class 4 venues and indeed, gambling activity in many such venues today is clearly visible from the street.
- (n) Notwithstanding this inconsistency, it is not proposing a general abandonment of the longstanding visibility rules.

The Secretary’s submissions

- 5. The Secretary submitted, in summary, as follows:
 - (a) He neither supports nor opposes the application, but in the context of a Class 4 appeal he has expressed his opposition to members of the public smoking at gaming machines.
 - (b) SCAL discusses condition 8(a) (which requires the Licence Holder to ensure that gambling activity is not visible from the street or other public areas outside the casino) and submits that the licence condition should not apply to surrounding apartment and office buildings because they are not public areas.
 - (c) He proposed the current wording of the condition when the Commission reviewed licence conditions for the Auckland casino. The condition previously read “The Licence Holder shall ensure that gambling activity is not visible from outside the

casino complex.” He made this proposal because he was not concerned about activity being visible from private areas of the types described and that in any event, the casino may not have much control over this visibility.

- (d) Since then, the Commission has considered an application by Dunedin casino to allow gambling to be visible from outside the casino. The Commission declined the application, noting that Dunedin casino was creating a visibility problem and then seeking relief from it. He now agrees with the Commission’s approach.
- (e) It would be in keeping with the Dunedin decision to require SCAL to ensure that the gambling activity at the new smoking balcony was not visible from outside the casino.
- (f) SCAL has argued a public/private distinction and suggests this proposal can be implemented without breaching licence condition 8(a) because adjacent buildings are not public areas in the sense that they do not allow for general admittance. He thinks that the distinction between public and private in this context is arbitrary. The Department considers that people who are located in private areas of adjacent buildings should be afforded the same consideration in relation to harm minimisation and prevention as those people who are in public areas.
- (g) In support of its application, SCAL has quoted from the Department’s paper entitled “The Gambling Act 2003 Consultation on Possible Regulations”.
- (h) Unlike casinos, there are hundreds of Class 4 venues spread throughout the country. To impose similar visibility requirements on Class 4 venues would have wider policy considerations in contrast to preserving a licence condition that already exists for New Zealand’s six casinos.
- (i) The 2004 consultation material suggested that the evidence of the usefulness of visibility restrictions was limited. Much of the “cue-reactivity” research specific to gambling was published after the consultation document was written but applying the research to the current situation would suggest that SCAL’s proposal could have harmful implications for problem gamblers who are inadvertently exposed to gambling-related stimuli.
- (j) He assumes that similar logic was initially used to support the licence condition when it was first created – that is, it was created to protect members of the public, including problem gamblers, from the negative effects of being exposed to gambling activity.

- (k) He further notes that SCAL's proposal could potentially create a situation in which people within adjacent buildings have little control over being exposed to gambling, perhaps even more so than if they were able to view gambling activity from public areas such as the street.
- (l) Another issue the Commission may wish to consider is the effect of auditory cues on individuals, especially problem gamblers, outside the casino venue. Research indicates that auditory stimuli can also elicit an urge to gamble.

PGF's submissions

6. PGF submitted, in summary, as follows:

- (a) There is a clear and well documented relationship between smoking and problem gambling. In the research report "Cigarette smoking is associated with increased severity with gambling problems in treatment seeking gamblers" the authors conclude:

... daily smokers demonstrated more severe gambling, family/social and psychiatric problems. Compared to non daily smokers the daily smokers gambled on more days and spent more money gambling. They also "craved" gambling more and had lower perceived control over their gambling.
- (b) This has been confirmed by other research.
- (c) There is a strong relationship between smoking and gambling, and in particular gambling on gaming machines.
- (d) It has noted substantial benefits from the introduction of bans on EGM gambling in smoking areas. The bans allowed smokers a "time out" in which they can reflect on their gambling activity. Smoking therefore creates a break in play for a particularly vulnerable group and allows them an opportunity to recognise that they have gambled a greater amount, and for a longer period, than they intended and/or than they could afford. Therefore a clear separation of gambling from smoking is very important as a mechanism to reduce gambling harm.
- (e) Gaming machines should not be visible or audible outside the casino. The sights and sounds of gaming machines in operation can trigger new or additional gambling, or relapses into problematic gambling behaviour.
- (f) SCAL has argued that high-rise buildings do not constitute public areas. However, in the context of the Act, they are "public", in that they encompass people who have no connection with the casino, are outside of the casino

environment, and have not chosen to enter the gambling environment or to be subjected or exposed to it. Having entered this space for a purpose totally distinct from gambling, people can be encouraged to take part in gambling activities or suffer a relapse into resuming problem gambling that they did not intend to participate in.

