GC20/12

IN THE MATTER of the Gambling Act 2003

AND of an appeal by **THE TRILLIAN TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
A K Foote
R D Bell

Date of Decision: 11 May 2012, 14 June 2012, 13 July 2012

Date of Notification of Decision: 27th July 2012

DECISION
ON AN APPEAL BY THE TRILLIAN TRUST

Background

1. The Trillian Trust ("**Trust**") appealed against a decision by the Secretary for Internal Affairs ("**Secretary**") to cancel its class 4 venue licence for the Brewers Bar in Nelson. The Secretary cancelled the licence under section 74(1)(a) Gambling Act ("**Act**"), on the grounds that one of the grounds in section 67 was no longer met, namely section 67(1)(f), which provides:

> (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that:
>
> ...
>
> (f) the territorial authority has provided a consent (if required under section 98).

BACKGROUND

2. Under section 102(5), territorial authorities are required to adopt a policy for class 4 venues and then to review the policy every three years. In the first half of 2010, Nelson City Council ("**Council**") undertook a review of its policy and, after a period of consultation, it adopted an amended 2010 policy in June 2010.

3. One of the amendments to the former policy was the amendment of the previous prohibition of electronic gaming machines within 100 metres of schools, playgrounds and kindergartens. Under the 2010 policy, the prohibition was replaced by one limited to sites "immediately adjacent" to a school, playground or kindergarten.

4. On 17 June 2010, the Trust applied to the Council for territorial authority consent ("**TA consent**") to operate up to nine class 4 gaming machines at Brewers. The Trust required TA consent under section 98(1)(c) at least because a class 4 venue licence had not been held for the venue by any society within the last six months.

5. On 30 June 2010, the Council granted a TA consent. Prior to the policy change, the consent would not have been granted because the site is within 100 metres of both a playground and a kindergarten.

6. On 9 August 2010, the Trust applied to the Secretary for a venue licence to operate nine gaming machines at Brewers, relying on the Council's consent.

7. On 17 September 2010, the Nelson Gambling Taskforce Incorporated ("**Taskforce**") filed a statement of claim seeking judicial review of the Council's 2010 Gambling Policy and the consent issued under it. The Trust was a respondent to the review proceeding. The Taskforce's statement of claim did not challenge the Brewers licence and, reflecting that, the Secretary was not named as a party. The Trust submitted that this affected how it opposed the judicial review.

8. The Taskforce drew the Secretary's attention to the proceeding. On 13 September 2010, the Secretary wrote to the Taskforce's counsel that the judicial review was relevant to his consideration of the Trust's application for a venue licence and stated:

> However, as the NCC **[Nelson City Council]** have indicated they consider the process followed was valid, I am inclined to let the matter be decided by the Court. If a venue licence is granted and the Court later decides that the NCC did not follow procedure, then there are provisions in the Gambling Act 2003 enabling the Department to cancel the licence.

9. The Trust submitted that it only learned of this letter as part of its appeal to the Commission.

10. On 21 September 2010, the Trust was served with the Taskforce's statement of claim. The Secretary submitted that on that date, Mr Collins, a Gambling Inspector, advised the venue operator/manager of Brewers and the building owner that, if the Taskforce's appeal were successful, the venue licence would be cancelled because Brewers was situated in close proximity to a children's playground and a kindergarten.

11. On 1 October 2010, the Secretary granted the Trust a venue licence for Brewers.

12. On 11 October 2010, the Trust started operating nine gaming machines at Brewers.

13. On 7 September 2011, the High Court issued its decision in *Nelson Gambling Taskforce v Nelson City Council & Anor* HC Nelson CIV 2010-442-368, 7 September 2011 ("**Taskforce Decision**"). The Court found that the Council had been significantly in

breach of its consultation requirements under the Local Government Act 2002. The Court declared that the amendments to the Gambling Policy in 2010 (other than an amendment to the maximum number of gaming machines) were invalid and that consequently the TA consent given under the policy to the Trust was also invalid. The Court commented, as part of its discussion on the possible implications of the decision:

> [52]... It seemed to be assumed before me that cancellation of the prior territorial consent would give the Secretary... a discretion whether to review the issue of the venue licence. No specific provisions to this effect are cited in the written submissions, and it is not apparent to me from the legislation that this is the case. The Gambling Act 2003 lists a number of specific changes that a venue operator must draw to the attention of the Secretary, but this is not one of them.
>
> [53] The existence of a territorial consent is a pre-condition to obtaining a venue licence (s 67(1)(f)). It will also be a requirement for when the licence is renewed (s 72(4)). Otherwise, not surprisingly, the Act does not appear to address the question of a territorial consent being cancelled. It would hardly have been thought to be a situation of sufficiently common occurrence to merit addressing.
>
> [54] The position as I see it, therefore, is that cancellation of the licence will not immediately affect the venue licence, which is not anyway the subject of these proceedings, and which was validly issued at the time it was issued. Even if it were the case that cancellation of the territorial authority consent would trigger a discretion in the Secretary of Internal Affairs, the discretion would be his. The Court should not deny otherwise appropriate relief to the plaintiff so as to remove that discretion.

