

IN THE MATTER of the Gambling Act 2003

AND of an application by **SKYCITY CASINO MANAGEMENT LIMITED** and **SKYCITY HAMILTON LIMITED** for variation of its casino operator's licence for the Hamilton Casino and associated game mix, design and floor plan changes

BEFORE THE GAMBLING COMMISSION

Members: L M Hansen (Chief Gambling Commissioner)
D C Matahaere-Atariki
W N Harvey
S C L Pearson

Date of Application: 10 December 2018

Date of Hearing: 19-26 November 2019

Date of Decision: 15 May 2020

Date of Notification
of Decision: 4 June 2020

**SKYCITY APPLICATION TO AMEND LICENCE CONDITIONS
AND FOR RELATED APPROVALS**

1. INTRODUCTION

- 1.1 On 10 December 2018, SKYCITY Casino Management Limited ("**SCML**") and SKYCITY Hamilton Limited, together ("**SKYCITY Applicants**") filed an application ("**Application**") seeking multiple approvals. The Applicants sought variations to the conditions of its casino operator's licence in respect of SKYCITY Hamilton Casino ("**Casino**") and associated changes to the game mix, design and floor plan of the Casino. The Application was made under s 139 of the Gambling Act 2003 ("**Act**").¹
- 1.2 In broad summary, the Applicants sought changes to the conditions which would allow it to deploy an additional 60 electronic gaming machines ("**EGMs**") at SKYCITY Hamilton

¹ All statutory references, unless otherwise indicated, are to the Gambling Act 2003.

Casino (“**Casino**”) in substitution for the removal of three Blackjack tables. The Application was the first in which a casino operator sought an increase in the maximum number of EGMs (and a reduction in the maximum number of table games) specified in a casino licence.

- 1.3 It was apparent that the Application raised two central issues, namely:
- (a) whether the proposed changes would increase opportunities for casino gambling (in breach of s 139(2)(a) and (d)) and s 11), a matter which involves an assessment by the Commission under s 12; and
 - (b) what the effect of the proposed changes would be on the prevention and minimisation of harm from gambling.

The latter issue potentially arises under s 139(2)(a) and (b) and s 3, the Act’s purpose provision.

2. **APPLICABLE STATUTORY PROVISIONS**

- 2.1 Determination of the Application is governed by the applicable provisions of the Act. The key relevant sections are set out below:

3 Purpose

The purpose of the Act is to –

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

11 No increase in casino gambling

A person must not increase the opportunities for casino gambling

12 What is increase in casino gambling

- 1. Decisions on what constitutes an increase in opportunities for casino gambling are a function of the Gambling Commission

2. An increase in the opportunities for casino gambling includes but is not limited to –
 - a. an increase in the number of gaming machines unless the increase is accompanied by a reduction in the number of table games that the Gambling Commission believes is proportionate;
 - b. an increase in the number of table games unless the increase is accompanied by a reduction in the number of gaming machines that the Gambling Commission believes is proportionate;
 - c. an increase in total player space at table games unless the increase is accompanied by a reduction in other opportunities for casino gambling that the Gambling Commission believes is proportionate.
3. Opportunities for casino gambling are not increased –
 - a. by increases in the Auckland casino, that comply with the Order for the Variation of Conditions of Casino Premises Licence dated 6 December 2002;
 - b. by gambling conducted by the New Zealand Racing Board referred to in section 120.

139 Conditions of Casino licence

1. The Gambling Commission may specify the conditions of a casino licence or vary or revoke the conditions of a casino licence in the following circumstances;
 - a. on granting a casino operator's licence;
 - b. on renewing a casino venue licence;
 - c. on approving a casino venue agreement or an amendment to it;
 - d. on application by the holder of the casino licence
 - e. on its own initiative or on the request of the Secretary
2. A condition of a casino licence specified under subsection (1) –
 - a. must be consistent with this Act; and
 - b. must contribute to achieving the purpose of this Act; and
 - c. must contribute to the efficient and effective administration of this act; and
 - d. must not permit an increase in the opportunities for casino gambling; and
 - e. may relate to any matter including the matters specified in Schedule 1, within the confines of paragraphs (a) to (d).

Schedule 1 – Conditions that may attach to casino licence

1. Initiatives to encourage responsible gambling.
2. Initiatives to minimise harm.
3. Arrangements for any contributions to the community.
4. Control on the placement of banking facilities available to patrons in a casino.

5. Requirements for security and surveillance in a casino.
6. The nature and standard of the casino facilities.
7. The designation of areas within a casino where casino gambling may be conducted.
8. The approval of, and procedures for the approval of, alterations to floor plans and the placement of gaming tables and gambling equipment.
9. Conditions regulating the number of gaming machines and table games, and the ratio of one to the other, and player space and positions at tables and machines.
10. The standard, type, installation, and operation of electronic monitoring systems and other surveillance equipment, including closed-circuit television systems.
11. The standard of facilities to be provided for gambling inspectors and the Police.
12. Procedures, forms, and, if appropriate, formulas for, or with respect to,—
 - a. hold percentages and calculations of hold percentages; and
 - b. revenue drop; and
 - c. expense and overhead schedules; and
 - d. complementary services; and
 - e. salary arrangements; and
 - f. personnel practices.

140 Procedure for specifying, varying or revoking casino licence conditions

1. The Gambling Commission must notify the holder of the relevant casino licence, the Secretary and any other person who it considers is affected by a proposal to specify, vary, or revoke the conditions of a casino licence.
2. Notification under subsection (1) must include —
 - a. the reason for the proposal; and
 - b. the procedure to be followed before the Gambling Commission makes a decision relating to the proposal.
3. the holder of the casino licence, the Secretary and any other person affected may make written submissions to the Gambling Commission concerning the proposal within 20 working days after the date of the notice under subsection (1) or any longer period that the Gambling Commission allows.
4. The Gambling Commission must consider any submissions made under subsection (3) and may, if it considers it appropriate, seek comment from the casino licence holder on the submissions received from the Secretary or other persons affected.
5. the Gambling Commission must notify the holder of the casino licence, the Secretary and other persons affected of —
 - a. its decision concerning the proposal and the reasons for the decision; and
 - b. the right to appeal the decision and the process for an appeal.

225 Gambling Commission is Commission of Inquiry

1. Within the scope of its jurisdiction, and subject to this Act, the Gambling Commissions (including any division) must be treated as if it were a Commission of Inquiry under the Commissions of Inquiry Act 1908.
2. Accordingly the Commission of Inquiry Act 1908 applies to the Gambling Commission

226 Gambling Commission may engage experts and receive wide evidence

1. The Gambling Commission may appoint experts to assist the Gambling Commission to exercise its functions or powers, or to do any of the things specified in subsection (2)
2. A person appointed as an expert –
 - a. May be required to make inquiries, conduct research, facilitate consultation, or provide reports on matters before the Gambling Commission; and
 - b. is entitled to be paid fees by the Gambling Commission at rates the Gambling Commission thinks fit; and
 - c. may be separately reimbursed for expenses reasonably incurred in performing the services.
3. The Gambling Commission may –
 - a. reconsider any matter that has been determined by it and issue a fresh determination; and
 - b. receive evidence that is not admissible in a court

Schedule 3 – Gambling Commission

(2) Meetings

1. The Gambling Commission may regulate its procedure as it thinks fit
2. Gambling Commission meetings are held at times and places decided by the Chief Gambling Commissioner
3. The Gambling Commission may meet in private or public as the Chief Gambling Commissioner decides
4. The Gambling Commissioner must give notice of public meetings of the Gambling Commission to persons likely to be interested in the subject matter of the meeting, in whatever way it thinks appropriate.

2.2 In addition, the following provisions of the Commission of Inquiry Act 1908 (“**COIA**”), which applies to the Commission pursuant to s 225(2), were applied to assist with determination of procedural issues:

4B Evidence

1. The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of inquiry, whether or not it would be admissible in a Court of law
2. The Commission may take evidence on oath, and for that purpose a member or officer of the Commission may administer an oath
3. The Commission may permit a person appearing as a witness before it to give evidence but tendering a written statement and, if the Commission thinks fit, verifying it by oath

4C Powers of investigation

1. For the purpose of the inquiry the Commission or any person authorised by it in writing to do so may:
 - a. inspect and examine any papers, documents, records or things
 - b. require any person to produce for examination any papers, documents, records or things in that person's possession or under that person's control and to allow copies of or extracts from any such papers, documents or records to be made:
 - c. require any person to furnish, in a form approved by or acceptable to the Commission any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents or records as aforesaid
2. The Commission may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this section shall be verified by statutory declaration or otherwise as the Commission may require
3. For the purposes of the inquiry the Commission may of its own motion or on application, order that any information or particulars, or a copy of the whole or any part of any paper, document, or records, furnished or produced to it be supplied to any person appearing before the Commissions and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars or copy.
4. Every person shall have the same privileges in relation to the giving of information to the Commission, the answering of questions put by the Commission and the production of papers, documents, records and things to the Commission as witnesses have in Courts of law.

3. PRIOR PROCEDURAL STEPS

Public notification

- 3.1 Following the receipt of the Application, and with the initial intention of deciding the Application on the papers (as is its usual practice), the Commission invited submissions from a number of potentially interested parties. Several parties asked the Commission to consult far more broadly than its usual practice on applications to vary casino licence conditions.

- 3.2 Pursuant to Schedule 3, clause 2(3), the Commission may meet in private or in public as the Chief Gambling Commissioner decides. The Chief Gambling Commissioner was asked, in this case, to decide to hear the Application at a public meeting.
- 3.3 It was clear that the Application had attracted considerable public attention in the local area, including public opposition by the territorial local authority. The Application also raised novel issues which had not been considered previously by the Commission and which were likely to affect the determination of any future application for licence condition variations which sought the substitution of EGMs for table games. As a result, the Chief Gambling Commissioner decided that the Application would be heard at a public meeting.
- 3.4 Under Schedule 3, clause 2(4), notice of public meetings must be given in whatever way the Commission thinks appropriate, to persons likely to be interested. Otherwise the Commission may regulate its procedure as it thinks fit.² In addition to notifying many potentially interested organisations directly, the Commission published notices of the Application and its intention to hold a public meeting in the local press and online, including on the Commission's own website. The notices invited written submissions from all potentially interested members of the public and also invited those who wished to appear in person and be heard at the public meeting to lodge a request in writing for approval to do so (with supporting reasons).

Written submissions

- 3.5 The invitation to file written submissions on the Application was extended in the public notices and on the Commission's website. The Commission expected to receive individual submissions directly from interested individuals and organisations in their own right. However, the Commission received submissions from several organisations which included, in various forms, the views of many other people.
- 3.6 It became necessary for the Commission to determine the formal status of the transmitted views of others, having regard to the various forms in which they had been delivered. The determination was published as decision GC15/19 (17 July 2019).
- 3.7 In the published decision, the Commission expressed its strong preference, for reasons of procedural integrity, for receiving written submissions directly from the submitting party. As it had not so stated previously, it decided in this case, however, to treat as separate submissions, independent of the parties that conveyed them, all expressions of view which appeared to convey an intention to be treated as separate and independent and which included the full name and contact details of the submitter. All other expressions

² Schedule 3, clause 2(1).

of view were to be regarded as an indication of support for the submission of the party conveying the view in question.

Permission to appear at hearing

- 3.8 Having invited requests for authorisation to appear, it was necessary for the Commission to decide which of the applying parties would be authorised to appear and be heard at the public meeting. The Commission's determination was published as decision GC16/19 (17 July 2019).
- 3.9 The Commission confirmed that the Applicant was expected to appear at the public meeting. It also authorised appearances by Hamilton City Council ("HCC"), the Ministry of Health ("MoH"), Waikato DHB ("WDHB"), the Problem Gambling Foundation Group ("PGF"), Salvation Army Oasis ("SAO"), and Anglican Action Mission Trust ("AAMT").

Expert report by Professor Delfabbro

- 3.10 Pursuant to its powers under s 226(1) and (2), the Commission asked Professor Paul Delfabbro, of the School of Psychology at the University of Adelaide, who has a background in research into behavioural addictions and from whom the Commission has obtained expert assistance in the area of gambling harm previously, to undertake a review of the relevant academic literature and to report to the Commission on the results of that review with regard to differences in relative harm caused by casino EGMs and casino table games, such as Blackjack.
- 3.11 In September 2019, Dr Delfabbro's report was provided to the parties who had been authorised to appear at the public hearing and published on the Commission's website. The contents of the report will be addressed later in this decision.

Provision of additional documents

- 3.12 On 11 October 2019, the Commission received a request from the solicitors for HCC, asking the Commission to make available to the appearing parties earlier reports to the Commission by Professor Delfabbro and documents containing information about the results of simulated trials to compare table game speeds in 2008 and 2009 and arithmetical opportunities calculations submitted in support of a proposed new game mix at the Casino which was the subject of decision GC08/17. The Applicants raised objections to the request for the documents on the basis of a breach of timetable orders, delay and prejudice to the Applicants' position. The Commission sought submissions on the request from the appearing parties.
- 3.13 Both the Act and COIA provide the Commission with broad powers to receive evidence, to undertake its own investigations and to refer to a range of materials. The Commission

is a specialist tribunal which is expected to use its accumulated knowledge and expertise in the discharge of its functions. However, it is also subject to the requirements of natural justice.

3.14 The Commission concluded that the requirements of natural justice meant that all appearing parties should have access to apparently relevant information in its possession and decided to make the following additional information, which it held (and to which both the Applicants and the Department of Internal Affairs (“DIA”) had had previous access), available to the appearing parties:

- (a) an affidavit by Professor Delfabbro sworn on 3 March 2006 (which was referred to in some of the Commission’s subsequent decisions);
- (b) the material on opportunities which it received in advance of decisions GC17/10 and GC08/17; and
- (c) the material on opportunities which it received in advance of decision GC04/09.

3.15 The appearing parties were subsequently provided with those documents on condition that they were to be used solely for the purpose of evidence and submission to the Commission on the Application.

4. THE APPLICATION

4.1 The Application sought the following specific variations to the conditions of SCML’s casino operator’s licence in respect of the Casino (“Licence”):

- (a) a variation to condition 5, increasing the permitted number of electronic gaming machines (“EGMs”) in the gambling area of the Casino from 339 to 399;
- (b) a variation to condition 6, decreasing the permitted number of gaming tables in the gambling area of the Casino from 23 to 20; and
- (c) the deletion of condition 7, the requirement that the ratio of EGMs to gaming tables in the gambling area in the Casino must not exceed 15 to 1, in its entirety.

4.2 The Application also sought the approval, pursuant to condition 9, of Revised Annex A (set out in Appendix 2) in substitution for the current Annex A, which currently contains 21 game mixes (all of which permit up to 23 table games). Revised Annex A would comprise the current regulatory game mix 1 (totalling 23 tables) and one further game mix (permitting up to 20 table games).