SA's submissions

7. SA submitted, in summary, as follows:

- (a) The proposal runs contrary to the purpose of the Act; namely controlling the growth of gambling, preventing and minimising harm and ensuring responsible gambling.
- (b) The addition of gaming machines in smoking areas can increase casino gambling opportunities, even when machine numbers remain within overall approved limits, if additional gaming machines are being installed and not just relocated. Research shows that for every new EGM there will be 0.8 extra gamblers.
- (c) Enlarging gambling areas can provide room in the future for further gambling products to be installed.
- (d) Providing an opportunity to break from play, whether it is for smoking or anything else, is an opportunity for host responsibility staff to prevent and minimise gambling harm. If machines are placed in smoking areas then gamblers lose this opportunity. It could also further expose smokers to problem gambling risk as they would be close to machines when they did take a break from machines in the main casino area.
- (e) This application follows decision GC31/10, which concluded that it was unreasonable for the Secretary to impose a licence condition that would prevent patrons in a Class 4 venue from gambling in an 'open area' where smoking is permitted. The Commission believed the proposed licence condition would have no materially beneficial effect on problem gambling and that there was little evidence to support the assertion that separating smoking and gambling would reduce the risk of harm caused by problem gambling. Until there is research conducted on this in New Zealand, we do not know the answer to this question. However, this lack of evidence does not take away the responsibility to do all that is possible to prevent and minimise harm in the meantime.
- (f) The licence conditions require that gambling activities are not visible from outside the casino venue by the public. This should be adhered to for the smoking areas

as well. It should include not being visible from surrounding office blocks and apartments housing the public, as well as from the street.

Submissions in reply by SCML

8. SCML filed submissions in response to the submissions by the Secretary, PGF and SA. SCML also responded to the Commission's request for additional information. SCML's submissions in reply are, in summary, as follows:
 - (a) The Secretary contends that the Commission should require SCAL to ensure that gambling activity in the new area is not visible from outside the casino, consistent with decision GC05/09 for the Dunedin casino. However the circumstances in its case are quite different. The new facility at the Dunedin casino was clearly a public area outside the casino and, in terms of Dunedin casino's preferred design, it did not want the visibility restrictions applied to its new area. Dunedin casino therefore proposed an amendment to its licence condition, which was ultimately refused. In SCAL's case, it is not seeking an amendment to its licence conditions as its new facility will comply with existing conditions.
 - (b) The Secretary contends that casinos should be subject to visibility restrictions because the licence condition already exists, but those same restrictions may not be applicable to the Class 4 environment because of wider policy considerations. It has difficulty reconciling the Department's position on this issue – it appears to be advocating that a high visibility standard should now apply to casinos over and above the existing visibility restrictions in their existing licences, while at the same time that no public visibility considerations need be applied to Class 4 venues.
 - (c) The Secretary considers that persons located in private dwellings should be afforded the same consideration as those located in public areas. He suggests that the public/private distinction would effectively mean that people are treated differently simply based on location, all the while ignoring the fact that the casino/Class 4 distinction around visibility issues results in exactly the same situation.
 - (d) While not addressing the Secretary's submission, there is a practical difficulty associated with the imposition of any visibility controls in private areas outside the Auckland casino. As casino operators have no access rights to surrounding private areas, they would not be in a position to confirm compliance if such requirement was in place.