14. On 4 October 2011, the Secretary wrote to the Trust proposing to cancel its venue licence for Brewers. An application for renewal of the venue licence must have been made around the same time but the Secretary proceeded to deal with the issue of the validity of the TA consent through the cancellation procedure, rather than the renewal procedure.

15. On 1 November 2011, the Trust made submissions to the Secretary opposing the cancellation proposal. Those submissions were not persuasive and, on 30 November 2011, the Secretary cancelled the venue licence. This appeal followed.

16. As at 15 February 2012, the Council was not able to confirm a timeframe for completing a further review of its gambling policy.

Relevant law

17. The relevant law is as follows:

> **67 Grounds for granting class 4 venue licence**
>
> (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that
>
> ..
>
> (f) the territorial authority has provided a consent (if required under section 98); and

98 When territorial authority consent is required

A territorial authority consent is required in the following circumstances:

(a) if a society proposes to increase the number of machines that may be operated at a class 4 venue ...:

(b) unless paragraph (c) or paragraph (d) applies, the first time there is an application for a class 4 venue licence for a venue for which a class 4 venue licence was not held on 17 October 2001:

(c) if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last 6 months: ....

74 Suspension or cancellation of class 4 venue licence

(1) The Secretary may suspend for up to 6 months, or cancel, a class 4 venue licence if the Secretary is satisfied that—

(a) any of the grounds in section 67 are no longer met; or

...

(2) In deciding whether to suspend or cancel a class 4 venue licence, the Secretary must take into account the matters in section 67.

72 Renewal of class 4 venue licence

(1) A corporate society may apply to the Secretary for a renewal of its class 4 venue licence before the expiry of the licence.

...

(4) Sections 66 and 67 apply to an application for renewal as if it were an application for a class 4 venue licence.

(5) The Secretary must refuse to renew a class 4 venue licence if—

...

(b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any matters specified in section 67; or ...

(6) Unless the associated operator's licence is cancelled, suspended, or not renewed, a class 4 venue licence continues in force after its expiry date if—

(a) the corporate society has applied for renewal before the expiry date; and

(b) the application has not been refused.

18. The Trust advanced two grounds of appeal:

(a) Section 74(1)(a) does not permit the cancellation of a class 4 venue licence solely on account of the subsequent invalidation of a TA consent which was valid when issued.

(b) In the alternative, the Secretary erred in exercising his discretion to cancel the venue licence.

Section 74(1)(a) does not permit the cancellation of a class 4 venue licence in these circumstances

19. The Trust submitted that the Secretary's decision was based on his interpretation of the section 67(1)(f) requirement as being an ongoing requirement such that the "consent" required by section 67(1)(f) must be a continually valid consent. The Trust submitted that this interpretation was incorrect for the following reasons:

(a) Section 67(1)(f) uses the past, rather than continuous tense - the territorial authority has provided consent (if required under section 98). This suggests that the requirement must be fulfilled at the time of application, but is not continuous.

(b) The Secretary, not the licence-holder, was the relevant obligation-holder under section 67.

(c) Section 67 requires the Secretary to consider carefully the circumstances in which a venue licence should, in his view, be subjected to the possibility of cancellation, and to clearly set out those circumstances in the conditions to the licence that he grants. The Secretary's power to include conditions that he considers will promote or ensure compliance with the Act is accordingly a better route for imposing an ongoing obligation on a licence holder in relation to section 67(1)(f).

(d) The High Court held in *Trillian Trust v Secretary for Internal Affairs* HC Wellington CIV 2010-485-2411 (**"Trillian Decision"**) that the Secretary's powers of suspension and cancellation under the Act were both punitive and remedial. However, in this situation, neither the remedial nor the punitive purpose of the power of cancellation would be served, because the (alleged) non-compliance was entirely outside the Trust's control.

(e) Section 71, which lists changes of which the licence-holder must notify the Secretary, does not include subsequent invalidation of territorial authority consents. Simon France J referred to this omission in the Taskforce Decision.

The Trust described the Judge's comment as a "very strong indicator" that the supervening invalidation of a TA consent would not trigger the power of suspension or cancellation in section 74 of the Act.