- 4.3 SKYCITY Hamilton Limited sought approval of associated construction and design changes (set out in Appendix 3) and a new floor plan (set out in Appendix 4). The Application expressly recognised that the latter approvals assumed that the licence conditions would be varied in accordance with the Application. They were provided in accordance with prior indications by the Commission of a preference for receiving a comprehensive set of all related proposed approvals so that the totality of the changes intended to be sought could be considered as a whole.
- 4.4 Although the Application was framed in terms implying that substitution of a proportionate number of EGMs for table games was a right, the Applicants acknowledged (appropriately in the view of the Commission), in opening its case at the hearing, that that was not the case. The permitted number of table games and EGMs and the ratio of deployment between them are controlled by the casino operator's licence conditions and all changes to licence conditions require a decision of the Commission under s 139. Such a decision by the Commission is separate from its determination under s 12 about proportionate substitution of opportunities for casino gambling (although the latter is a necessary part of considering the proposed changes).
- 4.5 In the Application, the Applicants advanced a number of grounds in support of the changes sought, including reference to the legislative change made in the New Zealand International Convention Centre Act 2003 ("NZICCA"), the 15:1 EGM to table game ratio condition (a common feature of New Zealand casino licences) and the correct approach to assessment of comparative opportunities for casino gambling.
- 4.6 In the latter regard, the Applicants observed that the Commission's historical approach to considering new table game mixes had been to compare the proposal with what had previously been approved, with the Commission having regard to maximum player spaces under the Rules and the available comparative data relating to each table game's rate of play to reach a common sense, "in the round" assessment.
- 4.7 The Applicants observed that, as EGMs can only be played by a single player and the rules of Blackjack fix the maximum number of players per game at 21, comparison on the basis of player spaces was straightforward; the change would be from 3 Blackjack tables (maximum 63 player spaces) to 60 EGMs (60 player spaces) or 3 fewer player spaces overall.
- 4.8 In comparing the rate of play, the Applicants acknowledged that, referring to the theoretical maximum, 60 EGMs would produce many more wagers in a given time than 3 Blackjack tables. It provided the following analysis of the comparative rates of play:

- (a) The data on rate of play from the trial which SCML provided to the Commission in 2010 indicated that a Blackjack game could generate 34 games in 15 minutes of play. Although the Commission had identified limitations with the 2010 data, it provided some general guidance.
- (b) There has never previously been a need to consider the rate of play of EGMs as they have always been treated as a generic product. The proposed additional EGMs are the type known as a single terminal EGM. The rate of play is determined in part by the player and in part by the game. In 2018, SCML undertook trials to determine EGM game speeds. The trial tested the number of games over 15 minutes of play. The result was between 99 and 201 games, with an average of 151 games every 15 minutes across the four different types of games tested.
- (c) Comparison using those rate of play data indicates that 60 EGMs generate 4.2 times more wagers than 3 Blackjack tables in a given time.

4.9 However, the Applicants contended that an arithmetical calculation of comparative opportunities based on player spaces and trial game speed results should be supplemented by another consideration; namely, the difference in average wager. Based on SCML's August 2018 player rating data, the average Blackjack wager was \$86 but the average wager on a single terminal at the Casino over the same period was only \$1.03. Alternatively, regard should be had to the lowest possible wager. Most EGMs allow players to wager 20 cents or less whereas the lowest wager on Blackjack is \$5.00. Table 3 in the Application showed that the value of the wagering options is substantially higher for 3 Blackjack games than 60 EGMs when using either the average or the minimum wager.

4.10 The Application also made reference to the Auckland casino regulatory concessions enacted by NZICCA, under which 20 Automated Table Games ("**ATGs**") could be substituted for a single unspecified table game.

4.11 SCML's Hamilton licence conditions specify that the ratio of EGMs to gaming tables in the gambling area shall not exceed 15:1. The Casino Control Authority ("**CCA**") imposed the ratio when casinos were first established, and it has not been altered since. The Application suggested that a licence condition which mandates a 15:1 ratio between EGMs and table games frustrates the intention of the Act which envisages the ability to change game mixes proportionately.

5. WRITTEN SUBMISSIONS

General body of public submissions

- 5.1 In total there were 242 individual written submissions treated as separately received by the Commission. Of those, 9 submissions were in support of the Application and 233 were opposed.
- 5.2 The supporting submissions were generally supportive of the Casino and considered that its operation had a positive impact on the city. They did not address the merits of the specific amendments sought with any specificity. The same comment may be made about the oral evidence given at the hearing by Mr Simpson of the Chamber of Commerce.
- 5.3 Many individual submissions were the result of an organised campaign to oppose the Application. Although the submissions came from individual submitters, it was apparent that they reflected collective common views, with 31 submissions being received as part of the #Opposepokeplans campaign and another 153 submissions using one of several standardised opposition forms created for a campaign.
- 5.4 Although the largest group of submissions (205/242) ostensibly contended that there would be an increase in the opportunities for gambling, on closer examination, the submission was usually better described as arguing that there would be an increase in utilisation (the extent to which the changed facilities would be used compared to the existing facilities), rather than opportunities (the extent of the possible options available after a change), coupled with an argument that the result would be an increase in harm. Some examples of those submissions are as follows:

"The table games are mostly empty on any given night, whereas gaming machines, especially the popular ones, are often full. Increasing gaming machines increases the opportunity for gambling for the majority of SKYCITY customers who go to the casino to use the machines."³

"Using provided opportunities to gamble as a guide to harm done does not take into account if those opportunities are being taken up. Exchanging empty seats for full ones will increase the number of people gambling even if the potential opportunities appear similar."⁴

- 5.5 63 out of the 242 submissions received contended that harm from problem gambling would be increased by increasing EGMs while reducing table games. Some examples are as follows:

³ Submission of Te Ariki Paitai.

⁴ Submission of Deborah Fisher.

"The majority of people seeking help for their gambling issues cite electronic gaming machines as their primary problem-gambling mode. On average a problem gambler affects six other people."⁵

"Pokies are a very different product from Blackjack tables. They take in more money and cause more harm than Blackjack tables. These machines stimulate reward pathways in the brain and it is easier to game continuously, more rapidly and unnoticed on the pokies than on Blackjack tables."⁶

"Pokie machines are known to be very addictive which increases the chance that harm will occur. Pokie machines are continuous forms of gambling so player can push play repeatedly and constantly lose money."⁷

"Casino tables are far less harmful than Electronic Gambling Machines (aka "Pokies"). One reason is the social nature of table games vs individual gambling on pokies. This is reinforced by the number of people that have sought support through Problem Gambling Services who have identified their most harmful mode of gambling; Pokies. Pokie machines are more addictive in their engineering and design than Blackjack tables."⁸

5.6 Thirty submissions contended that the proposed level of substitution was not proportionate and would therefore increase opportunities for casino gambling. None of these submissions relied on trial data or game rules but rather on a general impression that the resulting change would not be proportionate, as illustrated by the following:

"Compared to table games, those playing pokie machines can lose money at a far greater rate."⁹

"Only 18 players at a time could play the 3 table games in total, in contrast to the proposed changes would allow 60 people to use the same space for gambling at once."¹⁰

"There are much more pokie machines compared to only 3 table games."¹¹

"60 pokie machines can increase gamblers up to 60 where three Blackjack tables only accommodates to max of 30 people."¹²

"5-7 people per Blackjack table times 3 equals a maximum of 14 players for 3 Blackjack tables compared to 60 people per 60 pokie machines."¹³

5.7 The expressions of opposition collectively were far more numerous than indicated by the analysis of the submissions treated individually. As indicated in paragraph 3.7 above, not all expressions of support for a viewpoint in opposition were treated as individual submissions. The additional written expressions of support for an opposition submission amounted to a further 383 individuals expressing opposition to the Application.

⁵ Submission of Tui Ora.

⁶ Submission of Paul Bradley.

⁷ Submission of Joseph Paul William.

⁸ Submission of Eru Loach.

⁹ Submission of David Gock.

¹⁰ Submission of Callum Wakefield.

¹¹ Submission of Claire Gibson.

¹² Submission of Kylie Bryant.

¹³ Submission of Ted Wilson.

- 5.8 One submission, from a keen Blackjack player, opposed the Application out of concern about a reduction in the Blackjack facilities at the Casino.
- 5.9 The submissions by HCC, MoH, WDHB, PGF, Mapu Maia, SAO, the DIA and Christchurch Casinos Limited (“CCL”) addressed the Application at a greater level of analysis and detail and are summarised below.

HCC

- 5.10 HCC opposed the Application on two grounds:
- (a) It would permit an increase in opportunities for casino gambling; and
 - (b) It would not contribute to achieving the purpose of the Act – preventing and minimising gambling harm (under s 3(b)).
- 5.11 Licence conditions must satisfy all the mandatory requirements under s 139, including ensuring the variation would not permit an increase in opportunities and contributing to achieving the purpose of the Act.
- 5.12 In addition, the ratio of 15:1 EGMs to game tables is a reflection of community expectations and should be retained regardless of the Application of proportionality under s 12.
- The gambling opportunities calculation*
- 5.13 HCC pointed to the Court of Appeal decision, *SKYCITY Auckland Ltd v Gambling Commission* [2007] NZCA 407 at [76], to say that rates of play (which is what the Commission has called its assessment of the number of possible wagers per unit of time) are relevant in determining the number of opportunities for gambling and that the Commission should not just consider player spaces (the maximum number of people able to gamble at any one time). Using the DIA’s analysis, the higher rate of play for EGMs means a proportionate substitute for three Blackjack tables is 14 EGMs.
- 5.14 Wager size is not relevant to s 12 proportionality, as “(w)ager size relates to the financial scale of gambling and not to the opportunity to gamble”.
- 5.15 Usage data for EGMs and tables games were said to be relevant to the proportionality assessment. If table games have a low usage rate, this should be relevant to a gambling opportunities assessment. HCC argued that common sense and an overall assessment of whether the substitution will increase gambling opportunities should not be completely divorced from the reality of usage of EGMs compared to table game.

- 5.16 A variation of a licence under s 139 must contribute to achieving the purpose of the Act. One of the purposes is to prevent and minimise the harm from gambling, including problem gambling. The Application does not show how the proposed variation would achieve this.
- 5.17 Another purpose of the Act is to facilitate community involvement in decisions about the provision of gambling (s 3(h)). The proposed variations would undermine the community wishes reflected in the HCC class 4 gambling policy which prohibits an increase in EGMs in class 4 venues. To allow the Application would be at odds with the wishes of the community and against the purpose of the Act.
- 5.18 A final relevant purpose of the Act is to ensure that money from gambling benefits the community (s 3(g)). Class 4 venues in Hamilton must return 40% of profits (actually of net proceeds) to the community; the Casino venue licence holder only has to return 1.5% percent of profits (actually of casino operation revenue, excluding GST, before gaming tax). The addition of 60 EGMs would take custom away from other class 4 venues and therefore decrease the amount of money going to the community.

MoH

- 5.19 MoH opposed the proposed increase of 60 EGMs in the place of 3 Blackjack tables as it would contradict the objectives of the Ministry's Strategy to Prevent and Minimise Gambling Harm 2016/17 to 2018/19.
- 5.20 The submission referred to numerous studies on gambling harm and a meta-analysis that shows increased risks of harm associated with EGMs compared to gaming tables. The harm evidence is summarised below. MoH asserted that the harm can be severe and have profound impacts on family and the wider community. MoH observed that, if the proposed substitution were to take place, the Casino would have the highest ratio of EGMs to table games of any casino in the country.
- 5.21 MoH observed that the local representative body, HCC, does not want an increase in the number of EGMs in the city.
- 5.22 The submission emphasised that Māori are at a greater risk of problem gambling than non-Māori, that Māori make up a significant percent of the population in Hamilton so that an increase in EGMs would disproportionately affect Māori. The MoH asked the Commission to consider whether the Application was consistent with the principles of the Treaty of Waitangi. That issue is addressed later in this decision.

WDHB

- 5.23 WDHB opposed the increase in EGMs (in exchange for removal of 3 gaming tables). It urged the Commission to consider the health and social impacts of gambling, particularly those arising from EGMs.
- 5.24 WDHB outlined the intersection between health and gambling harm, and how the consequences of problem gambling affected its goal of improving health outcomes, particularly in Māori. Its submission referred to numerous studies that find EGMs to be “the major cause of gambling harm”. It pointed to studies which show how problem gambling impacts, not just the individual, but their family and wider community. WDHB emphasised how gambling harm especially affects people experiencing higher levels of social and economic deprivation and their children. WDHB has particular concern about the impact of gambling on Māori, as Māori make up over 20% of its population.
- 5.25 WDHB claimed that there are plenty of opportunities for people in Hamilton to gamble on EGMs already. The Casino already has 339 EGMs (45.5% of the total EGMs in Hamilton).
- 5.26 WDHB opposed the proposed substitution, submitting that, while the number of player spaces would remain the same, the rate of play of EGMs is significantly higher than gaming tables using SCML’s own trial rates of play. Therefore, there would be an increase in gambling opportunities and the proposed change would not be proportionate. WDHB opposed the submission that wager size should be taken into account when considering gambling opportunities.

PGF

- 5.27 PGF submitted that the proven increased harm from EGMs should be a sufficient reason alone to decline the Application. It referred to data from MoH on the higher levels of harm and problem gambling connected to EGMs.

Non-compliance with s 139

- 5.28 The Application was said to be inconsistent with one of the purposes of the Act, section 139(2)(b) to minimise harm. The Applicants had provided insufficient detail on how it would minimise harm with the substitution.
- 5.29 The Application was also said not to contribute to the efficient and effective administration of the Act (section 139(2)(c)) because the Applicants had brought separate but related applications.
- 5.30 A variation must not permit an increase in gambling opportunities (section 139(2)(d)). PGF submitted that the Application did not adequately show that there would not be an

increase in gambling opportunities and that there would be an increase in gambling opportunities as the proposed 60 EGM:3 table game ratio is not proportionate. It endorsed the calculation by DIA that 14:3 would be a proportionate substitution. PGF considered average wagers on different forms of gambling to be irrelevant to the comparative “opportunities” assessment.

Non-compliance with licence conditions

- 5.31 Condition 7 of the Venue Licence for the Casino requires an assessment of the impact of alterations on “...(c) harm, prevention, harm minimisation and responsible gambling.” It submitted that the Application contained no assessment of that, or any other matter listed in condition 7.
- 5.32 The proposed variation was said to be inconsistent with the licence condition ratio of 15:1.