- (e) It has reviewed the research cited by the Secretary in his submissions and does not accept that it is applicable to this application.
- (f) On a practical level, SCAL believes that it is unlikely that persons will be able to easily hear gambling related sounds from surrounding streets given the distance from the gaming machines and other ambient noise at street level.
- (g) It has a letter from its architects together with a series of photographs and plans to address the visibility issue. The lower sections of the louvres will be fixed and made of frosted glass. They will prevent visibility from street level. Above the frosted louvres will be clear (green tinted) louvres which will be locked in place once the most suitable angle for the louvres has been determined.
- (h) There is insufficient data to ascertain views from the surrounding buildings but, contrary to its earlier advice, it now seems likely that some gambling activity may be visible from at least some of these buildings. The earlier advice was based upon a misunderstanding that all of the louvres would be frosted, which is not the case.
- (i) It does not accept the PGF and SA submissions, which oppose its application.
- (j) Smoking and gambling are two lawful activities and some customers may enjoy combining both. The Smoke-free Act does not seek to ban gambling where smoking is permitted and in fact, the Smoke-free Act has specific provisions for smoking gamblers in open areas like that which it proposes to create. Similarly, the Gambling Act does not include any provisions to prohibit persons from gambling while smoking.
- (k) PGF cites research which highlights the relationship between smoking and problem gambling, but this research does not establish a positive correlation between preventing gambling and smoking at the same time and a likely reduction in, or minimisation of, problem gambling.
- (l) Both PGF and SA argue that allowing machines in smoking areas would prevent opportunities for breaks in play, with PGF noting that smoking creates a break in play "for a particularly vulnerable group". SCAL does not accept the underlying assumption in this argument that "vulnerable" persons (presumably problem gamblers) who smoke would be more likely to take breaks if prevented from smoking while gambling. It notes the Commission's comments in decision GC31/10 that this assumption is not supported by evidence and that the evidence regarding the benefits of breaks in play is qualified.

- (m) Irrespective of the benefits, or otherwise, of breaks in play, it notes the proposed level 3 Gambling Area includes lounge areas, and food and beverage facilities which may be used by patrons who do not wish to gamble or who may wish to take a break from their gambling. It also provides a wide range of non-gambling activities across its venue.
 - (n) Neither submission demonstrates that preventing smoking in the area in question will reduce or minimise the risk of problem gambling.
9. After it filed its submissions, SCAL provided an additional email stating that, although its preferred option is to use clear glass on the upper louvres, it would be prepared to frost the glass for the entire louvre system, if visibility from the surrounding buildings is an issue for the Commission.

Analysis

10. Submissions by SA questioned whether the proposal would increase opportunities for casino gambling, although the basis for concern was not made clear. The proposal does not increase the size of the Gambling Area as the area was made part of SCAL's alternative Gambling Area in decision GC33/10. The proposal involves the relocation of existing gaming machines without the addition of any new gaming machines. While enlarging the Gambling Area can have a potential effect on opportunities in the case of table games for which the rules do not control the maximum number of players, the same is not true of games with controlled player numbers or of gaming machines, which can only be played by one player at a time. The Commission is satisfied that the proposal does not increase opportunities for casino gambling.
11. SCAL has sought the necessary approvals to operate an area at the Auckland casino where patrons can both smoke and gamble should they so choose. The application is not without controversy due to the combining of two legal but potentially harmful activities in smoking and gambling. However it is a combination with which the Commission is familiar, having twice considered whether patrons should be permitted to smoke while playing gaming machines in a dedicated area of the Kilbirnie Tavern in Wellington (see decisions GC03/07 and GC31/10). As the area in question is an "open area" under the Smoke-free Act, gambling activity may be visible from outside the casino. This is another issue which the Commission has considered previously.
12. Having first satisfied itself on the issue of increase in the opportunities for casino gambling, the Commission identified the following two issues remaining for consideration on SCAL's application:

- (a) whether the application should be declined for reasons relating to harm caused by problem gambling;
- (b) whether what is proposed is acceptable having regard to concerns about visibility of gambling activity outside the casino.

Previous decisions

13. The Commission has previously considered applications in relation to the construction and use of smoking areas at the Auckland, Christchurch and Dunedin casinos (see decisions GC05/04, 06/04 and 07/04). The first decision arose from an application by SCAL to exclude the smoking decks from the Gambling Area of the Auckland casino. SCAL had already obtained a CCA approval to construct the decks, but that approval was conditional on SCAL applying to redesignate the casino's Gambling Area to exclude those decks before they were used.
14. The CCA was disestablished after it made its decision, so SCAL applied to the Commission to exclude the smoking decks from the casino's Gambling Area. The Commission had little difficulty in granting the application which the CCA had envisaged. The application did not raise the issue of whether patrons could simultaneously smoke and gamble, and the Commission granted the application to exclude the smoking decks from the casino's Gambling Area.
15. In the context of the present application, the Commission checked the CCA decision that preceded GC05/04 to see if that assisted in any way. The Commission was unable to locate the formal decision, but did locate the CCA's agenda papers and minutes for its meeting dated 13 February 2004 when it approved the smoking decks. These documents show that SCAL sought approval of the decks to accommodate patrons who smoke at the casino, but who would be prohibited from doing so following the passing of the Smoke-free Environments Amendment Act 2003. In its application dated 15 January 2004, SCAL wrote:

We are proposing to construct a number of decks off the casino for the convenience of those patrons who smoke and who will no longer be able to do so within the premises following the commencement of amendments to the Smoke Free Environments legislation Subject to the Authority's approval of the changes to the gaming floor, it may wish to consider re-designating the gaming area to exclude the decks (although there would not appear to be any implications in leaving the designation as it currently is). ...