(f) Section 98 provides an exhaustive list of the circumstances in which TA consent is required for a venue licence. Subsequent invalidation of a TA consent is not listed. This is significant because sections 98(a) and (c) explicitly address situations where circumstances have materially changed after a venue licence has been granted (namely where a society wants to increase the number of gaming machines at a venue and where a class 4 venue licence has not been held for the venue by any society within the last six months). Further, section 98 does not require a fresh TA consent where a territorial authority's gambling policy has been amended and consent would not be issued for the venue under the amended policy. This is further confirmation of Parliament's intent that TA consents are not an ongoing requirement, but are only required if section 98 is triggered.

(g) The Secretary's approach effectively involved reading the words "continually valid" before "consent" in section 67(1)(f). This was inconsistent with the drafting of the Act, in particular sections 67, 71, 74 and 98, which evidences a single and consistent Parliamentary intent that the TA consent requirement was a requirement only in the circumstances set out in section 98, rather than a continuing obligation.

(h) As a matter of basic fairness, the Secretary should not be able to punish the Trust for a legal "wrong" that was not and could not be controlled or prevented by the Trust.

(i) Cancellation of the Brewers licence would cause the loss of net proceeds to the community; "strand" sunk costs invested by the Trust and by the venue operator; and cause a loss of revenue to the Trust and to the venue. The courts have accepted that good faith investment decisions should not be frustrated by exercises of statutory interpretation. For example, in *Fonterra Co-Operative Group Ltd v The Grate Kiwi Cheese Company Ltd* [2011] NZCA 67, the Court of Appeal accepted that the fact that "investment could potentially involve considerable sunk costs" was relevant when interpreting ambiguous regulatory requirements. The Trust made significant investments in the venue, including:

    (i) $11,073 in "sunk costs", such as consent and licence fees, electrical wiring, painting and carpeting;

(ii) $17,639 in capital expenses, namely bases, LCD monitors and a digital CCTV security system;

(iii) gaming machine equipment.

(j) These investments were made on the assumption that the validly granted TA consent would remain valid. The Trust submitted that the Secretary frustrated its reasonable expectations, effectively "stranding" the money it had invested through the early cancellation of the licence, with adverse financial consequences for the Trust, the venue operator and the community, the latter of which will lose net proceeds.

20. The Trust also submitted, in the alternative, that, if section 67(1)(f) creates an ongoing obligation, it was not the case that section 67(1)(f) was not satisfied. The gambling policy had been set aside for a procedural error. A decision on the policy would now be made afresh. The final consequences of the successful judicial review proceedings were, therefore, not yet known. The policy that was set aside could be confirmed. The decision in relation to the TA consent could only be made when the Council has reconsidered its Gambling Policy. The Secretary could not, therefore, say at the present time that section 67(1)(f) is not being met by the Trust.

21. The Trust submitted that it acknowledged that its approach to sections 67(1)(f), 74(1)(a) and 98 meant that, if a local community makes significant changes to its gambling policy, such as by substantially reducing the number of gaming machines, that change could not be immediately effective. In its view, Parliament did not appear to have contemplated immediate outcomes in such cases, but rather the Act appeared to be premised on effect being given to local community input by (for example in cases where the local community favours a reduction in gaming machine numbers) a process of natural attrition or possibly by regulation.

The Secretary erred as a matter of discretion in deciding to cancel the venue licence

22. The Trust argued, in the alternative that, if the Commission decided that the invalidation of a TA consent did trigger the Secretary's power of cancellation under section 74(1)(a), then the Secretary erred in the exercise of his discretion. It submitted that, while Simon France J expressed the tentative view, in the Taskforce Decision, that the cancellation of a TA consent did not trigger the Secretary's discretion to cancel the licence, if it did, the discretion would be the Secretary's, and the Secretary was wrong to exercise the discretion for the following reasons:

(a) The Secretary failed to give sufficient weight to the desirability of awaiting the outcome of the Council's review. In this respect, the Trust submitted that it is

relevant that the 2010 Gambling Policy was invalidated on procedural rather than substantive grounds. It was therefore possible that, following its review of the invalidated policy, the Council would adopt the same amendments.

(b) The Secretary justified his decision to cancel immediately on the basis that it would give effect to the community interest in certainty; however, the community's interest could also be given effect after its position has been confirmed by its representatives, the Council. In this respect, the Trust pointed to section 102(6), which provides that a class 4 venue policy does not cease to have effect because it is due for review or is being reviewed. This provision, in the Trust's submission, suggested that decisions adverse to societies and venues should not be made unless and until a review of a gambling policy had been completed and formally approved. The Trust also submitted that the community was not homogeneous. In addition to the "anti-gambling" voice, regard should be had to those elements at the local community who rely on the proceeds of gambling. Further, the Trust, venue operator and others make up a section of the community that support the invalidated Gambling Policy. A fair balance could be struck between the competing community interests by waiting for a new gambling policy before the Secretary acts.