Mapu Maia

- 5.33 Mapu Maia is part of PGF. It generally endorsed PGF’s submission on the Application. Mapu Maia’s submission focused additionally on the gambling harm experienced by Pacific peoples in New Zealand.
- 5.34 Mapu Maia contended that the current 15:1 ratio in the Licence should continue in force as a regulatory requirement and the Application should be refused for that reason.
- 5.35 It pointed to high rates of problem gambling associated with EGMs when compared to gaming tables and submitted that SMCL had not provided sufficient evidence that the proposal would not adversely impact its efforts to reduce the harm associated with gambling.
- 5.36 Mapu Maia contended that the rate of play is significantly higher for 60 EGMs than three gaming tables, resulting in increased gambling opportunities if the proposed substitution were approved. It also argued that that opportunities calculation assumed that the Blackjack tables would be at full capacity which would not accurately represent reality (a submission which appeared to confuse opportunity and utilisation).
- 5.37 It asked the Commission to decline the Application as being inconsistent with the Act’s purpose because granting it would increase gambling harm.

SAO

- 5.38 SAO opposed the Application as involving a disproportionate substitution and leading to a significant increase in gambling harm.
- 5.39 Its position was founded on three grounds:

- (a) the Applicants' proposal is inconsistent with the Act;
- (b) the Applicants provided no sound or valid reasons for the proposed changes; and
- (c) the Applicants provided no rational assessment of the impact of the proposed changes on gambling harm in Hamilton and the wider Waikato region.

5.40 The proposed amendments would increase opportunities for casino gambling. Adopting the data used in the Application, which showed 60 gaming machines, each with an average rate of play of 151 games per 15 minutes, while three Blackjack tables each have a rate of play of 34 games per 15 minutes, SAO argued that, as each Blackjack table has up to 21 player spaces, the proposal was to replace 2142 gambling opportunities with 9060 gambling opportunities, a net increase of 6918.

5.41 SAO agreed with the Applicants' submission that the Commission's opportunities analysis should be conducted "in the round" but opposed the inclusion of the value of wagering opportunities. Average wager is a measure of actual gambling, not the opportunities to gamble. If the opportunities assessment involved comparison of expected actual gambling activity, the variation would "unequivocally lead to an increase" because of the expected higher utilisation of the additional EGMs compared to the table games for which they were to be substituted.

5.42 The proposed orders were said to be contrary to the purposes of the Act in the following respects:

- (a) They would facilitate the growth of gambling through a 7.9% increase in the total number of gaming machines in Hamilton City and a 17.7% increase in casino gaming machines. Even with the reduction in gaming tables, the result would be a net increase of 46 gaming machines in terms of gambling opportunities, a figure equivalent to more than 5 new electronic gaming venues, and 1 EGM for every 200 people in Hamilton.
- (b) They would significantly increase gambling harm, a fact corroborated by a wealth of local and international research. A 2002 study found that gamblers who engage primarily in EGM gambling become problem gamblers almost three times earlier than those who engage in other forms. While part of this result is attributable to class 4 rather than casino EGMs, the contribution by class 4 EGMs is due to their availability rather than a difference in the type of EGMs used. In 2018, the Hamilton SAO centre saw three times more clients for casino gambling machine harm compared to casino table gambling harm.

- (c) Australian studies suggest that casino venues are more unsafe than smaller venues. It cites a study which found that 6.7 percent of all casino visitors were problem gamblers compared with between 1.4 and 3.8 percent of community pubs and clubs.
- (d) Regardless of the venue in which EGMs are operated, they possess a number of dangerous characteristics which can lead to gambling harm, namely solitary, easy to play, continuous and rapid play, low cost, unstaged and a variable ratio schedule of reinforcement.
- (e) The Applicants provided no assessment of the impact that the proposal might have on gambling harm other than reference to the Casino's Host Responsibility Programme ("HRP"). At a minimum, an independent social impact assessment should be provided and there should be a review of SCML staff, training and HRP to accommodate the new product mix.

DIA

5.43 The DIA's written submission is important because it is the department responsible for the Act and had extensive prior involvement in all prior decisions of the Commission on the main issues. Although its submission was referred to extensively by other parties, DIA elected not to appear at the public meeting. As a consequence, communication of its views, especially on the key issue of "opportunities" (with which it is the most experienced party to appear, along with SCML), was limited to its written submission.

The correct level of substitution

5.44 The DIA noted that the Application called for an assessment that the Commission had never been required to undertake previously; namely assessment of the opportunities created by an EGM and the proportional reduction in the number of table games to offset the opportunities increase arising from increasing the number of EGMs. The Commission had previously only compared differences in opportunities created by different table games. The decision on the Application is therefore bound to have important precedent effects.

5.45 DIA submitted that assessment should start with considering the arithmetical opportunities calculations available, using maximum player spaces and rates of play. It agreed with the Applicants that the maximum player spaces for EGMs are straightforward (1 player per EGM). SCML's EGM trial produced an average of 151 games every 15 minutes, giving each EGM a comparative "gambling opportunities" score of **151**. DIA submitted, presumably using the 2010 table game trial results, that 3 Blackjack tables

would produce an equivalent score of **2,142**. On that basis, **the removal of three Blackjack tables would equate to 14 EGMs** ($2,142/151= 14.185$ EGMs).

- 5.46 DIA accepted the Applicants' suggested rate of play of 151 games every 15 minutes (or 1 game every 6 seconds). On that basis, the "starting point for determining the number of EGMs to allow in substitution for three Blackjack tables would therefore be **14 EGMs** – not the 60 EGMs proposed by SCML".

Other factors to be considered by the Commission

- 5.47 Once the starting point had been identified, DIA submitted that the Commission should look at an application "in the round" to determine the correct level of substitution. DIA's submission identified what it said were a number of both relevant and irrelevant matters to be considered when the Commission makes its determination:

- (a) *International Convention Centre concessions*: The results of commercial negotiations between the New Zealand Government and SKYCITY were not relevant to the determination. The negotiations did not occur within the confines of the section 11 prohibition on increasing opportunities and the outcome was intended to constitute a special statutory departure from the statutory prohibition.
- (b) *Average Wager*: Such an approach had never been advanced nor adopted for table game comparisons and adopting it would make such comparisons much more complicated than was already the case. In addition, it would present a shift from opportunities (what might occur) to utilisation (what occurs in actuality). Average wagers are not static but shift for many reasons, leading to a need to re-assess every game at every casino on a regular basis. The difference in average wager between Blackjack (\$86) and an EGM (\$1.03) is not a matter that should be considered by the Commission when determining the proportionate substitution.
- (c) *Occupancy levels*: Occupancy levels of the Blackjack tables should not be a factor in the opportunities assessment, as the comparison would then be of conceptually different things. Occupancy levels reflect utilisation, not opportunities, are not static and including them would increase the complexity of the Commission's future decisions.
- (d) *Gambling Harm*: As a purpose of the Act is to "prevent and minimise the harm from gambling", the higher potential for gambling harm associated with EGMs compared to gaming tables was a relevant matter to be considered by the Commission.

- (e) *Views of local community:* Community consultation is important because the effect of the proposed changes would be permanent. DIA supported the decision to hear the Application at a public meeting.

New game mix

- 5.48 The DIA raised concerns with the revised Game Mix proposed by the SCML in Revised Annex A. Game Mix 1 functions as the current regulatory benchmark against which requested game mixes are ultimately assessed to determine whether an increase in gambling opportunities would arise. The DIA's calculations of the effect of the revised Game Mix 2 totals indicated that each additional EGM would produce an additional 66 opportunities ($39632/60 = 66.03$), significantly less than indicated by SCML's own testing where each EGM produced 151 gambling opportunities.

Removal of EGM to table game ratio

- 5.49 The DIA did not support removal of the 15:1 ratio as it represents the "community expectation of the gambling experience in a New Zealand casino."

New floor plan

- 5.50 The new floor plan and construction changes should not be approved. SKYCITY Hamilton should submit revised designs once it is clear what amendments the Commission otherwise approves.

SKYCITY Hamilton HRP

- 5.51 If the substitution were approved, SCML should amend its HRP to account for the fact that EGMs reduce the ability of casino staff to monitor patrons and prevent problem gambling, compared to table games. DIA expressed a suspicion that many problem gamblers avoid table games in favour of EGMs in order to minimise interaction with casino staff. Effective additional steps to monitor continuous presence and continuous play should be required.

CCL

- 5.52 CCL supported the Application. CCL acknowledged that there is no perfect formula for calculating the substitution envisaged by section 11 of the Act but the 60 EGMs:3 table games ratio has merit as the Commission must make their decisions "in the round" based on a range of relevant factors.

6. THE APPLICANTS' REPLY SUBMISSIONS

- 6.1 The Applicants provided a written reply submission to the written submissions received. The Applicants noted that it is not in issue that EGMs have the potential to cause harm; it is accepted that most forms of gambling have the potential to cause harm. The real issue is one of **comparative** harm.
- 6.2 With specific reference to a comparison between EGMs and table games and PGF's submission about the variables that should be factored into any comparison of gambling opportunities, the Applicants submitted that many of the suggested variables, such as the type of EGM, features of the game and the addictive and solitary nature of EGM play, go well beyond the matters previously recognised by the Commission as relevant to the assessment of opportunities and move away from the theoretical to actual utilisation.
- 6.3 Although many submissions say that an assessment of opportunity requires a consideration of harm, issues of harm minimisation are not relevant to a section 12 assessment.
- 6.4 Harm is relevant to s 139(2)(b) which states that any condition attached to a casino licence must contribute to achieving the purposes of the Act. Although one such purpose is harm minimisation, many submitters have overlooked the other purposes of the Act.
- 6.5 Although gambling activity has the potential to cause harm, s 139(2)(b) should not be construed as prohibiting any variation that resulted in an increase in gambling activity at a casino. Despite the potential for gambling to cause harm, the Act permitted certain types of gambling in New Zealand and made provision for proportionate changes to the gambling product mix at casinos.

7. THE HEARING

- 7.1 The hearing of the Application took place in Hamilton over a period of 6 days, between 19 and 26 November 2019. By prior direction of the Commission, written statements of evidence were provided to the Commission and to the other parties appearing in advance of the hearing. The other parties appearing were given the opportunity to cross-examine each witness who gave evidence. An opportunity to re-examine each witness was provided to the party who called the witness.
- 7.2 The Applicants made opening submissions and called 7 witnesses. At the conclusion of the evidence and submissions of the other parties appearing, the Applicants made submissions in reply.

- 7.3 By prior agreement between them, HCC and MoH divided the focus of their submissions and evidence in order to avoid unnecessary duplication. HCC's primary, but not exclusive, focus was on the issue of "opportunities for casino gambling" and whether the proposed removal of 3 Blackjack games was a proportionate exchange for the addition of 60 EGMs, while the primary focus of MoH was on the likely harm effect of the proposed change. The former called 2 witnesses and the latter called 3 witnesses, two of whom appeared by video link.
- 7.4 Of the other parties appearing, only AAMT called a witness. The other parties made oral submissions following the close of evidence.

8. ISSUES FOR DETERMINATION

- 8.1 Determination of the Application is primarily governed by s 139(2) which sets out 4 separate and cumulative requirements for the specification of a new licence condition; namely consistency with the Act, contribution to achieving the purpose of the Act, contribution to the Act's efficient and effective administration and no increase in the opportunities for casino gambling.
- 8.2 The opposing parties essentially argued that one or more of the requirements were not met. They particularly focused on two aspects; namely the prohibition on permitting an increase in opportunities and contribution to achieving the purpose of the Act, arguing that the proposed licence condition changes would permit an increase in opportunities and would not contribute to the Act's purpose (but would rather have an adverse effect).
- 8.3 Section 3 sets out the purpose of the Act; it comprises 8 separate and cumulative elements. Of those, the opposing parties primarily focused on s 3(b), "prevent and minimise harm from gambling, including problem gambling". Opposing parties also raised issues with the proposed change's contribution or otherwise to two other matters in s 3, namely s 3(g), "ensure that money from gambling benefits the community" and s 3(h), "facilitate community involvement in decisions about the provision of gambling".
- 8.4 In addition, PGF argued that the s 139(2)(c) requirement to contribute to the efficient and effective administration of the Act was not met because the Application sought a number of related orders. As the nature of the Application was in compliance with earlier requests by the Commission to combine all related changes in one application, the Commission was not persuaded that PGF's particular objection had any merit. However, DIA raised, in its written submission, the potential for the Application to add to the future complexity of the Commission's task under s 12, the assessment of comparative opportunities. Substitution of EGMs for table games involves greater complexity than comparison between table games only (as had been the case to date) and all comparative

assessments would become more complex if average wagers (as suggested by the Applicants) and utilisation (as suggested by HCC) were added to the assessment criteria. That concern is addressed in the following section.

- 8.5 The Commission regards the objections to the Application containing proposals to amend licence conditions (which would otherwise be breached if not amended) to be logically circular and flawed. Most variation, and probably all revocation, applications are aimed at removing or reducing current obligations or prohibitions in order to allow future activity which would otherwise breach licence conditions. The Commission does not address those objections further.
- 8.6 The claim that there are plenty of other opportunities for EGM gambling in Hamilton, even if correct (which seems doubtful as the Casino has over 45% of all EGMs in the city and has brought the Application, it says, to cater for unmet demand), is not directly material to determination of the Application. The Commission has not historically regarded the extent of Class 4 gambling in a locality as directly relevant to the regulation of casino gambling.
- 8.7 The separate objection, that the Application would not contribute to the s 3(a) purpose (“control the growth of gambling”), because it seeks an increase the number of EGMs adds nothing material to the concerns already raised. The purpose is to control, not prohibit, the growth of gambling and, in the present context, control of growth is specifically addressed by the prohibition on increasing opportunities.
- 8.8 The following sections address, separately and in sequence, the issue of comparative opportunities for casino gambling, followed by the issue of comparative harm. The interim conclusions reached on those matters are then applied to an overall consideration of the Application against the requirements of s 139(2) and the Commission’s discretion.

9. OPPORTUNITIES FOR CASINO GAMBLING

- 9.1 The Act contains¹⁴ a general prohibition on increasing the opportunities for casino gambling. In addition, the Commission’s statutory power to vary licence conditions is expressly circumscribed by an obligation that any new condition specified must not permit an increase in the opportunities for casino gambling.¹⁵ Determining what constitutes an increase in those opportunities is a matter for the Commission.¹⁶ Section 12 specifies

¹⁴ Section 11.

¹⁵ Section 139(2)(d).

¹⁶ Section 12(1).

certain matters that are, and are not, increases but the former are specified on an expressly non-exhaustive basis.

- 9.2 Accordingly, the Commission's power to vary the current licence conditions as proposed is subject to it deciding that the proposed reduction in the number of permitted table games (both generally in the licence conditions and specifically with regard to them being Blackjack tables in relation to game mixes) would produce a reduction in opportunities sufficient to offset the opportunities arising from the proposed increase of 60 EGMs. This is a key issue on the Application.