16. The CCA appears to have simply adopted SCAL's proposal and approved the application, including the addition of a requirement that the Gambling Area be redesignated. The Commission subsequently approved smoking decks at the Christchurch and Dunedin casinos on the same basis, namely that they did not form part of the Gambling Areas.

17. Neither the Commission nor, apparently, the CCA was asked to consider whether patrons should be permitted to smoke and gamble simultaneously at casinos. The applications were made on the basis that they would not do so.

Smoking and gambling at the Auckland casino

18. Section 13A of the Smoke-free Act provides for smoking in casinos, as follows:

13A. Smoking in casinos

- (1) The holder of the casino operator's licence in respect of a casino must take all reasonably practicable steps to ensure that no person smokes at any time in any part of the casino that is not an open area.
- (2) Subsection (1) does not prevent the holder of the casino operator's licence in respect of a casino from prohibiting smoking in a part of the casino that is an open area.
- (3) No person may smoke at any time in any part of a casino that is not an open area.

19. The Smoke-free Act, like the Gambling Act, is silent on the question of smoking while gambling. The Commission has not previously considered section 13A of the Smoke-free Act nor, as noted above, did the Commission, in its early decisions relating to smoking balconies at casinos, consider whether smoking and gambling could co-exist.

20. However, the Commission has considered both the equivalent provision of the Smoke-free Act and the question of smoking while gambling in relation to a Class 4 gambling venue, the Kilbirnie Tavern. The licence holder for the Kilbirnie Tavern, The Lion Foundation, appealed against a licence condition imposed by the Secretary preventing gaming machines from being played in areas in which patrons could smoke. As part of the Kilbirnie Tavern appeals, the Commission considered whether the Smoke-free Act prohibits the simultaneous participation in smoking and gambling at Class 4 venues in New Zealand and held that it does not.

21. Sections 13B of the Smoke-free Act, which was inserted by the Smoke-free Environments Amendment Act 2003, provides as follows:

13B Smoking in certain gaming machine venues

- (1) The holder of a class 4 gambling venue licence in respect of a place must take all reasonably practicable steps to ensure that no person smokes at any time in any part of the place that is not an open area.
- (2) Subsection (1) does not prevent the holder of a class 4 gambling venue licence in respect of a place from prohibiting smoking in a part of the place that is an open area.
- (3) No person may smoke at any time in any part of a place in respect of which a class 4 gambling venue licence is held that is not an open area.

22. The effect of this section is to ban smoking in Class 4 gambling venues in other than “open areas” at these venues. An open area is defined in the Smoke-free Act as “...a part of the premises that is not an internal area.” An internal area is defined as:

... an area within or on the premises ... that, when all its doors, windows, and other closeable openings are closed, is completely or substantially enclosed by –

- (a) a ceiling, roof, or similar overhead surface; and
- (b) walls, sides, screens or other similar surfaces; and
- (c) those openings.

23. From this, the Commission concluded that Parliament had chosen not to prohibit smoking and gambling at Class 4 venues absolutely, and instead provided for the possibility remaining open through the use of “open areas”. At paragraph 30 of decision GC03/07, the Commission held:

The Amendment Act did not completely prohibit smoking in class 4 venues, as Parliament could have done if that were its intention, but rather provided for the circumstances in which smoking could take place.

24. The same conclusion was reached by Clifford J in the declaratory judgment proceeding commenced by the Secretary following decision GC03/07. At paragraph 63 of *The Secretary for Internal Affairs v Kilbirnie Tavern Limited & Ors*, (HC Wellington CIV-2007-485-1988, 14 November 2008), Clifford J said:

... the scheme of the Smoke-free Environments Act would appear to allow, and perhaps indeed contemplate, that under the legislation class 4 gambling and smoking may co-exist in open areas.