(c) The Secretary failed to disclose to the Trust that it had indicated in correspondence with the Taskforce, four days before the Taskforce filed its judicial review application, that, if the Taskforce were successful, the Secretary would consider cancelling the class 4 venue licence for Brewers. The Secretary's failure to disclose his position meant that the Trust did not seek protective orders, which it could have sought under section 4(5) Judicature Amendment Act 1972 to preserve the validity of its venue licence pending the Council's reconsideration of its 2010 Gambling Policy. The Trust submitted that, during the Taskforce proceeding, it raised at one point a question as to whether the Taskforce's true purpose was to seek the cancellation of its licence and argued that, if it was, the Secretary should be joined as a defendant. The Taskforce stated, in a memorandum, that it did not seek the cancellation of the licence. In the Trust's submission, the Secretary's failure to disclose his position at the time regarding cancellation was a further pointer to the overall unfairness of cancelling the licence.

(d) The Secretary could have granted the venue licence conditionally on the outcome of the Taskforce case, but chose not to. It was not fair for the Secretary to use his "back-end" power of cancellation to effectively add a "front-end" licence condition that the Secretary earlier ruled out, and then to

punish the Trust and the venue for breaching that condition even though the infringing conduct was by the Council and wholly outside of the Trust's control.

(e) The Secretary relied, in his decision to cancel the licence, on the importance of certainty. However, the Secretary's decision in fact created greater uncertainty, because the relevant decisions might need to be made again after the Council had determined its new gambling policy. The "certainty" referred to by the Secretary was detrimental to the Trust and the venue operator, who had invested time and money in the venue and in the interest of that part of the community that opposed the now invalidated Gambling Policy.

(f) Finally, the good faith basis on which the Trust relied on the TA consent, which the Trust detailed in relation to its primary argument, was a factor to which the Secretary failed to give sufficient weight.

SECRETARY'S SUBMISSIONS

23. The Secretary submitted that section 67(1)(f) imposed an ongoing obligation on the Secretary. The Secretary relied on decisions GC10/10 (the Southern Trust decision) and GC22/10 (the Tomo's decision), which, he submitted, made clear that the matters in section 67 were systemic requirements, which must be satisfied on an ongoing and forward-looking basis. The Secretary submitted that the Act contemplated situations in which TA consent lapses or extinguishes and must be revisited. Section 98(c), which requires TA consent where continuity of use has been broken by more than six months, extinguishes the prior use right established by a site approval under the Gaming and Lotteries Act 1977 or by a TA consent previously provided to the same venue.

24. The Secretary submitted that, even if section 98(c) does not specifically contemplate the situation to be considered by the Commission on this appeal, the Act contemplates a TA consent being required by the society at times other than the initial application for a class 4 licence. The Secretary submits that section 98 contemplates that, if certain circumstances arise during the period of a venue licence, then TA consent is required and that this is a circumstance where a TA consent has been extinguished and, as such, section 67(1)(f) is no longer being met.

25. The Secretary accepted that the Trust acted in good faith when it applied for the venue licence. He submits, however, that section 74 did not limit the use of the Secretary's discretion to cancel a licence for punitive or remedial reasons. The Secretary could cancel a licence if any of the grounds in section 67 were no longer being met. In this case, section 67(1)(f) was no longer being met.

26. In response to the Trust's submission that, if section 67(1)(f) was an ongoing requirement, it did not follow that it was not being met, the Secretary submitted that he must act on the facts available to him. At the time of the appeal, the TA consent is invalid. Following the Council's review, the Trust may or may not be issued with TA consent. The Secretary could not grant a licence on the basis that a requirement of the Act may be met at an undetermined future date.

27. The Secretary submitted that his approach was not contrary to good policy. The Trust incurred similar costs to what it would normally incur when assisting a venue to become operational. In any case, the Secretary considered competing policy issues. First, pursuant to section 4, some gambling must be authorised and the rest prohibited. Secondly, community involvement in decisions about gambling must be facilitated. In this case, the Secretary decided that the need to facilitate community involvement in decisions about gambling outweighed the need for the gambling.