Legislative background and early applications

- 9.3 The predecessor legislation, Casino Control Act 1990, contained no purpose similar to section 3(a) ("control the growth of gambling") and no prohibition on increasing opportunities for casino gambling. Provision was made for conditions to be imposed on casino operator's licences but the expressly provided scope did not include any reference to the limitation of opportunities. The closest permitted subject for imposition of conditions was "approval of, and procedures for the approval of alterations in the floor plans and the placement of gaming tables and gaming equipment".
- 9.4 As a result, the prohibition on increases in opportunities for casino gambling imposed by the 2003 Act was a prohibition on increasing something that was permitted previously, and only controlled incidentally, under the 1990 Act. The 1990 Act required CCA to control the placement of gaming tables and equipment but imposed no constraint on their increase. Because increasing opportunities had not been previously prohibited, on commencement of the 2003 Act there was no formally fixed level of existing opportunity which could not be increased.
- 9.5 The first application to come before the Commission, decision GC01/04, raised the issue of the meaning and application of s 12 which deals with what could comprise an increase in opportunities. The SKYCITY applicant submitted that s 12 should be restrictively interpreted so that only the matters expressly set out in s 12 could constitute an increase, effectively meaning that opportunities would be assessed solely by reference to player spaces. The Commission declined to adopt a restricted "closed list" approach but, adopting instead a broad "in the round" assessment of all potentially material factors, nevertheless approved the application.
- 9.6 In one of its early decisions, GC02/05, the Commission:
- (a) adopted the CCA approved floor plans as the best indicative baseline for the state of opportunities at the commencement of the 2003 Act;

- (b) considered relative game speeds by reference to simple relative speed ranking information received from DIA;
- (c) noted that it expected future applications to address all matters potentially affecting opportunities, including game speed; and
- (d) approved “blank box” floor plans, which allowed for interchangeable tables in designated spots, coupled with an approved game mix which specified the maximum number of games of each type.

9.7 In the course of prior decisions, the Commission also recognised that the Act created a form of “sinking lid” of opportunities because opportunities could never be increased from what was currently permitted.¹⁷ Accordingly, to prevent the unintended loss of opportunities in operation, it set what became known as the “regulatory benchmark mix” in the casino operator’s licence conditions for each casino (initially being its assessment of the level of opportunities which existed before sections 11 and 12 came into effect), with the intent that that mix would generally be retained in addition to the additional operational mixes that each casino actually used.

Judicial decisions

9.8 In 2006, SKYCITY brought a declaratory proceeding in the High Court challenging the Commission’s interpretation of s 12, with the High Court’s decision then being appealed to the Court of Appeal. The Commission’s “in the round” approach to the assessment of opportunities was ultimately confirmed in *SKYCITY v Gambling Commission* [2007] NZCA 407.

9.9 SKYCITY had sought a declaration as to the meaning of an increase in “opportunities for casino gambling”, contending that the assessment should be restricted to the matters set out in section 12 and arguing that the Commission had erred in considering that things such as differences in the relative speeds or rates of play between different table games were potentially relevant to the opportunities assessment.

9.10 The Court of Appeal confirmed, at [76], that:

- (a) opportunities were not limited to player spaces;
- (b) the result may well be micro-management of casinos by the Commission; but

¹⁷ See GC23/05 (para 26-27) and GC04/09 (para 5.23).

- (c) opportunities were obviously not intended to be determined by an arithmetical exercise because the Act required the Commission to make decisions (and none would be required if the answers could be determined purely arithmetically).

9.11 It also confirmed, at [64], the following matters:

- (a) The Commission's decision would require "difficult and uncertain assessments".
- (b) The need to do so would result in "an intense level of supervision of casino operations by the Commission".
- (c) The decision would involve "making broad judgments based on its assessment of the impact of particular changes based on sometimes incomplete information".
- (d) The decision would be an "inherently uncertain exercise but one which is able to be arrived at if a broad brush approach is adopted."

9.12 In declining to grant the declaration sought by SKYCITY, the Court of Appeal expressly approved making opportunities assessments as matters of impression "in the round" and rejected SKYCITY's submissions that decisions under section 12 could or should be reduced to a calculation based on player spaces to produce an easily quantifiable measure of opportunities.

Commission decisions since 2006

9.13 The Commission's subsequent approach to assessment of opportunities was influenced by the declaratory proceedings and their outcome.

9.14 The first development was the adoption by the Commission¹⁸ of the concept of "opportunities" as set out in a 2006 affidavit by Professor Delfabbro, which contained the following statement:

Opportunity is a theoretical construct which is concerned with the potential (the maximum possible) for gambling consumption rather than with actual gambling consumption. Opportunity concerns what is available for potential consumption not what is actually consumed in any particular circumstances. I would distinguish opportunity from accessibility, which, I consider is concerned with a person's ability or desire to utilise opportunity. Gambling is more accessible where people have to overcome fewer impediments (physical, cultural, social or financial) in order to engage in the activity.

9.15 Based on that approach to the assessment of opportunity, opportunity could be increased by permitting the introduction of extra gaming machines at a venue, even if overall actual

¹⁸ Otago Casinos, decision GC10/06.

gambling consumption did not increase following their introduction. The key matter for consideration was that potential for gambling consumption would have increased.

- 9.16 In subsequent decisions,¹⁹ the Commission adopted the concept that opportunity reflects what is possible, irrespective of its attractiveness, confirming that improving the attractiveness of the current opportunities would not increase them and frequently rejecting submissions to the effect that, if revenue were to increase, opportunities must have increased.
- 9.17 Although the Commission adopted the analytical approach which Professor Delfabbro had suggested (opportunity concerns the theoretically maximum level of permitted activity) as a starting point, it also made plain that the assessment would not be concluded purely arithmetically and without regard to practical reality. The Commission's approach is well illustrated in the final decision on the proposal to amend Christchurch Casino's conditions (decision GC04/09), which concerned what games should be substituted, as a permanent change to the regulatory benchmark game mix, for Keno and the Racing Game, both of which had been played at Christchurch in September 2003, but which had fallen into disuse. The casino used arithmetical calculations to argue that their equivalent was 12 new tables games. The Commission rejected the numerical analysis in favour of an impressionistic assessment with the result that each was held to be the equivalent of a single table of Roulette or Tai Sai.
- 9.18 The Commission adopted a similar stance in decision GC11/11. Consistently with decision GC04/09, it declined to use theoretical calculations of opportunities arising from a dealing style not ordinarily employed in practice and to approve the transfer of those theoretically calculated "opportunities" to other games. The same thinking (tempering theoretical calculations with practical reality, especially in cases where it involved transfer of calculated "opportunities") resulted in earlier expressions of doubt that it would always be right to treat back-betting and "at the table" positions as exact equivalents in all cases.

Prior game speed trials

- 9.19 In 2010, SCML conducted player speed trials on various table games to create an improved source of data for use by the Commission when considering the comparative rates of play of different table games in its assessment of comparative opportunities. Decision GC17/10 recorded in detail the testing undertaken by SCML (and some resulting weaknesses with the test data). The major feature of the tests was that a range of games were played for 15 minutes by only four players (irrespective of the number permitted

¹⁹ See SKYCITY Auckland, decision GC36/06 and SCML, decision GC25/08, with more comprehensive observations.

under the Game Rules). The dealing style used in each case was the style most commonly used.

- 9.20 In the decision, the Commission rejected arguments that its established practice was to use an arithmetical formula to determine the level of opportunity and that the formula used deemed maximum player numbers in cases where the Game Rules imposed no maximum. It summarised its approach in paragraphs 30, 31 and 32 of the decision as follows:

[30] It is true that the Commission considers that assessment of opportunities for casino gambling involves considering the maximum number of players and what they are able to do but it cannot be adequately reduced to the suggested formula.

[31] That does not mean that the Commission has no regard to the formula and its results – it can provide indicative figures which offer some general guidance to parties and the Commission. The Commission does consider the results of the formula but, for the reasons set out above, does not consider them determinative. Rather, the Commission makes its decisions on casino gambling opportunities "in the round". This means that the Commission holistically compares the assessed effect of the changes proposed against a casino's regulatory benchmark and forms an overall view on whether or not the changes will increase opportunities for casino gambling in comparison. It considers what games are being removed from the game mix and which ones are being inserted. Do these games have player limits fixed by the rules or not? Can back-bettors participate? What does the Commission know about relative game speeds? How is game speed affected by the numbers participating? How much assistance does the formula offer in the circumstances?

[32] The Commission makes a common sense assessment of the situation and forms an overall view in the round. The assessment is ultimately a matter of impression and judgment, and one which benefits from the Commission's growing experience of doing so.

- 9.21 The SCML 2010 game speed trial data was used by DIA to undertake the calculations in its submissions summarised in paragraph 5.45 above.

The "opportunity" evidence

- 9.22 The witnesses who gave evidence before the Commission on the subject of opportunities were Phillip O'Connell and Neil Spencer (both called by the Applicants) and Dr Finlay Thompson (called by HCC). All three witnesses were cross-examined.
- 9.23 Mr O'Connell is the Group General Manager, Regulatory Affairs and AML for SKYCITY Entertainment Group. The key elements of his evidence were as follows:
- (a) In the light of the Commission's interest in rate of play previously, which led to the 2010 trials, SKYCITY conducted trials to provide EGM rate of play data and provided that with the Application.²⁰ (The results of the EGM trials are summarised above at 4.8(b).)

²⁰ Transcript of Proceedings, 19 November p144.

- (b) As, in comparing relative levels of opportunity, the Commission ultimately makes a common sense assessment in the round, rather than simply relying on an arithmetical calculation (rate of play x player space), there are other factors to which the Commission may have regard.²¹
- (c) One is the different “price points” associated with different gambling products.²² The entry price for playing an EGM is significantly lower than the entry price to play a table game.²³ The different wagering options available affect the maximum bet possible on EGMs and table games.²⁴ By way of example, on a 7-box Blackjack table with a \$250 maximum, the potential wager could be up to \$4000 when playing on every box, doubling down and placing side bets.
- (d) He pointed to provisions in the NZICC Agreement relating to substitutions between EGMs and table games.²⁵ In particular, clause 7.2 records that, in addition to the approvals in the prior clauses, SCML may install up to 240 additional ATG terminals (which may **not** be substituted for Single Terminal Gaming Machines) or, in the alternative, up to 12 further gaming tables (if each such gaming table is substituted for 20 of the additional ATG terminals).
- (e) He referred to the condition imposed generally by the Casino Control Authority on casino licences which required a 15:1 ratio such that, for every single table in a casino no more than 15 EGMs could be operated alongside it.²⁶

9.24 Mr Spencer is an independent gaming consultant who has worked in the gambling industry for over 31 years both internationally and in New Zealand. Mr Spencer advanced a number of opinions recorded in, or consistent with, his written evidence, but made important concessions on a number of key matters under cross examination. The key aspects which the Commission has taken from his evidence are as follows:

- (a) Mr Spencer considered that the rate of play data for EGMs did not reflect the speed of real play, that the presence of more players on a table could reduce the assumed rate of play²⁷ and that bonus features on EGMs would slow down rate of play²⁸ but that those weaknesses could be resolved by more robust trials involving playing for longer periods of time and with more representative

²¹ Transcript of Proceedings, 19 November p147.

²² The price points are set out above at 4.9.

²³ Transcript of Proceedings, 19 November p146.

²⁴ Transcript of Proceedings, 19 November p151.

²⁵ Transcript of Proceedings, 19 November p148.

²⁶ Transcript of Proceedings, 19 November p148.

²⁷ Transcript of Proceedings 19 November p108-109.

²⁸ Transcript of Proceedings 19 November p113.

customers.²⁹ Under cross-examination, Mr Spencer accepted that the 2010 rate of play trials for table games had the same shortcomings as the more recent EGM rate of play trials.³⁰

- (b) Mr Spencer considered that the number of differences between EGMs and table games made them so difficult to compare that a simplified comparison involving comparison of player spaces alone was justified.³¹ Under cross-examination, Mr Spencer accepted that the greater the differences between different table games in terms of rate of play (or anything else), the less meaningful would be an opportunities comparison limited to counting player spaces.³² Ultimately, Mr Spencer accepted that “it would be meaningful to compare the rate of play when looking at the opportunities afforded to gamble.”³³
- (c) Mr Spencer considered that the different wager levels should be a relevant factor in comparing opportunities. His opinion was that the minimum, average and maximum wagers of EGMs either were, or were at least generally, lower than table games.³⁴ Under cross-examination, Mr Spencer agreed that comparing average wager size would involve considering a degree of actual gambling behaviour rather than theoretical opportunities.³⁵ Mr Spencer also agreed that, in that event, it would be “more legitimate to look at both utilisation and average bet”.³⁶

9.25 Dr Thompson is a data scientist and statistician with no particular familiarity with gambling. His evidence involved presentation of the results of a series of calculations using the data presented to him and a number of recorded alternative assumptions. His evidence showed the sensitivity of the result to different assumptions, demonstrating that the Applicants’ preferred assumptions produced the answers most favourable to the Applicants’ interests. Because none of the assumptions were matters which he could establish as a matter of his own expertise and were mostly not supported by other evidence, the calculation results were otherwise of limited value. The presented results would be directly relevant only if the Commission adopted one or more of the alternative assumptions used.

²⁹ Transcript of Proceedings 19 November p134.

³⁰ Transcript of Proceedings 19 November p134.

³¹ Transcript of Proceedings 19 November p133.

³² Transcript of Proceedings 19 November p127.

³³ Transcript of Proceedings 19 November p126-128.

³⁴ Transcript of Proceedings 19 November p115,118 and 119.

³⁵ Transcript of Proceedings 19 November p135.

³⁶ Transcript of Proceedings 19 November p136.

Submissions on “opportunities”

- 9.26 The Applicants submitted, relying on the differences identified in Mr Spencer’s written statement³⁷, that EGMs and table games are such fundamentally different types of gambling as to make comparison difficult³⁸ and, as a result, the Commission should limit itself to comparison solely on player spaces. In doing so, it argued that a back-betting position in Blackjack is equal to a frontline, “at the table” position, commenting that the Commission had not previously drawn any distinction between the two.³⁹ While the Court of Appeal had said that opportunities were not limited to player positions, it did not say that the Commission could not make an assessment based only on player spaces. On the basis of comparison on player spaces alone, the substitution of 3 Blackjack tables was broadly proportionate to 60 EGMs.
- 9.27 In the alternative, if the Commission took the rate of play into account, it should also take into account the average and minimum wagers for each game. The Applicants accepted the DIA calculations of comparative rate of play (acknowledging that EGMs are much faster than table games) but pointed out that differences in wager levels were significant and argued that comparison based on rate of play, without adjustment for disparate wagers, would not result in a proportionate comparison.⁴⁰ The Applicants also argued that wagering levels should be taken into account without also considering utilisation, pointing to a longstanding Commission view that utilisation (or the attractiveness of a game) is not a relevant factor.
- 9.28 The Applicants addressed additional factors that could be considered by the Commission as follows:
- (a) The actual level of utilisation of player positions based on popularity, attractiveness or accessibility was irrelevant. It relied on a previous Commission decision, GC02/13, in which it claimed that the Commission had acknowledged that roulette places and frontline Blackjack places were both more likely to be utilised than back-betting Blackjack places but that acknowledgement had not apparently affected the Commission’s decision.
 - (b) Mr Spencer’s criticism of the rate of play data before the Commission could be ignored. The data sets were the best available to the Commission.