25. This analysis was conducted in relation to smoking and gambling at Class 4 venues, and in particular smoking and gambling in the specific circumstances of the Kilbirnie Tavern but applies equally to casinos, with sections 13A and 13B of the Smoke-free Act being identical in tenor.
26. Accordingly, applications and appeals regarding the placement and use of gaming machines in smoking areas fall to be decided upon the same criteria as other applications and appeals. As the Commission noted in decision GC31/10, approval depends on exactly what is proposed at the venue in question. The Commission needs to be satisfied that the proposal is consistent with the Gambling Act and its purpose, with the key consideration being the likely effect of the proposal on the potential for harm. The purposes of the Gambling Act are set out in section 3, which provides:

3. Purpose

The purpose of this Act is to—

- (a) control the growth of gambling; and
- (b) prevent and minimise the harm caused by 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
- (g) ensure that money from gambling benefits the community; and
- (h) facilitate community involvement in decisions about the provision of gambling.

27. The Commission had further regard to the relationship between smoking and gambling as disclosed by research, a matter to which it had had recent and detailed regard in the Kilbirnie appeal. The research position has not changed. The evidence indicates a relationship, but falls short of establishing a causative correlation. That does not mean that the relationship should be ignored but, in the Commission's view, it means that the precautionary approach (in effect, prohibiting activity until it is proven to be safe) argued in some of the submissions is not justified if more balanced alternatives exist. In recent years, the Commission has generally favoured an approach of permitting activities, coupled with enhanced requirements for monitoring and intervention, rather than precautionary total prohibition. In the casino sector, SCAL has been required to develop and report regularly to the Commission on a detailed and customised Host Responsibility Programme. Areas of potential concern can accordingly be made the subject of monitoring and action as needs require.

28. In this instance, the Commission was of the view that SCAL's proposal would not increase the potential for harm, for the following reasons:

- (a) The Commission considers that the research does not establish a clear benefit for the minimisation of problem gambling harm from banning smoking while gambling. Although there is evidence of a correlation between smoking and problem gambling, the evidence does not establish that smoking bans would reduce incidences of problem gambling (as opposed to gambling *per se*).
- (b) The level of host responsibility at the Auckland casino is of a sufficiently high standard that if a patron exhibited signs of problem gambling while smoking and playing gaming machines, the Commission would expect that person to be identified and the appropriate intervention to occur.
- (c) The Commission can exercise considerable control over casinos. This means that the Commission can, for example, grant an approval but impose additional host responsibility obligations, or additional licence condition requirements. The correlation means that SCAL should consider its harm minimisation obligations carefully and address the issue in the next revision of its Host Responsibility Programme but does not lead the Commission to forbid gambling in open areas.

- (d) Although smoking decks have been used by patrons as respite areas from gambling, patrons can still obtain respite on other smoking decks or in other areas at the casino where gambling does not take place, such as bars, cafes or restaurants.

Visibility of gambling

29. All casinos in New Zealand, including the Auckland casino, were licensed to operate on condition that gambling activity was not visible from outside the casino. There have been two minor exceptions to this rule for the Hamilton and Wharf casinos (in which people in a public area outside the Hamilton casino can view gambling activity if they stand at the very far left of the main entrance and look in, or if people are on the upper deck of the "Earnslaw" steamship, which docks outside the Wharf casino), but they do not undermine the essence of the original rule.
30. The original condition regarding visibility of gambling activity at the Auckland casino was as follows:

A4 General Specifications for physical layout

The holder shall ensure that:

- (a) gaming activity is not visible from outside the casino complex; ...

31. This condition was amended when the Commission reviewed the licence conditions for the Auckland casino in 2005 and 2006, to provide as follows:

8. The Licence Holder shall ensure that:

- (a) gambling activity is not visible from the street or other public areas outside the Casino Venue; ...

32. The equivalent conditions were similarly amended for the other casinos in the country, although the relevant conditions for SKYCITY Hamilton and Wharf casinos contained the further provision that gambling activity may be visible as and when approved by the Commission.
33. It is clear from reviewing each of the decisions that the change was approved without discussion on the basis that it was supported by all parties. The Commission did not have the potential effect of the change drawn to its attention and did not consider specifically whether the visibility controls, which had been in place from the outset of casino gambling, should be relaxed.