28. The Secretary submitted that he did not err in his discretion by giving insufficient weight to the option of waiting for the outcome of the Council's review. He submitted that the Trust's submission in this respect assumed that the Council would, on its review, reinstate the invalidated 2010 policy. The Secretary submitted that this could not be assumed and that, further, even if the 2010 policy was reinstated, it did not follow that the Council would automatically reinstate the TA consent. The Secretary submitted that the Council would have to consider any application in accordance with the new policy.

29. Finally, the Secretary submitted that the Department did not fail to disclose its position on the cancellation of the Brewers licence in a timely way for the following reasons:

    (a) The Trust was aware when it applied for the licence that the Council's policy was going to be challenged. At the time the Trust was in regular contact with the Secretary as part of the licensing procedure.

    (b) The Trust instructed legal counsel as part of the judicial review proceedings. Counsel for the Trust did not make contact with the Department.

    (c) The Taskforce's legal counsel contacted the Secretary to discuss the potential outcome of the High Court proceedings on the venue licence. The Secretary discussed the matter freely. There was nothing to stop the Trust or its legal counsel contacting the Secretary and asking what the Secretary's views were on the potential outcome of the High Court proceedings.

    (d) On 21 September 2010, a Gambling Inspector, visited the venue and, while there, advised the venue operator/owner and building owner that if the

Council's policy was invalidated, it was likely that the Secretary would cancel the venue licence.

(e) When the Department sent the Trust its provisional class 4 licence for Brewers, on 21 October 2010, it was clear from the content of the letter that the venue licence was subject to the provisions of the Act, any regulations, or game rules made under the Act and any licence conditions included in or added to the licence. The Department indicated that if the Trust required any additional information it could contact the writer, Mr Madden. The Trust did not contact him.

30. The Secretary concluded that both he and the Trust acted in good faith. Now that the TA consent was invalid, and there was no certainty as to when the Council's policy would be reviewed or the likely outcome of that review, the Secretary acted appropriately in using his discretion to cancel the venue licence. This would allow a proper consultation process to be undertaken by the Council. The Trust was not prevented from making a new application to the Secretary in the future.

ANALYSIS

31. The Appellant presented its case on the basis that section 67(1)(f) was not a continuous or forward-looking requirement, in contrast to many other requirements in section 67. The Appellant seemed to assume that the requirement in section 67(1)(f) would be satisfied if a consent were in apparent existence when the decision was made, even if it were later declared to be invalid. The analysis was approached solely on the basis that the Commission must decide whether or not the requirement is a continuous and forward-looking one. If it were not forward-looking, on the Trust's reasoning, the Commission must allow the appeal; it submitted that the High Court decision would only affect the licence and the Secretary's powers to cancel it if the requirement were continuous. If the requirement were not continuous and forward-looking, it was met at the relevant time and that position is unaffected by the latter declaration that it was invalid.

32. The Secretary opposed the appeal solely on the basis that section 67(1) imposed only continuous and forward-looking requirements. The Secretary also relied on section 98 to support a submission that section 67(1)(f) in particular created a continuous requirement.

33. Many of the requirements in section 67 require present satisfaction about an ongoing and forward-looking state of affairs; examples include access by under 18-year-olds, suitability of the venue manager and others, ownership of the equipment, financing of

the equipment, operation in accordance with minimum operating standards, principal use of the venue, co-location with a casino or other class 4 venues, and minimisation of problem gambling. However, two requirements are clearly expressed as past events – the requirements for the surrender of any current licence held by another society for the venue (e) and for territorial consent (f). From their context and language, these two requirements apply only at the time of the issue of the licence; the others are capable of operational change in the future and may be reassessed during the course of the licence and on renewal.

34. As a result, the Commission does not agree with the Secretary's contention that section 67(1)(f) is a continuous requirement. Rather it imposes a present requirement about the existence of a past event (namely, that, at the time at which the Secretary grants the licence, the territorial authority had provided a consent if required by section 98).

35. Section 67(1)(f) also does not require territorial authorities to maintain an ongoing consent throughout the course of the issued licence and all future renewals. Such a view would be inconsistent with section 98, which provides for consent only when a licence is first applied for at the venue, if any earlier licence expired 6 months ago or longer, or if the number of machines is to increase. The Secretary is correct that section 98(c) might require a new consent in the future (as a result of a break in continuity) but that was not the case in the circumstances of this appeal.

36. It is possible, but not necessary, to analyse the requirements of section 98(c) on the basis that earlier TA consents lapse or are extinguished. Section 98 imposes obligations to obtain territorial consents only at specific points in time. Whenever section 98 requires a TA consent, a new one must be obtained as any earlier consent would relate to an earlier consent requirement and not satisfy the present statutory requirement. Only in this sense do earlier consents lapse however.