³⁷ Statement of evidence of Neil Phillip Spencer, at [37]-[55].

³⁸ Written Closing Submissions SKYCITY p14.

³⁹ Written Closing Submissions SKYCITY p14.

⁴⁰ Written Closing Submissions SKYCITY p16.

- (c) There was no need to differentiate between different EGMs; the Commission has always treated EGMs generically and they are subject to independent certification and approval by the Secretary before they can be deployed.
- (d) The hours of operation are not relevant as the High Court has held it falls outside consideration of the sections.⁴¹

9.29 On the key issue of comparative opportunities, HCC presented the most comprehensive submissions in opposition. Other parties, WDHG and PGF supported generally the submissions of HCC.

9.30 HCC submitted that comparison based on player spaces alone would be meaningless, especially in the light of the very substantial differences in the rates of play. In an application for the substitution of table games, the Commission would always compare the rate of play between the two table games to determine whether the opportunities to gamble would increase or not. The Court of Appeal had confirmed that rates of play are relevant to the assessment. An increase in overall play, predicated upon an understanding of rates of play, can properly be regarded as an increase in opportunities for gambling, notwithstanding the difficulties and uncertainties in making assessments based on rate of play.⁴² Using player spaces alone as the sole consideration would be contrary to the statutory definition of casino gambling which directs the Commission to consider opportunities to pay or stake consideration on an outcome.⁴³ Accepting DIA's calculation and using SCML's own data, a comparison of rate of play x player spaces would result in an increase "3-6 fold" in opportunities.⁴⁴

9.31 HCC submitted that wager size should not be taken into account by the Commission.

- (a) Wager size is not an appropriate measure of the opportunities to gamble – an opportunity is an opportunity regardless of the size of the wager. Doing so would involve making a value judgment that a larger wager is more significant than a lower one.⁴⁵
- (b) Including wager size in an assessment of the proportionality of opportunities to gamble would be a radical departure from the Commission's approach to date and would have wide ranging effects on the ability of the Commission to exercise its function.⁴⁶

⁴¹ Written Closing Submissions SKYCITY p22.

⁴² Written Closing Submissions HCC p9.

⁴³ Written Closing Submissions HCC p11.

⁴⁴ Written Closing Submissions HCC p10.

⁴⁵ Written Closing Submissions HCC p14.

⁴⁶ Written Closing Submissions HCC p15.

- (c) As average wagers are not a static state of affairs, the Commission would be required to make assessments against a continually fluctuating benchmark.
- (d) The Commission would need to undertake a wide-ranging review of all existing game mixes in order to incorporate wager size and, in doing so, would need to determine the average wager size in 2003 for benchmark comparison.
- (e) The evidence put before the Commission on average wage is insufficient for the Commission to make any decision with certainty.⁴⁷
- (f) If the Commission were to decide to consider average wager in its assessment of opportunities, it should also consider utilisation, average duration, average spend and types of EGMs to be introduced.⁴⁸

Analysis of “opportunities” issue

- 9.32 The Commission first considered whether it was appropriate to exclude rate of play – the number of wagers which could be made per unit of time – from its assessment of comparative opportunities for casino gambling. That was the position consistently advanced by the SKYCITY Applicants prior to declaratory judgments referred to in paragraph 9.8. The Commission had declined to ignore rate of play in opportunities assessments, contrary to the position advanced by SKYCITY (in part on the basis that doing so would simplify comparison). Its decision to consider rate of play was upheld by the High Court and Court of Appeal.
- 9.33 While the Applicants may be correct that the High Court and Court of Appeal decisions do not **require** rate of play to be taken into account in all cases, not doing so in this case would be inconsistent with its now well-settled approach to opportunities assessment.
- 9.34 More to the point, there is no sound reason not to do so. On the contrary, failing to have regard to rate of play would not satisfy the Commission’s common sense approach to opportunities assessment, especially when SCML’s own test results indicate that the rate of play differences are very significant.
- 9.35 Using the rate of play trial data as a starting point, in accordance with its established approach, would equate the opportunities associated with the proposed removal of 3 Blackjack tables with an additional 14 EGMs, not the additional 60 EGMs sought.
- 9.36 The Commission next addressed the Applicants’ alternative proposal that it should consider average wager (or maximum or minimum wager) as part of its opportunities

⁴⁷ Written Closing Submissions HCC p16.

⁴⁸ Written Closing Submissions HCC p18.

assessment and offset the higher value of Blackjack wagers against the greater number of wagers possible with EGMs. In advancing this submission, however, the Applicants argued that the Commission should continue to exclude utilisation (the extent to which opportunities were likely to be taken up in practice) from its assessment.

- 9.37 There would be an unattractive degree of conceptual inconsistency in having regard to average wager, which is a product of actual gambling activity, while excluding utilisation (or actual gambling activity) from its “opportunities” assessment. The Commission considers that its established approach to assessing opportunities, based primarily on what is possible rather than what happens on average, remains generally correct. In addition, considering average (or maximum or minimum) wager would introduce a new consideration, namely wager value, for which there appears to be little support in the statutory language.
- 9.38 In addition, there are important practical considerations which lead it to reject the idea of adopting average wager as a consideration on assessing opportunities. Those considerations were pointed out by DIA in its written submissions⁴⁹ and by HCC.⁵⁰ Averages are not static and vary with both time and place. At present, the Commission can undertake assessment of relative opportunities guided by maximum player spaces, to the extent that they are fixed by the Game Rules, and rate of play as indicated by the latest and most dependable speed trial data. While assessments based on those considerations are not necessarily easy in practice, the underlying considerations at least have the advantage of being applicable to all casinos at any time – the opportunities associated with a Blackjack table are assumed to be the same whether the table is in Auckland, Hamilton, Christchurch, Dunedin or Queenstown.
- 9.39 Average wager is inherently not static. It will vary from casino to casino and, within the same casino, from time to time. In that regard, it is no different to other aspects of utilisation. If the Commission were to have regard to average wager, all game mixes in all casinos would require revision on a regular basis and the opportunity assessments for each game would differ for each casino. It is uncertain whether the Commission would be able to establish a 2003 benchmark for average wagers, as it has been able to do with the number and type of table games using floor plans approved by the CCA. The Commission considers that having regard to wager size would create serious and unnecessary difficulties in application and would not contribute to the efficient and effective administration of the Act.

⁴⁹ See para 5.48(b) above.

⁵⁰ See para 9.31(b) above.

- 9.40 The Commission similarly declines to be influenced, in assessing relative opportunities for casino gambling, by likely utilisation (or occupancy levels), the terms of the NZICC agreement, risk of harm and community views. It considers that the legislative decision to use “opportunities for casino gambling” rather than “casino gambling” (which might refer to the level or value of actual gambling activity) to have been deliberate. It sees no reason to depart from its established approach.
- 9.41 The NZICC agreement was the product of a commercial negotiation, the explicit intention of which was to avoid the statutory constraints on increases in opportunities; the negotiated outcome does not assist the Commission in its assessment of the constraint being avoided. While both risk of harm from gambling and community views are relevant to other aspects of its consideration of the Application under s 139(2), neither has a bearing on its assessment of relative opportunities for the purposes of being satisfied that the variations sought do not permit an increase in the opportunities for casino gambling.⁵¹
- 9.42 The Commission has concluded that the central variation proposed in the Application, the substitution of 60 EGMs for 3 Blackjack tables, does not satisfy the requirements of s 139(2)(d). Permitting an extra 60 EGMs in exchange for 3 Blackjack tables would result in an increase in the opportunities for casino gambling.
- 9.43 On the information currently before to the Commission, the equivalent substitution would not exceed 14 EGMs. Even that number rests on an assumption that no distinction should be drawn between the 7 places at the table and the 14 back-betting positions which the Game Rules permit for Blackjack, despite indications in earlier decisions that adjustments might be appropriate when an application seeks the transfer of opportunities which are unlikely to be utilised in practice to another in which utilisation is far more likely.
- 9.44 In that regard, the Commission does not accept the submission summarised at paragraph 9.26 that the Commission has never drawn any distinction between the opportunities associated with “at the table” and back-betting positions in Blackjack. The potential relevance of the distinction is expressly recorded in the quoted passage from GC17/10 set out in paragraph 9.20 above. The distinction was also the subject of argument in a subsequent decision concerning the Casino, GC02/13, concerning whether front- and back-betting positions in Blackjack should be treated as equivalent opportunities. The Commission rejected the argument then advanced by SCML that “all opportunities are the same and can therefore simply be counted”. The Commission said:

⁵¹ Pursuant to s 139(2)(d)

The issue is not whether or not something is an opportunity, as SCML suggests, ..., but whether one form of opportunity is proportionate to another, the assessment of which is not a matter of simple arithmetic.⁵²

- 9.45 In the course of the hearing, counsel for SCML advised that, if the Commission did not consider that the substitution of 60 EGMs would meet the requirements of s 139(2)(d), SCML wanted the opportunity to make a commercial decision whether or not to seek a lower number, consistent with the Commission's view.⁵³ As the Commission is unable to vary the licence conditions as proposed in the Application, the Commission does not need to address the application for approval of associated new game mixes. As a result, it is not required to address the concerns which it had about a request to approve a new game mix which would retain the current regulatory benchmark (and which therefore would have been inconsistent with the proposed reduction in table games) and about the likely permanent loss of opportunity which would arise from approving only the proposed operational game mix (without the current or amended regulatory benchmark).
- 9.46 Although the Commission's assessment under s 12 means that the Application cannot be granted, in the light of the indication that another application may be made in future, the Commission considers the remaining issues.

10. HARM MINIMISATION

- 10.1 As indicated earlier, harm minimisation arises, not as a separate s 139(2) consideration (like increased opportunities for casino gambling), but as one of eight aspects of the Act's purpose. Nevertheless, it was the statutory purpose aspect which was most frequently raised in opposition to the Application and was the principal ground of opposition raised by the MoH, with the support of the other opposing parties who appeared.
- 10.2 The Commission received a considerable volume of evidence on the subject of the relative harm arising from the deployment of EGMs or table games at a casino. The Commission regards it as material to its decision whether substitution of EGMs for Blackjack, adjusted to represent proportionate levels of opportunities for casino gambling, is more or less likely to result in harm to visitors to the Casino. Accordingly, relative harmfulness is a subject worthy of separate consideration.
- 10.3 Prior to the receipt of witness statements, the Commission obtained an overview report from Professor Paul Delfabbro, an academic at the University of Adelaide with a special interest in research into gambling behaviour and its risks. The Commission has obtained expert assistance from him previously, including in the context of periodic Host

⁵² GC02/3, paragraph 12. It also recorded, at paragraph 14, that the result was not to be taken as endorsing the submission that no substitution of player spaces can ever constitute an increase in opportunities.

⁵³ Transcript of Proceedings, 19 November SKYCITY p20 and 21.

Responsibility Programme reviews at casinos and on harm issues raised in a casino renewal application. Professor Delfabbro was asked to outline the available research-based approaches to the harm issues raised by the Application and the principal research information of potential application and to identify any important qualifications on the applicability of that research to the questions before the Commission.

- 10.4 His report, entitled "Problem gambling and harm associated with electronic gaming machines and casino table games, September 2019" was published on the Commission's website and distributed to the appearing parties. As a consequence, reference was made to the report in evidence and submissions. He was not called to give evidence at the public hearing.

Delfabbro report

- 10.5 Professor Delfabbro reported that there is consistent literature that suggests that not all forms of gambling are equally associated with gambling problems or gambling-related harm, with non-continuous forms being the least harmful. In this particular case, both forms in issue, EGMs and Blackjack, are continuous forms of gambling and relatively harmful. He considered how one might establish whether casino EGM gambling is more harmful than casino table game gambling and undertook a review of the available research concerning the relative harmfulness of the two activities.
- 10.6 He set out the reasons why EGMs have generally been thought to be more harmful than table games but went on to observe that the results of research which endeavoured to confirm those views have been equivocal and have not established clearly that any of the identified features of EGMs have contributed to greater harm.
- 10.7 Research to establish the inherent harm characteristics of different forms of gambling is complex and faces many difficulties. He identified 7 possible research approaches and commented on the adequacy and applicability of currently available data and any important qualifications on their use in respect of each:
- (a) Approach 1: Relative prevalence of problem gamblers identified for each activity
- Overall, higher risk gamblers are more likely represented in skill-based activities, such as table games, than EGMs but the result is confounded by the fact that table game players also play EGMs. As a result, the difference may reflect the types of people who choose to play both, rather than the effect of exposure to each game individually. The studies involve comparison against the general population, not the casino population and therefore may not reflect differences in risk at the same casino but, overall, they indicate that table games are more harmful than EGMs.

(b) Approach 2: Participation rates by problem gamblers in each activity

Casino table games are disproportionately more likely to be played by higher risk gamblers but, as indicated above, those people gamble on EGMs as well. The application of multivariate regression analysis to the data (to adjust for participation in both) produces the opposite result. EGMs consistently produce a higher odds rate than table games, meaning that the odds of being a higher risk gambler were higher for EGMs than for playing table games. The results of this research provide the strongest support for the view that EGMs are inherently more harmful than table games.

(c) Approach 3: Help-seeking

There is overwhelming evidence in Australia and New Zealand that those seeking help for gambling problems are more likely to identify EGMs than other forms of gambling. However, the results are likely to be misleading as an indication of relative harmfulness because EGMs are much more commonly played and EGM gamblers may be more likely to seek help.

(d) Approach 4: Dominant for favourite activities

Although potentially useful, these data are rarely collected, may suffer from confusion between activity and harm and do not usually differentiate between casino and non-casino EGMs. Although those who report that EGMs are their dominant gambling activity are more likely to experience problems with gambling than others, the evidence base is very limited.

(e) Approach 5: Conversion from general participation into regular gambling

The limited survey data available indicate that participation is more frequent with EGMs than table games, but care needs to be exercised in drawing conclusions because EGMs are far more readily accessible both in terms of geography and cost. That observation indicated another important limitation – no distinction in the data had been made between casino and non-casino EGMs. He pointed to an indication in some research that casino EGMs are less associated with harm than non-casino EGMs so it may be misleading to apply undifferentiated results in considering casino EGMs.

(f) Approach 6: Links between activities and harm

A higher percentage of casino table game gamblers are problem gamblers than EGM gamblers, but the reason may lie in the demographic groups attracted to the former. However, when analysed at community levels, EGMs tend to be

associated with greater harm. Overall, he concludes, the connection between activity and harm is not clear cut in the available studies.

(g) Approach 7: Progression to problem gambling.

Limited, self-report-based studies on the period taken to develop gambling problems after starting show a shorter period for EGMs than for table games. However, the data are from identified problem gamblers and the analysis is retrospective. The evidence is too limited to be used to draw prospective conclusions of the kind the Commission is seeking.