34. SCAL submitted that, although it was not seeking to abandon the visibility rule, the licence condition nevertheless allows visibility from private areas outside the casino, so its proposal complies with the condition's wording.
35. The Secretary argued that the public/private distinction apparently created by the changed condition is arbitrary, and that it is possible that visibility from some private areas may be more detrimental than visibility from some public areas. Although it was he who proposed the change to condition 8(a), he now agrees with the view expressed by the Commission in decision GC05/09, in which the Commission held that gambling should not be visible from outside the casino despite the narrower wording of condition 8(a).
36. The present application has required the Commission to consider, as a matter of policy, whether it is desirable to maintain the present visibility restriction, remove the public/private distinction or abandon the visibility control altogether. The Commission last considered this issue in decision GC05/09, in which the Dunedin casino sought Commission approval to construct a restaurant adjacent to the casino, and for gambling activity to be visible from that restaurant. In declining the application, the Commission stated:
44. A requirement to ensure that gambling activity is not visible from outside the casino premises has been a standard feature of casino licences. Exceptions have been created and allowed in particular cases where existing building constraints have created a limited potential for visibility (as explained below) but those exceptions do not alter the normal approach.
- ...
47. In this case, the associated construction changes sought by DCL would have the purpose and effect of creating the visibility problem, with DCL seeking relief from the very problem which it set out to create. Granting an approval in such a case would, in reality, be an abandonment of the rule against visibility. The Commission declines to vary condition 8(a) as sought.
37. The Commission's views have not changed. It does not see any reason to depart from the longstanding rule that gambling activity should not be visible from outside the casino. The rule appears to have been implemented to limit the extent to which people outside the casino are exposed to the sight of gambling. The underpinning rationale may contain elements of concern about preventing gambling harm but the Commission is inclined to the view that it also reflects a more general concern about environmental impact. The Commission can see no reason to loosen or remove an environmental control which has been in place since casinos opened in New Zealand.
38. The Commission sees no reason to make a distinction between visibility from public or private areas. The only logical purpose of the condition (to limit the extent to which people outside a casino are exposed to the sight of gambling) does not support such a

distinction because gambling activity should, as a matter of policy, either be visible, or it should not.

39. As noted above, the Secretary has changed his view and now supports the visibility restriction.
40. Shortly before the Commission concluded its deliberations on this application, SCAL informed the Commission that it was prepared to frost all of its glass louvres to ensure that gambling activity would not be visible from anywhere outside the casino, if the Commission considered visibility of gambling activity to be an issue. As the Commission has decided that gambling activity should not be visible from outside the casino, SCAL must take steps to ensure that this does not happen. However the Commission will leave it to SCAL to determine how best to prevent gambling activity from being visible from outside the casino. This may be achieved by frosting the louvres, or by some other means.

Other

41. As the current wording of condition 8(a) has created much of the difficulty with the current application, the Commission will initiate an amendment to licence condition 8(a) for all casinos in the country to ensure that the condition clearly prevents gambling activity from being visible from outside a casino. SCAL and other affected parties will be consulted on the proposed amendment in the usual manner.
42. The PGF and SA made submissions in relation to the audibility of gaming machines from the streets neighbouring the casino, and the effect this might have on problem gamblers, or potential problem gamblers. This is an issue that the Commission has not previously considered.
43. When the Commission attended outside the casino during the day to assess possible audibility, the noise from traffic was such that it would be virtually impossible for anyone outside the casino to hear gaming machines being played inside. However, the Commission recognises that this may not always be the case and that gaming machines may be more audible during the night when traffic subsides, or in other environments. The Commission intends to propose a restriction on audibility as well as visibility in its proposed amendment so that it receives the benefit of submissions on the issue.
44. Finally, the Commission questioned SCAL in relation to the open area receiving approval from the relevant smoke-free authorities under the Smoke-free Act. SCAL stated that such approvals were not provided in advance; rather it is incumbent on SCAL as the operator of the open area to ensure that it is compliant on an ongoing basis. If SCAL is

not compliant, it will have to accept the consequences of any non-compliance. The Commission accepted this response.

Decision of the Commission

45. The Commission permits SCAL to undertake the construction and design changes sought to allow it to construct the area on level 2 where patrons can both smoke and play gaming machines. In doing so, it will be for SCAL to satisfy both the statutory requirements of an "open area" and the licence condition prohibition on external visibility of gambling activity. The Commission also expects SCAL to maintain close supervision of patrons in this area who smoke while they gamble, and for SCAL to report to the Commission on this area in its six-monthly host responsibility reports.
46. For the reasons outlined above, the Commission approved, under conditions 6 and 7 of SCAL's venue licence, the proposed construction and design changes to the casino.
47. Gambling activity is not to be visible from outside the casino.



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

22 June 2011