37. Territorial consent under section 98 is, accordingly, not a continuous requirement, but one confined to specific occasions. Territorial authorities are required to adopt class 4 venue consent policies (section 101), to revise them periodically (section 102) and to make consent decisions in accordance with them (section 100). In many cases, the policies change over time (predominantly, as a matter of history, by restricting growth of sites and machines). However, despite changes in class 4 venue policies, existing venues can continue in operation by maintaining section 98 continuity which, if it were broken, would result in the venue not being able to regain a licence (as a new consent would not be given). Community control over venues is thus limited to the occasions to which section 98 applies and is not continuous.

38. However, although the Commission agrees with the Trust that the TA consent requirement is not continuous in that sense (as it will always be an inquiry as to whether a past event had occurred at the relevant point in time), it does not follow that the High Court decision is without effect on that inquiry. The issue is not whether section 67(1)(f) imposes a continuous and forward-looking requirement, but whether the High Court decision means that the requirement (which is to be assessed by reference to the time of application and grant) has not been met.

39. In the Commission's view, the High Court decision requires the Commission to treat the apparent consent on which the Secretary originally relied as of no legal effect. In the Taskforce Decision, the High Court did not simply declare that the process which had produced the class 4 venue policy was defective; it also declared that both the policy and the resulting consent given in respect of the Trillian venue were invalid. The relief sought in the proceeding did not extend to what the consequences might be for the licence. That was appropriate as the effect was not automatic, but was dependent on the exercise of a decision making power of the Secretary under section 74(1).

40. If a statute imposes a pre-condition to an action in the form of an administrative decision such as an approval or consent, a decision setting aside the pre-condition decision ordinarily has the effect of invalidating the subsequent action unless the statute provides otherwise. In *Martin v Ryan* [1990] 2 NZLR 209 (HC), Fisher J, in considering the consequences of a declaration of invalidity, noted that, although judicial review was inherently discretionary, coherence and predictability would normally require, in the absence of express statutory qualifications, a decision to be void for all purposes or valid for all purposes (at 241).

41. Under the Gambling Act, the consequences of the invalidation of the TA consent are to be determined by applying section 74. Section 74(1)(a) even provides some assistance with a retrospective reconsideration of a past event requirement because the power arises if "any of the grounds are no longer met". This indicates that the power arises on a change in circumstances after the licence is issued. While this would more usually apply to a later operational change or assessment affecting one of the continuous requirements, the Commission sees no reason why it would not also extend to the more unusual circumstances of correcting an earlier assessment made in error or the invalidation of a prerequisite decision. In the Commission's view, the Taskforce Decision provides a basis for the Secretary (and the Commission on appeal) to exercise the power to cancel or suspend under section 74(1)(a) because its effect is to establish that the ground in section 67(1)(f) was no longer met.

42. The Commission did not consider the first question was resolved by determining whether or not section 67(1)(f) required a "continually valid" TA consent. Section 67(1)(f) imposes obligations on the Secretary to be satisfied about the listed licence requirements. In the case of section 67(1)(f) and (e), the requirement is the existence of a pre-existing state of affairs at the time of the initial grant. The statutory obligation is placed upon the Secretary (so a failure to be satisfied does not involve a potential breach of statutory obligation by the applicant or licence-holder), but the consequence of non-fulfilment is no licence (so fulfilment is a practical obligation for a successful applicant).

43. In relation to the Trust's argument that the power of cancellation should not be exercised to address issues outside a licence-holder's control, the Commission considers that the Appellant has confused the punitive and remedial elements of the powers of cancellation and suspension under section 74. Sometimes the power is used purely remedially (to deal with something in section 67 no longer being met and not necessarily involving any breach by the licence-holder), sometimes it is used purely punitively (to punish a past breach by the licence-holder) and sometimes it is used both punitively and remedially (to bring a continuing breach to an end or to remedy a section 67 requirement in circumstances where an element of punishment is also appropriate). Cancellation in this case was purely remedial, to remedy the issue of a licence where a statutory pre-requisite has been held not to have been fulfilled. It does not matter whether that state of affairs is within the Trust's control. If it were within the Trust's control, suspension might have been an alternative response. However, when (as here) the licence-holder cannot immediately rectify the state of affairs, cancellation will usually be the outcome. Cancellation in this case has nothing to do with punishment or past breaches.

44. The Trust's argument summarised in paragraph 20 is similarly unpersuasive. The High Court invalidated both the amended policy and the consent. As a result, there is no effective consent. In addition, any new consent could only be granted in accordance with the currently effective policy, namely the previous policy (see s102(b)). Under that policy, no consent could be granted. A legally effective TA consent would require both a new policy, following proper public consultation, and a new consent decision. A new consent in the future would not necessarily satisfy the requirements of section 98, which are expressly time-specific, and is not even an imminent prospect.