10.8 He concluded that the task of using currently available research to assess comparative harm is very difficult because of the number of limiting or confounding factors which qualify the applicability of each piece of research identified. It is difficult to refine data so they apply to the specific issue, namely comparison between the comparative harm effects of casino EGMs and casino table games on the relevant population; namely those likely to play them at the Casino. To the extent that regression analysis can be applied to adjust for those factors, there appears to be a consistently higher association with harm for casino EGMs than for table games, but the resulting sample sizes are undesirably small.

Evidence about relative harm

10.9 Anecdotal evidence about harm effects was given by a problem gambler who had previously gambled at the Casino and elsewhere. The evidence provided a compelling account of the nature and extent of the harm suffered by a problem gambler but was of limited assistance in guiding the Commission to draw conclusions about the relative harmfulness of EGMs and table games like Blackjack respectively.

10.10 Anecdotal evidence is generally of limited value in answering a question of that nature and, in this case, that was particularly the case as the witness said that he gambled on both Blackjack and EGMs. The general inapplicability of limited anecdotal evidence to establish a population effect is perhaps fortunate for the objecting party which called the witness because the witness's own evidence was that he was particularly vulnerable to Blackjack⁵⁴ and the Applicants presented evidence⁵⁵ that his recorded pattern of gambling activity showed much higher losses on Blackjack than on EGMs.⁵⁵

10.11 The Applicants called factual evidence from several senior employees:

⁵⁴ Transcript of Proceedings, 21 November p292.

⁵⁵ Transcript of Proceedings, 21 November p293.

- (a) Evidence providing the reasons for the Application was given by Michelle Baillie, the General Manager of the Casino. Her evidence was that, on the basis of a utilisation review in May 2019, the casino needs to change the game mix in order to meet customer demand; on busy nights, there are insufficient EGMs available to meet customer demand, but the Blackjack tables are never fully utilised. Ms Baillie also described the facilities at the Casino, including the services that they offer not related to gambling such as the “Bowl and Social”, the impact that the Casino has on employment locally and the geographic spread of its customers.
- (b) Andre Row, the Security and Host Responsibility Manager at the Casino, gave evidence about the Casino’s responsible gambling programme, which takes the form of an HRP approved by the Commission. He described how the programme was practically carried out in the Casino, including his management of staff, training and liaison with Auckland Casino. He described how problem gamblers are practically identified and the levels of intervention and support and produced a number of additional internal host responsibility documents for the Casino.
- (c) Mr Row’s evidence on harm mitigation steps was supplemented by Robert Burrell, the Group Host Responsibility Manager based at SKYCITY Auckland Casino. His evidence focused on his oversight of the HRP in Hamilton and the evolution of, and future plans for, the HRPs at Hamilton and at SKYCITY’s other casinos across the country.

10.12 By letter dated 31 January 2020, the Commission received advice from counsel for the Applicants that Mr Row’s evidence contained an error. The incorrect evidence related to regular monthly reporting on the top 50 carded players by value of play and monthly reports relating to the Frequency and Expenditure (“F&E”) parameters specified in the HRP. The Applicants discovered that, in fact, no F&E reports had been generated since 26 March 2018. Since uncovering the error, all F&E reports for the affected period had been reconstructed with no additional concerns raised from the analysis of those reports. Ultimately, the Commission’s view was that the impact of the change in the evidence was limited to indicating the vulnerability of HRPs to unintended operational error.

10.13 The balance of the evidence about relative harm effects took the form of expert opinion evidence presented to the Commission by witnesses most of whom had, like Professor Delfabbro, a significant history in gambling harm research.

Professor Mark Griffiths

10.14 Professor Griffiths, a chartered psychologist specialising in the field of behavioural addictions, including gambling disorders and gaming addictions, was called to give evidence by the Applicants. Much of his evidence was consistent with the Delfabbro report, including that EGMs and table games share the key structural elements associated with harm, that research to date has failed to establish that either is inherently more harmful on a consistent basis, that studies which indicate that that one game type is more harmful than the other are likely the result of confounding factors such as accessibility and gamblers participating in both. Professor Griffiths placed significant emphasis on his view that good responsible gambling programmes have been shown to reduce harm from problem gambling and that SCML's HRP was one of the best that he had seen.

10.15 His written evidence summarised his conclusions⁵⁶ as follows:

Based on the evidence outlined in the report, there is no conclusive proof that increased harm with the Hamilton community would be inevitable by the proposed replacement of three table games with up to 60 gaming machines. In [his] view it would be unlikely because the issue is not simply about the number of EGMs vs the number of table games, but what the regulators and gaming operators have in place to minimise the risk of harm to vulnerable individuals.

Based on the host responsibility initiatives that SKYCITY have in place currently, together with those planned to be introduced (such as the use of behavioural analytics and facial recognition software), the measures appear to be sufficient (if not more than sufficient) in managing any potential additional problems arising from the addition of up to 60 gaming machines to the Hamilton Casino.

10.16 In his evidence in chief, Professor Griffiths did not express any view on the probability (as opposed to the inevitability) that one form of gambling was inherently more likely to cause harm than the other. Under cross examination, he identified a list of key structural characteristics associated with harm. He was asked about their presence in EGMs in comparison to table games.⁵⁷ Significantly, Professor Griffiths went on to accept that EGMs have the structural characteristics in riskier forms than table games. He stated: "so an EGM, based on everything I've written in the literature, would tend to suggest that they are more risky than a casino table game".⁵⁸ He also said that, if one were especially vulnerable or susceptible, the structural characteristics of EGMs make them inherently risky.⁵⁹ He maintained however that the inherent increased risk of harm would be mitigated by SCML's excellent responsible gambling (or host responsibility) programme.

⁵⁶ At (xviii) and (xix).

⁵⁷ Transcript of Proceedings, 20 November p256.

⁵⁸ Transcript of Proceedings, 20 November p256 and 257.

⁵⁹ Transcript of Proceedings, 20 November p258.

- 10.17 In cross-examination, Professor Griffiths was critical of the “public health” model of harm under which all consequences of gambling activity were described as harm, irrespective of their severity, and added together with the result that the sum of many minor effects was said to exceed known significant harms. He expressed the view that many of the things counted as harms could not sensibly be described as such, being things like opportunity costs. He questioned the value of such an approach to the issue before the Commission.
- 10.18 In particular, Professor Griffiths expressed his concern about the manner in which many studies used “PGSI” scores. The Problem Gambling Severity Index (“**PGSI**”) is a well-established research and diagnostic tool for assessing individual risk of gambling harm from the answers given to a short questionnaire. The PGSI test gathers answers to 9 questions where participants are asked whether they never, sometimes, most of the time or always endorse certain behaviours. It presents the answers as a score in the range of 0 to 27. It was generally recognised that problem gamblers fell into the range of scores 8 and above, that moderate risk gamblers fell into the range 3 to 7 and that low risk gamblers fell into the range 1 to 2.
- 10.19 His concern was that many studies combined moderate risk and problem gamblers, effectively treating them the same from a harm perspective. However, some who would score as a moderate risk gambler would suffer no harm – he illustrated his point by showing that he personally would be assessed as a moderate risk gambler on the PGSI.
- 10.20 A further difficulty arose with the tendency of those who adopted a public health perspective to combine everyone who had any risk of harm, including low risk gamblers. He considered that there were significant differences in the levels of harm suffered in each group, with many of the harms suffered in the lower level groups not being “real” or “serious” harms.⁶⁰ However, in cross-examination, he accepted that the statutory definition of “problem gambling” covered all behaviour that harms or may harm the individual, family, community or society, a much broader focus than addiction to gambling.
- 10.21 In cross examination, Professor Griffiths also accepted that utilisation was relevant to the determination of net harm from the proposed substitution.⁶¹ However, he repeated his view that, regardless of that effect of substitution, SCML’s HRP was sufficient to contain the elevated risk of harm.”⁶²
- 10.22 Professor Griffiths was questioned by Commissioners on additional measures SCML could undertake to improve to the current HRP. He suggested that all carded players

⁶⁰ Transcript of Proceedings, 20 November p202-205.

⁶¹ Transcript of Proceedings, 21 November p 315.

⁶² Transcript of Proceedings, 21 November p315.

should be required to complete a PGSI questionnaire and the score retained for data purposes and that some present voluntary measures, such as limit setting, be made compulsory.⁶³

Dr John Wren

- 10.23 The remaining expert evidence was called by MoH, starting with an employee, Dr John Wren. Dr Wren described the major differences in approach between what he described as the medical model, the public health model and the responsible gambling model. He argued for adoption of a public health or whole population perspective in which all harms, whether minor or major, are added together; doing so would lead to a conclusion that gambling harm is a greater problem than diabetes or arthritis. However, his evidence did not make clear how a public health approach, while being material to the MoH's role in relation to problem gambling, was relevant to the particular issue before the Commission, which involved the substitution of one form of gambling for another at a particular casino.
- 10.24 Dr Wren offered the view that harm is more strongly associated with EGMs than other forms of gambling and was critical of Dr Delfabbro's report, because of the contrary impression which he considered it created.
- 10.25 Counsel for the Applicants challenged Dr Wren's qualifications to express opinions on relative gambling harm. Under cross-examination, he conceded that he had no personal background in gambling research and his views were derived from reading studies over the last two years, since he moved to MoH.⁶⁴ His claim to expertise was in researching research done by others. In the area of criminal law, expert evidence based on such a foundation has been excluded as inadmissible.⁶⁵ While the Commission has the power to receive evidence that would not be admissible in a court,⁶⁶ its weight may be affected by reservations about true expertise.
- 10.26 The Commission ultimately found Dr Wren's evidence of limited assistance. It was inclined to place much greater weight on the expertise of the other expert witnesses, all of whom had extensive research experience in the area of gambling harm, were familiar with each other's research and in some cases had co-authored studies.
- 10.27 In addition, Dr Wren gave the impression that he lacked impartiality (not to be confused with independence). The Commission was not particularly concerned that Dr Wren was employed by a party opposing the Application; its concern arose from its perception that, in his evidence, Dr Wren appeared to have adopted the role of an advocate, rather than

⁶³ Transcript of Proceedings, 20 November p337.

⁶⁴ Transcript of Proceedings, 21 November p357.

⁶⁵ *Platt v R* [2010] NZCA 43, at [36]-[44].

⁶⁶ Section 226(3)(b).

that of an impartial expert witness. In comparison to the other expert witnesses, he appeared less prepared to make proper concessions or to recognise the need to apply appropriate qualifications to research results put forward in support of the MoH case.

- 10.28 Finally, the Commission did not find the public health or whole population perspective that he adopted to be helpful. In relation to the issue of gambling harm, the Commission is considering the relative harm effects which bear upon the decision whether or not to permit the Casino to exchange 3 Blackjack tables for a proportionate number of EGMs. Any harm effect will necessarily be limited to those who visit the Casino, not the whole of the New Zealand population, and the public health perspective did not appear to offer much insight into the critical question of whether changing the current conditions would likely result in more harm being suffered by those who visit the Casino.

Professor Max Abbott

- 10.29 Professor Abbott was also called by MoH. There was no challenge to his qualifications to give opinion evidence. In his written evidence, he adopted a public health perspective, arguing that gambling creates more harm than drug dependency and almost as much as major depressive disorders and alcohol abuse. As a result, much of his evidence was not directed at the relative harm differences between EGMs and table games.
- 10.30 When it was so directed, his view was that the proposed change would likely result in an increase in harm because the opportunities offered by the EGMs would be more likely to be utilised than the existing opportunities offered by the Blackjack tables (a matter which, he noted, underpinned the rationale for the Application) and because of the characteristics of those participants. In the former regard, EGMs are significantly more popular than table games in New Zealand casinos, with annual EGM participation rates being more than double table game rates. In the latter regard, Pacific adults have significantly higher casino EGM participation rates than European/other and Māori, Asians have a higher rate of table game participation, and people aged 18-34 have a much higher participation in both casino EGMs and casino table games. In Dr Abbott's view, an increase in harm is not so much likely to be the result of the inherent characteristics of each game but of differences in their likely utilisation.
- 10.31 Under cross examination Professor Abbott responded to the criticism by Professor Griffiths about the use of PGSI scores to conflate moderate and problem gamblers and to endorse a focus on low level, rather than serious, harms. He considered that the level of harm occasioned did not matter. All forms of harm come within the definition in the

Act.⁶⁷ In his view, focus should not be limited to the individual and their experience of harm but should extend to where the harm falls in terms of the vulnerability of the players.

- 10.32 He suggested that if certain voluntary measures, such as pre-commitment, behavioural monitoring, card technology for everyone, facial recognition and monitoring, were made compulsory they could have a positive impact.⁶⁸ He accepted that, as drafted, SKYCITY's policies compare very well with other jurisdictions but reliance on the quality of the HRP required careful assessment of how well the policies are implemented in practice and how effective they are in preventing and reducing harm.⁶⁹
- 10.33 When questioned by counsel assisting on the odds ratio, he expressed the view, based on the balance of information with which he was familiar, that EGMs and table games are comparable in terms of their association with harm.⁷⁰ They may well be equivalent, but it is possible that on average EGMs are slightly more harmful if people are exposed. If EGMs are much more popular with the result that many more people use them, particularly from sectors of the population that are at risk, then much more harm is likely.⁷¹

Associate Professor Matthew Browne

- 10.34 Associate Professor Browne's evidence referred to the greater number of EGM gamblers seeking treatment than table game players, went on to show the far greater number of EGMs than table games available and then outlined the studies which control for other forms of gambling. He assumed that the value of wagers would be relevant to opportunity. His harm focus appeared more related to utilisation than to anything inherent in the form of the games.
- 10.35 Associate Professor Browne's analysed the comparative risk of the EGMs and table games through two viewpoints: the inherent characteristics of the game and its attractiveness. In his view, assuming equal participation, the relative risk of playing EGMs is either roughly similar or slightly higher than table games, but it is difficult to be sure.⁷² However, when their comparative attractiveness is considered, he thought that compared to table games, EGMs are far more likely to engage players, to cause them to gamble more often and more intensively and ultimately to cause more harm.
- 10.36 In his view, an increase in aggregate losses could be a reasonable proxy for an increase in harm because harm from gambling arises almost entirely from financial loss and a large

⁶⁷ Transcript of Proceedings, 21 November p407 and p426.

⁶⁸ Transcript of Proceedings, 21 November p431.

⁶⁹ Transcript of Proceedings, 21 November p420.

⁷⁰ Transcript of Proceedings, 21 November p435.

⁷¹ Transcript of Proceedings, 21 November p436.

⁷² Transcript of Proceedings, 22 November p486.

proportion of gambling revenue is from people suffering harm.⁷³ Because EGMs are inherently at least as harmful as table games (and possibly more harmful), if the changes sought increased casino revenue, as the rationale for the Application indicated was likely, aggregate harm would increase.

- 10.37 Associate Professor Browne responded to the criticism by Professor Griffiths of the use of the PGSI to conflate moderate and problem gamblers and in endorsement of low level, rather than serious, harms. He outlined the Burden of Harm test on which he had been working as an alternative to PGSI. He observed that there is no magical boundary beyond which someone starts to experience adverse impacts from their gambling. Impacts start low and progressively increase as the severity of one's condition increases.⁷⁴ Both the Burden of Gambling Harm and the PGSI are lists of symptomologies which are indicative of an underlying condition. Scoring on individual items is not evidence of harm but of an association with diminished wellbeing and with strong indicators that the person will suffer other harms.⁷⁵

Consideration of harm evidence

- 10.38 In their briefs of evidence, the expert witnesses showed greater differences in their views than was apparent in later questioning. The tendency to focus evidence exclusively on the aspects favourable to the position of the party that called each expert was revealed by the broader focus of the Delfabbro report commissioned by the Commission. However oral examination by the other parties and the Commission resulted in considerable common ground. Putting Dr Wren's evidence to one side, the keys areas of agreement (or at least minimal disagreement) were as follows:
- (a) Both EGMs and table games such as Blackjack are relatively harmful forms of gambling. It is difficult to find conclusive evidence that one is more inherently harmful than the other. Two experts thought that, on balance, EGMs were inherently more harmful while one thought table games were more harmful. All agreed, however, that the difference, if any, would be small.
 - (b) An increase in harm was likely to be the result of greater utilisation of the additional EGMs than the removed Blackjack tables. The differences in utilisation were likely to be significant and would likely lead to an increase in harm suffered by visitors to the Casino.

⁷³ Transcript of Proceedings, 22 November p486.

⁷⁴ Transcript of Proceedings, 22 November p443.

⁷⁵ Transcript of Proceedings, 22 November p448 and p466.

- 10.39 The most fundamental disagreement related to the likelihood that the Casino HRP was so effective as to eliminate any additional harm which might otherwise arise from the change in game type. Only Professor Griffiths advanced a strongly supportive view. The experts called by the MoH said that there was no evidence to support that assertion. They pointed out that, while not without positive effect, even good HRPs did not prevent all harm and logically there was no sound basis to assert that they would counteract the entire effect of the increased risk arising from the expected increase in utilisation.
- 10.40 The debate about what relevantly constitutes harm, ranging from harm as opportunity cost, to gambling losses alone through to “serious harm”, on closer examination ultimately proved to be unhelpful and of little application to the matter in hand. The Commission’s view is that the Act requires a focus on harm, which the Act defines using a tautology (**harm** – means “harm or distress of any kind”) and does not limit consideration to “serious harm”. However, as a concept, it requires an overall negative assessment of consequence arising from the activity, not limited to considering only possible negative effects without considering likely benefits such as participant enjoyment. Gambling losses, seen in that light, may be an element of harm suffered but they are not a valid proxy for harm.
- 10.41 In that regard, the Commission was not persuaded that the “public health” perspective is useful in the context in which the Commission is required to consider harm. This is especially the case as a number of the matters used to illustrate the broad concept of harm being advocated appeared to be nothing more than opportunity costs, applicable to all activities. The Commission does not consider that treating harm as incorporating the opportunity costs of an activity is required or appropriate in the context of the Act.
- 10.42 Finally, from inquiries made of witnesses, it appeared that none of the studies on which any witness relied had used a PGSI score of less than 3. That was a further reason that the “extent of harm” debate did not ultimately assist the Commission’s assessment of the merits of the Application.

Submissions on “harm”

- 10.43 The Applicants advanced two broad arguments in relation to harm:
- (a) The proposed substitution is unlikely to cause additional harm. In that regard, the proper focus of the inquiry was any difference in the harm that would be caused by 60 EGMs compared with that caused by 3 table games, specifically Blackjack.
 - (b) Any additional risk of harm can, in any event, be mitigated by the operation of the regulatory regime and the continued implementation of the Casino’s HRP.

10.44 As to the first argument, it was submitted that the proposed substitution would be unlikely to cause additional harm for the following reasons:

- (a) The research evidence indicates a high association of both forms of gambling with problem gambling such that it is difficult to identify one game type as being inherently more harmful than the other.⁷⁶
- (b) The views of the experts generally supported the proposition that the risks of harm were commensurate with one another and that it was difficult to be sure whether one was more harmful than the other. (Griffiths, Abbott, Browne)⁷⁷
- (c) The Commission has previously observed that, if some table game players transferred their gaming from gaming tables to EGMs, it would not automatically follow that those players would suffer harm from doing so (decision GC23/11 at [16]⁷⁸).
- (d) Much of the data on prevalence, presentations and harm did not distinguish between casino and non-casino EGMs (Browne).⁷⁹
- (e) The relationship between the availability of EGMs and prevalence of problem gambling is positive but complex.⁸⁰
- (f) Care should be exercised in what is taken from studies which have deficiencies in the data in the light of the concerns expressed by Professor Griffiths about the conflation of PGSI categories to include people who suffered no harm.⁸¹

10.45 As to the second argument, mitigation of additional harm by regulatory framework and the Casino's HRP were supported by the following matters:

- (a) Casinos operate in highly regulated environment which includes supervision by the Commission, detailed legislation, and specific conditions and regulations relating to EGMs.⁸²
- (b) The Casino HRP is considered by Professor Griffiths to be one of the best that he has seen internationally. Mr Burrell and Mr Row gave evidence that the HRP

⁷⁶ Written Closing Submissions SKYCITY p28.

⁷⁷ Written Closing Submissions SKYCITY p39.

⁷⁸ Written Closing Submissions SKYCITY p30.

⁷⁹ Written Closing Submissions SKYCITY p30.

⁸⁰ Written Closing Submissions SKYCITY p31.

⁸¹ Written Closing Submissions SKYCITY p32.

⁸² Written Closing Submissions SKYCITY p35-36.

has been continually improved and upgraded in both its substance and its practical implementation.⁸³ SCML is doing all that it can feasibly do.⁸⁴

- (c) SCML is in the process of implementing new measures at the Casino, including appointment of a new host responsibility executive, and implementation of both facial recognition technology (to detect excluded person attempting to enter) and the Focal problem gambling detection algorithm.

10.46 Counsel for MoH advanced a number of opposing submissions, which can be summarised as follows:

- (a) the Applicants' harm arguments are belated, iterative and deficient.
- (b) While Professor Griffiths expressed the view that the Casino's HRP was sufficient to counteract any increased risk of harm that might result from the proposed change,⁸⁵ he offered no substantive evidence to support that view. It is not sufficient to establish merely that some elements of the Casino HRP have been shown to be effective.⁸⁶
- (c) The Commission has accepted that there are deficiencies in the current HRPs.⁸⁷
- (d) SCML is not doing all it can. During the hearing, a number of additional measures that SCML could undertake were identified, including making limit setting mandatory and administering the PGSI test to carded players.⁸⁸
- (e) Criticisms about the grouping together of PGSI categories should be disregarded. While the PGSI is not intended to be diagnostic of harm, it was designed to identify symptomatology associated with harm and it has been validated as indicative of harm.⁸⁹ The PGSI conception of harm accords with the statutory definition which requires a broader focus than that suggested by Professor Griffiths.⁹⁰
- (f) Granting the Application would offend against the statutory purpose. Harm at the population level arises from the aggregation of harms at the individual level. Harm is not limited simply to harm suffered by an individual gambler but extends

⁸³ Written Closing Submissions SKYCITY p39.

⁸⁴ Written Closing Submissions SKYCITY p43.

⁸⁵ Written Closing Submissions MoH p16.

⁸⁶ Written Closing Submissions MoH p17.

⁸⁷ Written Closing Submissions MoH p18.

⁸⁸ Written Closing Submissions MoH p20.

⁸⁹ Written Closing Submissions MoH p25.

⁹⁰ Written Closing Submissions MoH p25.

to harm suffered by others in contact with the gambler – family, whanau, community and society.⁹¹

- (g) Much of the evidence of the experts suggested that replacing table games with EGMs would have greater harm effects.⁹²
- (i) Associate Professor Browne indicated that the unique likely harm effects were 2.4 times greater for EGMs than casino table games.⁹³
 - (ii) Even Professor Griffiths thought that, based on a comparison of their structural characteristics, EGMs were inherently riskier than table games.
 - (iii) Professor Abbott's longitudinal study indicated that monthly EGM participation was the strongest predictor of staying a risk gambler.
- (h) It is also relevant to consider where the burden of harm falls. All experts say that this should be a relevant factor. There will be groups in society with particular vulnerabilities and susceptibilities.⁹⁴ The evidence has been that gambling harm exists alongside a range of co-morbidities.

Analysis of “harm” issue

10.47 With the exception of the issue of the extent of the harm mitigating effect of the Casino's HRP, there was considerable agreement between the experts called, apart from Dr Wren. To the extent that they differ, the Commission places more weight on the views of the other experts who gave evidence (and the views of Professor Delfabbro). Based on its assessment of the expert evidence, the Commission reached the following conclusions:

- (a) Both EGMs and Blackjack are relatively harmful forms of gambling.
- (b) The views of the experts called differed on the inherent harmfulness of each game, all things being equal. On balance, more favoured a view that EGMs were probably more inherently harmful than table games. However, there was not complete consensus on that issue and none of the studies referred to provided support for that conclusion without the need for important qualifications.

⁹¹ Written Closing Submissions MoH p27.

⁹² Written Closing Submissions MoH p28.

⁹³ Transcript of Proceedings, 22 November p441.

⁹⁴ Written Closing Submissions MoH p31.

- (c) An increase in harm experienced by visitors to the Casino was most likely to arise from the expected greater utilisation of the substituted EGMs compared to the removed Blackjack games, rather than as a result of differences in inherent harmfulness of each form of gambling.
- (d) While the Casino's HRP is of very high quality, on an international comparative basis, and no doubt has a material beneficial effect regarding reduction in harm, there was little to support the assertion that its effect is so powerful as to eliminate all additional risk of harm arising from the proposed substitution (as a result of increased utilisation). As HRPs are not so effective as to prevent the occurrence of any gambling harm, such a conclusion does not arise as a matter of logic.

10.48 The most troubling conclusion was the likely harm effect arising from increased utilisation. For the reasons set out in the previous section, utilisation has long been excluded from the concept of "opportunities". This is the first occasion on which the Commission has had expert evidence before it which enables it to consider the harm effect of a proportionate exchange of opportunities, arising from the likelihood that the new opportunities would be more likely to be utilised by customers. It is reasonable to expect casino operators to seek flexibility in deployment of different game types in order to be able to deploy the game types which they consider are likely to be more popular with customers, compared to the games replaced. That is expressly the motivation for the present Application – at busy times, SCML experiences more demand for EGMs than it can cater for while the Blackjack tables are never fully utilised.

10.49 The question for the Commission is therefore whether it should decline to permit the exchange of more popular proportionate opportunities as a result of concern that the result will be more gambling activity overall and therefore more harm. The Commission considers that such an approach would be wrong for the following reasons:

- (a) Support for the approach rests upon a literal and unqualified reading of section 3 (b), which specifies one of the eight elements of the Act's purpose as "prevent and minimise harm from gambling". "Prevent" is an unqualified term and "minimise" means to "make as small as possible".
- (b) However, the Commission considers that section 3 requires the eight elements of the statutory purposes to be read together and balanced, rather than any single purpose element being read as dominant to the other seven.
- (c) The Act cannot be sensibly applied if the rest of section 3 is to be read as subject to sub-section (b). It is common ground that gambling is not risk free and that

all forms of gambling carry some risk of harm. Some forms are known to be more harmful than others, but all carry the potential for harm.

- (d) Another purpose element of the Act is to “authorise some gambling and prohibit the rest”.⁹⁵ The forms of gambling which are the subject of this Application (EGMs and casino tables games) are known to be particularly harmful compared to some other forms of gambling but they are forms which the Act expressly permits. Class 4 gambling is restricted to EGMs and the authorised forms of casino gambling are casino table games and EGMs.
- (e) It follows that, in the context of the Act, section 3(b) should not be read as limiting the Commission to making decisions which exclude the possibility of harm resulting from the gambling which the Act authorises. Such an unqualified application would be inconsistent with the provisions of the Act overall.
- (f) Another purpose element is to “control the growth of gambling”.⁹⁶ In respect of casino gambling, growth is controlled by a prohibition on the grant of any new casino venue licences while allowing for existing licences to be renewed⁹⁷ and the prohibition on increasing the opportunities for casino gambling.⁹⁸ As discussed in the previous section, the Commission has a central statutory role in the latter form of control – it determines what a proportionate increase in one thing is to the proportionate removal of something else.
- (g) While the Act does not confer on casino operators a right to exchange opportunities as they wish, the Act provides for the Commission to approve changes in the forms of types of gambling offered so long as it regards the exchange as proportionate. It would not be reasonable, in the overall context of the Act, to approach the approval of the exchange of proportionate opportunities on the assumption that it should only permit exchanges in favour of less popular game types.

10.50 The Commission considers that it should apply section 3(b) to the present Application as follows:

- (a) If different game types are clearly established to differ on likely inherent harmfulness, it would be reluctant to approve the exchange of a game type which was inherently more harmful for another which was inherently clearly less

⁹⁵ Section 3(c).

⁹⁶ Section 3(a).

⁹⁷ Section 10.

⁹⁸ Section 11.

harmful, without some offsetting conditions to address the likely increase in the risk of harm.

- (b) On the other hand, it should not be reluctant to approve an exchange of game types of approximately similar inherent harmfulness simply because the exchange will be more popular with casino customers and the new game type will be played more often than the type removed so that overall gambling activity will increase accordingly.
- (c) In the latter case, however, it may nevertheless consider improvements to the harm minimisation programme which the casino is required to undertake in order to respond to the expected increase in gambling of a particular kind.

10.51 In the present case, on the evidence before it, the Commission has reached the following conclusions:

- (a) Blackjack and EGMs are both relatively harmful, but it is not clear that either is inherently more harmful than the other.
- (b) It expects that, if the Casino were to offer more EGMs in place of Blackjack tables, the additional EGMs would be more likely to be utilised in busy periods than the Blackjack tables would have been. Even if the number of EGMs permitted were limited to the proportionate opportunities associated with the removed Blackjack tables, gambling activity overall would be expected to increase.
- (c) In addition to a likely increase in overall gambling activity, the increase would be in a form of gambling with different characteristics from the form substituted. EGM gambling is essentially a solitary form of gambling with a lower level of engagement between casino staff and customers than table games.
- (d) As a result, consideration should be given to requiring improvements in the Casino's HRP to recognise the shift in likely activity.

10.52 In the event of a new application, it would be beneficial to see the application accompanied by specific proposals for improvements to the HRP to address the expected change in gambling activity. Several improvements were suggested by expert witnesses in response to questions.