45. With reference to the submission summarised in paragraph 19(i), regulatory certainty may be a factor in the interpretation of ambiguous statutory provisions but this is not such a case. All cancellations have the effects outlined. This cancellation is the exercise of a discretionary power under s.74 which arises as the result of an earlier High Court decision invalidating a pre-requisite condition. The consequences for the licence

holder may be something to be weighed in the exercise of the discretionary exercise of that power but are not determinative of its existence.

46. In respect of the submission summarised at paragraph 19(c), namely that that licences should set out, as express conditions, all section 67 requirements, while the Commission recognises that there is a power to add specific licence conditions to assist in the continuing ones being met, it does not see any need to replicate the statutory requirements in the licence. This is especially the case in the case of requirements that are historical, and not continuous.

47. Nor did the Commission consider that the fact that invalidation of prior consent was omitted from section 71 (changes of which the Secretary must be notified) and section 98 was decisive. Invalidation of prior consent is no doubt not listed in section 71 as it is not an expected event (as the High Court observed). The matters listed in section 71 are likely operational changes that could lead to a reassessment of certain continuous section 67 requirements (suitability, use, and incapacity). The matters in section 71 however are not co-extensive with those listed in section 67. For example, there is no requirement to report underage access, changes in ownership or financing of equipment, failures to comply with minimal operating standards, co-location developments or incidents of problem gambling harm but those are express requirements of section 67, providing a basis for suspension or cancellation (section 74) and requiring re-assessment on renewal (section 72). The Commission considers that section 71 is not impliedly intended to limit the ambit and application of section 67. It simply creates a reporting obligation that assists in the monitoring of some of the section 67 ongoing requirements. A failure to report could have punitive consequences under section 74(1)(b) as well as remedial ones under section 74(1)(a).

48. The omission of subsequent invalidation from section 98 is no doubt for the same reason. Invalidation is rare and not a contemplated potential operational change. The argument also ignores the analysis that the Commission has already adopted above, namely that section 98 does not impose a continuous requirement but rather imposes requirements that are limited to specific points of time.

49. Seen in that light, what the Secretary was required to do, when considering whether the circumstances triggering the power to cancel or suspend under section 74(1)(a) was to ask whether he was still satisfied that the required TA consent had been granted. In other words, the question for the Secretary, and the Commission on appeal, is a reappraisal of whether the original historical requirement was met. The same question would also have arisen on renewal of the licence, if it had not been cancelled, when the Secretary would have been required by section 72(5)(b) to refuse to renew the licence if

his investigations caused him not to be satisfied about any matter specified in section 67. On renewal, the Secretary would have been required to refuse to renew the licence if he were not satisfied, on the basis of the Taskforce Decision, that the valid TA consent which section 98 required had not been provided when the licence was issued.

50. The Commission is satisfied that the requirement in section 67(1)(f) is no longer met and that the Secretary was correct to regard the condition for the exercise of his power to cancel or suspend under section 74(1)(a) as having been satisfied.

Should the licence be cancelled?

51. Having confirmed that the finding by the High Court that the TA consent was invalid triggered the Secretary's discretion under section 74(1), the Commission then considered whether it should confirm the exercise the discretion to cancel.

52. It is common ground that the power in section 74 is discretionary. The language contrasts with the peremptory language used in section 67 (granting licences) and section 72 (renewal of licences). In some cases, the Secretary may decide not to exercise a discretion to cancel in favour of postponing assessment until renewal when the issue ceases to be discretionary and the test and onus may be subtly different. In this case however, the historical nature of section 67(1)(f), in combination with section 98, means that the issue made less sense to be left until renewal because the obligation is historical, not continuing, so it would always need to be assessed as at the time of original grant and not reassessed as at renewal (when section 98 does not impose any requirements for consent). With respect, the contrary suggestion made in para [53] of the Taskforce Decision overlooks the effect of section 98 on section 67(1)(f). A further complication in this case was that the licence was already coming up for renewal at the same time as cancellation was being considered so that the discretionary cancellation decision had in fact become contemporaneous with the non-discretionary renewal decision.

53. The Secretary had a discretion whether to cancel (or suspend) the licence under section 74. Suspension would not be rational in the absence of imminent prospect of remedy by the licence holder so the choice was effectively between cancellation and doing nothing. The competing considerations for the exercise of the discretion were:

(a) the interests of the licence holder, and community beneficiaries, including the consequences of cancellation, and the prospect that a policy change may be effected at some time in the future which could result in the issue of a new valid consent; and

(b) the desirability of effective community involvement in gambling provision decisions, which is a statutory objective of the Act (section 3(h)), and the resulting community interest arising from a successful High Court challenge to the consent, coupled with the requirements for renewal (section 72(5)(b)).