11. CONTRIBUTE TO ACHIEVING THE PURPOSE OF THE ACT

11.1 Subsection 139(2) imposes a series of requirements for any condition amendment made by the Commission. Apart from the prohibition against permitting an increase in opportunities,⁹⁹ which was addressed in section 9 above, the focus of the submissions was primarily on section 139(2)(b), “contribute to achieving the purpose of the Act”.

Submissions on the “contribution” issue

11.2 The Applicants submitted that section 3 lists eight purpose elements and that, as a result, each purpose element has equal standing with no purpose having primacy over any other. It submitted that the correct approach is to consider the contribution of the proposed condition to achieving a single purpose, made up of eight elements; a cumulative assessment overall is required, rather than one undertaken against each element in isolation.

11.3 The Applicants also submitted that, pursuant to section 139(2)(b), the proposed variation does not necessarily have to have a positive effect on any of the purpose elements set out in section 3; it is sufficient if the effect is neutral (so long as it is not negative). In that regard, the Applicants submitted that “contribute” means simply “must not have a detrimental effect”.¹⁰⁰

11.4 Notwithstanding that submission, the Applicants submitted that the proposed condition would contribute to the element in section 3(g), “to ensure that money from gambling benefits the community”. It submitted as follows in that regard:

- (a) Condition 14 of the venue licence for the Casino imposes an obligation to provide funding to an independent charitable trust.
- (b) The new condition is expected to result in an increase in gambling activity overall, with a resulting increase in the contribution which the venue licence holder, SKYCITY Hamilton, will be required to make to the charitable trust and also in the Casino’s contribution to the Problem Gambling Levy.
- (c) The Casino as a whole consists of much more than a casino operation. It is an entertainment hub offering a range of restaurants, bars, other entertainment activities, conference facilities and parking. It employs over 330 people and has directly contributed \$398.9m to the Hamilton economy since 2005.

⁹⁹ Section 139(2)(d).

¹⁰⁰ Transcript of Proceedings, 25 November p584.

- 11.5 The balance of the Applicants' submissions on the issue, while claiming contributions to other purpose elements, would be more accurately described as suggesting that other purpose elements would not be adversely affected:
- (a) There would be no growth in gambling because there must be no increase in gambling opportunities for the Application to be granted.
 - (b) There are measures already in place to ensure the fairness and integrity of the games and to limit the opportunity for crime and dishonesty.
 - (c) The Commission's decision to publicly notify the Application and to hold a public hearing serves the purpose of facilitating community involvement in decisions about the provision of gambling.
- 11.6 HCC submitted that the concept of contribution requires the proposed licence condition to be positively conducive to the Act's purpose. It submitted that risk minimisation ("prevent and minimise harm from gambling") is "quite clearly" central to the regulation and control of gambling activities under the Act.
- 11.7 It also submitted, in relation to section 3(h), "facilitate community involvement in decisions about the provision of gambling", as follows:
- (a) A proposed licence condition will facilitate community involvement in a meaningful way only if serious regard is paid to the community's views on the proposal.
 - (b) In this case, granting the Application would result in an outcome completely at odds with the expressed wishes of the community in the form of the submissions received.
 - (c) The Commission should have regard to HCC's Class 4 Gambling Policy and to the submissions received from community groups and individual members of the community, which were overwhelmingly opposed to the Application.
- 11.8 MoH submitted that, whilst the prevention and minimisation of harm was directly referred to only in section 3(b), concern about harm underpinned each of the other seven elements of the Act's purpose.¹⁰¹ As a result, contribution to achieving the purpose of the Act can be reduced to a singular purpose, namely harm minimisation, as each and every one of the purpose elements is harm related. In this way, all elements are united in a single

¹⁰¹ Written Closing Submissions MoH, p 35.

purpose.¹⁰² In response to a question, it submitted that compliance with s 139(2)(b) required a positive effect on every individual element of section 3.¹⁰³

- 11.9 MoH also submitted that the Commission should not consider social benefits, consumer choice and commercial interests in its assessment of whether the proposed condition contributed to achieving the purpose of the Act.

Analysis of the “contribution” issue

- 11.10 The ordinary meaning of “contribute” is to “help to achieve something or cause to bring something about”. It does not connote a neutral effect and, contrary to the submission for the Applicants, the Commission does not consider that s 139(2)(b) requires no positive effect on any of the purpose elements set out in section 3.
- 11.11 On the other hand, contrary to the submissions for HCC and MoH, it does not consider that all-purpose elements in section 3 reduce to a concern about harm and nothing more. Similarly, it rejects the submission for MoH that s 139(2)(b) requires any condition amendment to have a positive effect on every single one of the eight purpose elements.
- 11.12 Section 139(2)(e) provides that a condition “may relate to any matter, including the matters specified in Schedule 1”. Schedule 1, headed “Conditions that may attach to casino licence”, is set out in paragraph 2.1 above and lists 12 items. They are a diverse range of subjects, most of which have an obvious connection to at least one of the eight purpose elements in section 3 but equally obviously none has an obvious connection to every single purpose element.
- 11.13 If s 139(2)(b) were construed as MoH submitted, few if any amendments would ever be possible; it would be an unusual condition which had a positive effect on all eight of the purpose elements. The Commission is influenced by the fact that the Act expressly specifies only a single purpose, albeit one made up of eight elements. It concurs with the submission for the Applicants that what is required is a cumulative overall assessment, considering section 3 as a whole.
- 11.14 On the submission that the proposed condition would contribute to the purpose element of ensuring that “money from gambling benefits the community”¹⁰⁴ as a result of the effect of an expected increase in overall gambling activity, the Commission makes the following observations:

¹⁰² Transcript of Proceedings, 26 November p 674.

¹⁰³ Transcript of Proceedings, 26 November p 704.

¹⁰⁴ Section 3(g).

- (a) Condition 14 of the Casino venue licence requires an annual contribution to the independent charitable trust amounting to “1.5% of the revenue from the operation of the Casino (GST exclusive) before gaming tax”. It follows that, if the condition produced an increase in gambling revenue, 1.5% of the increase would go to the independent charitable trust, presumably to the benefit of the community.
- (b) The Casino is subject to a levy, collected as a percentage of gambling revenue by sector and imposed under the Act, in order to cover the cost to central government of the integrated problem gambling strategy for which MoH is responsible. While the amount paid is increased by an increase in revenue, there is much less connection to community benefit than contributions to the independent charitable trust.
- (c) It is difficult to see the contribution which the presence of the Casino operation as a whole would make to the particular purpose element. There is no suggestion that the proposed condition is a requirement for the continued operation of the Casino, without which it would cease to operate, leading to a loss of local amenity and employment.

11.15 As the increase in the extent to which the community would benefit from money from gambling was advanced as the primary contribution of the proposed condition to the purpose of the Act, the Commission was surprised to receive little evidence on the extent and value of the expected benefit. It appears that the need to establish such a contribution may have been overlooked. In the light of this decision, the Commission would expect to see more supporting information to support such a submission in the future.

11.16 As to the other matters advanced:

- (a) The submission that there would be no growth in gambling was contradicted by the foregoing submission. It appears that, even if the number of EGMs approved is proportionate to the opportunities associated with the removed table games, there is an expectation that the change would produce an increase in gambling activity.
- (b) As the proposed condition is not expected to have any effect at all on the fairness and integrity of games nor on the opportunities for crime and dishonesty, it will not have a contributing effect to achievement of the statutory purpose in those regards.

- (c) It is difficult to see how the proposed condition itself would contribute to the facilitation of community involvement in decisions about the provision of gambling, even if the Commission's decision to publicly notify the Application reflected that purpose element. Indeed, there is force in HCC's submission that it is difficult to argue that granting the Application would contribute materially to that interest when the Application was opposed by a large number of local individuals and community groups and by the local authority. However, HCC's policy on Class 4 gambling has no direct application to the Application (although it does have direct application to the exercise of other functions of the Commission).
- (d) The effect of the analysis in section 10 is largely to neutralise the purpose element related to harm minimisation, apart from possible consideration of improvements to the Casino's harm minimisation programme.

11.17 In the light of the conclusion in section 9, in relation to section 139(2)(d) and the issue of proportionate opportunities, the decision does not ultimately rest on this consideration and the Commission has not reached a firm conclusion on the material before it. In the event of a new application, it would expect this aspect to receive more focused attention from the participating parties.

12. CONSULTATION AND THE TREATY OF WAITANGI

- 12.1 As the effect of the Treaty of Waitangi was raised in submissions, for completeness, the Commission addresses that matter as well.
- 12.2 The Commission starts by noting that there is no express reference in the Act to the Treaty of Waitangi and no statutory provision that requires special consultation with Maori.
- 12.3 In some circumstances the courts have found that an obligation to consider Treaty principles as a material consideration may be implied from the context and purpose of an Act, particularly where that Act relates to matters of particular concern to Maori. The Treaty principles of partnership, reciprocity, autonomy, active protection, mutual benefit and equal treatment have been developed through a number of Waitangi Tribunal decisions. In the leading case of *New Zealand Maori Council v Attorney General (Lands)* [1987] 1 NZLR 641, the Court recognised that, in appropriate cases, weight should be given to the Waitangi Tribunal's interpretation of the principles of the Treaty.

12.4 The leading cases which have held that Treaty principles were a relevant consideration, despite statutory silence, are *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 and *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179. However, both cases are distinguishable from the present circumstances:

- (a) In those cases, the parties contending that the Treaty was a relevant consideration were themselves Maori; that is not the case in the present Application.
- (b) The subject matter was also different from the matter before the Commission. Each case involved a clear link to Maori and the relevance of the Treaty principles to the decision being made:
 - (i) *Huakina* involved water rights, specifically with reference to Maori spiritual and cultural connection to water.
 - (ii) *Barton-Prescott* concerned the family organisation structure of a whanau, a concept unique to Maori. The High Court held that familial organisation of one of the peoples which are party to the Treaty must be seen as taonga.

12.5 In the Christchurch Casino renewal decision, GC05/19, the Commission addressed submissions made by PGF and SAO about Treaty of Waitangi obligations and the Commission's work. The relevant sections of the decision are recorded below:

[6.61] The Act makes no reference to the Treaty. In the absence of a reference to the Treaty in legislation, statutory decision makers are generally free of legal obligations arising from the Treaty. Absence of reference may be interpreted as an indication that Treaty matters have been considered by Parliament, which has decided not to include reference to the Treaty or a Parliamentary intention that Maori should address any concerns arising from the legislation to the Waitangi Tribunal. Unless given force by an Act of Parliament, Treaty duties do not generally give rise to legal obligations.

[6.62] The Commission concludes that, in the absence of express reference to the Treaty or its principles in the Act and anything in the subject matter to imply an obligation to observe or apply Treaty principles, it has no obligation to consider CCL's application in light of Treaty principles. None of the entities asserting Treaty obligations were Treaty partners and no representative of a Treaty partner made submissions to the Commission.

12.6 Similarly, the Commission concludes that it has no obligation to consider the Application by reference to Treaty principles. There is no express reference to the Treaty or its principles in the Act and no apparent basis in the subject matter to imply an obligation to observe or apply Treaty principles. The entities raising Treaty obligations are not Treaty partners.

- 12.7 If that were not correct and the Commission were required to consult with Maori as a Treaty obligation, the Commission in fact took steps to engage with representatives of Maori so they were aware of the Application and of the availability of an opportunity to be heard. On 21 March 2019, the Commission contacted Waikato Tainui by telephone to apprise it of the Application. In making contact, the Commission had regard to the claim by Waikato Tainui that it is the authoritative entity representing iwi in the region. Waikato Tainui's website states: "Te Whakakitenga o Waikato (formerly known as Te Kauhanganui) is the tribal authority that represents tribal members of the 68 Marae of Te Whakakitenga o Waikato."¹⁰⁵
- 12.8 Later that day, the Commission forwarded a copy of the Application and supporting documentation. On 22 March 2019, the Commission invited Waikato Tainui to file a written submission and to seek authorisation to appear and be heard at the public hearing of the Application, but the Commission received no response.
- 12.9 Consultation does not require anything more than the genuine provision of an opportunity for consultation to occur. Such a view is supported by *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605 which held that the issue of consultation is to be judged on an objective basis, and held at p644:
3. The requirement of consultation is not to be treated perfunctorily as a mere formality but is nevertheless subject to the condition or assumption that the supply authorities would be ready and willing to avail themselves of a reasonable opportunity to state their views.
 4. Although no supply authority could be forced to advance any views, it would be unreasonable if the Commission could be prevented from appointing a conciliator because one or more supply authority had no view, or did not wish, or declined, to express any view
 5. Finally supply authorities could not complain if, having both the time and opportunity, they limited the extent to which they availed themselves of the opportunity and extent to which they gave expression to their view.
- 12.10 The Commission concluded that, although it had no obligation to consult arising from the Treaty of Waitangi, the steps that the Commission took to seek the views of Waikato Tainui arguably would have satisfied any such obligation.

¹⁰⁵ <https://www.waikatotainui.com/organisation/te-whakakitenga-o-waikato/>

13. DECISION

- 13.1 The Commission declines the Application. The Application proposed amendments to the licence conditions which fall outside the requirements of section 139(2)(d) by proposing the substitution of 60 EGMs in exchange for the removal of 3 tables of Blackjack. The proposed substitution is far from proportionate, in terms of section 12, for the reasons set out in section 9.
- 13.2 As it does not regard the proposed substitution as proportionate, the Commission declines the variations sought by SCML to vary or revoke conditions of its casino operator's licence in respect of the Casino to:
- (a) increase the number of EGMs in the gambling area from 339 to 399;
 - (b) decrease the number of gaming tables in the gambling area from 23 to 20; and
 - (c) remove the requirement that the ratio of EGMs to gaming tables in the gambling area should not exceed 15 to 1, except with the approval of the Commission.
- 13.3 The Commission declines the subsequent requests for approval, namely;
- (a) the revised Annex A for consequential changes to SCML's game mix;
 - (b) SKYCITY Hamilton's proposed design changes to the gambling area in accordance with Appendix 3; and
 - (c) the proposed new floor plans by SCML in accordance with Appendix 4.
- 13.4 Although the outcome was inevitable from the opportunity analysis alone, the Commission had regard to the indication that, if the Application were declined for that reason, the Applicants would consider bringing a new application. Partly for that reason, but also because it conducted a lengthy public hearing, including substantial expert evidence, and received detailed submissions on a wide range of issues which it had not previously been required to consider and which were likely to have material future precedential effect, the Commission has taken the time to deal with the evidence and the submissions in considerable detail. It would not have been fair to the parties who participated in the hearing for it not to have done so. The Commission thanks all who participated in the hearing and leaves it for the Applicants to consider whether to make a new application. In the latter event, it expects that all who participate in any subsequent hearing will benefit from the guidance offered by this decision.

Right of appeal

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



Lisa Hansen
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

4 June 2020