54. The Secretary exercised his discretion in favour of cancellation to reflect the High Court's decision on a successful application by a community group and to rectify the absence of a valid and legally effective consent for the grant of the licence. The Trust argues that the discretion should have been exercised in favour of interim continuation of the licence, pending the outcome of consultation, potential new policy adoption and potential new consent. As the Commission adopts a *de novo* approach to appeals, the Commission is entitled to exercise the discretion afresh, having regard to the material before it, and is not restricted to finding that the Secretary's exercise was "wrong".

55. It cannot be doubted that the interests that prevailed for the Secretary are worthy of serious recognition. Community involvement in decisions about gambling provision is an express objective of the Act (section 3(h)). It is given form in section 67(1)(f) and section 98 and the following provisions which provide for the adoption of class 4 venue consent policies (section 101), their periodic revision (section 102) and the making of consent decisions in accordance with them (section 100). The provisions include express public consultation obligations that, the High Court found, were materially not fulfilled in adopting the revised policy which was necessary for the particular TA consent to be issued. The High Court declared that both the revised policy and the TA consent given under it were invalid.

56. The issue for the Commission is whether the countervailing interests and related matters raised by the Trust are sufficient to tip the balance in favour of exercising the discretion not to cancel the licence.

57. The consequences of a loss of licence are significant to the venue, the Trust and to the community beneficiaries of the Trust. However, these consequences arise on every cancellation. In this case, they are not necessarily permanent. The initial licence application required TA consent so no rights based on a continuity position under section 98 would be lost. If the policy is changed, consent may be obtained and a successful licence application made in the future.

58. While it is true that the invalidation was on procedural grounds, that is common in judicial review. The judicial review is concerned with whether decisions are made in accordance with law so the focus is usually on the conditions for the exercise of a power rather than on the substantive merits of a decision which involved balancing of competing considerations. In this case, the basis for invalidity was a matter of

procedural substance, not a mere technicality. It involved material lack of public notice of a policy change on which the consent relied. The consent could not have been granted under the old policy and the validity of the consent is a prerequisite for the grant of the licence. Describing the grounds as "procedural" does not strike the Commission as a material consideration for the exercising the discretion.

59. Section 102(6) is important as it preserves the existing (valid) policy pending its effective amendment. As a consequence of the High Court decision, the current effective policy is the previous policy under which consent could not have been given. The statutory status quo created by section 67, 74 and 102 does not favour preservation of the licence (in case a new policy emerges leading to a new consent). This is especially the case where that eventuality is not imminent.

60. The Appellant's submission that the discretion should not be exercised until the possibility of a new consent has been exhausted involves something close to an assumption that the invalidated policy will be restored after consultation but such an assumption tends to undermine the High Court's decision and deprive the successful applicant for review of the benefits of its success in the High Court. It also sits uncomfortably with the Commission's analysis that section 67(1)(f) and section 98 combine to make the inquiry about a particular point in time, not a later change in circumstances.

61. The Commission looks with more favour on the other matters raised by the Trust. The Commission considers that it would have been preferable for the Secretary to have advised the Trust expressly, when granting the licence that, if the Taskforce application for judicial review succeeded, the licence was likely to be cancelled. As a result, the Trust proceeded to incur expenditure in reliance upon the issued licence without any formal warning on the part of the Secretary as to what was likely to occur if the judicial challenge to the validity of the consent were upheld. That was not a desirable state of affairs, particularly as the prospect of cancellation was in serious contemplation.

62. In other circumstances, the Commission would have considered seriously whether the fairest balance of the competing interests might have been achieved by not taking action to cancel the licence during the period of its initial issue and instead allowing the licence to remain in place until renewal when the decision to refuse to renew would have been inevitable. In this case, however, the cancellation and renewal processes were contemporaneous so such considerations did not arise. By the time the Secretary made his decision to cancel, a renewal application must have been received which, in the light of the Taskforce Decision, the Secretary would have been obliged to decline pursuant to section 75 (5)(b).

63. The Commission is satisfied that the Secretary's decision to cancel the licence was correct.

DECISION

64. The Gambling Commission confirms the decision of the Secretary to cancel the class 4 venue licence for the Brewer's Bar, Nelson but varies the decision to provide for the cancellation to take effect from 3 August 2012 (rather than 21 December 2011 as originally provided).

Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

7th July 2012

GAMBLING COMMISSION