

**IN THE MATTER** of the Gambling Act 2003

**AND** of an application by **SKYCITY CASINO MANAGEMENT LIMITED** and **OTAGO CASINOS LIMITED** for variation to casino venue agreement and variations to casino venue licence and casino operator's licence

**BEFORE THE GAMBLING COMMISSION**

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

Date of Application: 16 December 2019, amended 5 May 2020

Date of Decision: 10 July 2020

Date of Notification  
of Decision: 20 August 2020

**APPLICATION BY SKYCITY CASINO MANAGEMENT LIMITED AND OTAGO CASINOS LIMITED FOR VARIATIONS TO CASINO VENUE AGREEMENT, CASINO VENUE LICENCE AND CASINO OPERATOR'S LICENCE**

**1. BACKGROUND**

1.1 SKYCITY Casino Management Limited ("**SCML**") and Otago Casinos Limited ("**OCL**") (together "**the Applicants**") filed an application dated 16 December 2019 in relation to the conditions of the venue licence agreement and the venue and operator's licences for the Wharf Casino in Queenstown. The applications arise from OCL's expected loss of control of the Wharf Casino premises in September 2021.

1.2 OCL holds both the casino venue licence and a casino operator's licence for the Wharf Casino. SCML also holds a casino operator's licence with conditions applicable to the Wharf Casino. Following the purchase by SCML's parent of the shares in OCL, SCML took over the operation of the Wharf Casino, pursuant to its operator's licence and a casino venue agreement between SCML and OCL, which was approved by the Gambling Commission ("**Commission**") in decision GC43/13 (20 December 2013). In that decision, the Commission declined to remove OCL's operator's licence conditions because,

although SCML was expected to operate the casino under the new arrangements, OCL retained its statutory entitlement to operate the Wharf Casino and, in the event that it did so, would have been unrestrained by any of the usual conditions attaching to operator's licences. To make compliance by both licence holders easier, the Commission made amendments which had the effect of mirroring the operator's licence conditions for both SCML and OCL.

- 1.3 The OCL venue licence was issued on 18 June 1999 and expires on 11 September 2024. The venue licence stipulates the name of the licence holder, the description of the venue, authorisation to use the premises as a casino, the period of the licence, and annexes conditions. Although, for reasons which will be outlined below, OCL's ability to use the described premises or venue as a casino and to comply with the requirements of the Gambling Act 2003 ("**Act**") and licence conditions depend on it holding rights of access to, and control over, the premises, it does not own the Wharf Casino premises. It has occupied the premises as a lessee since the casino operation commenced.
- 1.4 Under its current lease, OCL holds the right to occupy most of the premises specified in the Wharf Casino venue licence, including all of the defined gambling area. However, the current lease will expire on 8 September 2021 and may be unilaterally terminated by the lessor earlier if the venue remains closed for an extended period. In the latter regard, in March 2020, the venue was closed as the result of the Covid-19 alert level restrictions but has not re-opened since the Covid-19 alert levels allowed it to do so.
- 1.5 The lessor has advised OCL that it will not grant OCL a lease for any part of the casino venue after 8 September 2021 unless OCL is prepared to make a significant capital investment in the venue, which OCL does not wish to do. If the position remains as it is currently, OCL will cease to have control over, or right of access to, any part of the licensed premises from 8 September 2021. In that event, neither OCL nor SCML would be able to comply with their current regulatory obligations.
- 1.6 OCL has indicated that it is unwilling to surrender its casino venue licence under s 147(1)(b) if unable to secure a new lease by September 2021. OCL considers that it might still be able to realise the value of the licence prior to its expiry if the lessor reconsiders its decision regarding renegotiation of the lease on terms acceptable to OCL or if Parliament addresses what OCL perceives to be a "statutory deficiency" which currently prevents the regulator from amending the boundaries or location of a casino venue where that venue has become unusable.
- 1.7 The Wharf Casino venue licence expires on 11 September 2024. Any application by OCL for renewal of the licence must be made between 11 September 2022 and 11 September

2023.<sup>1</sup> The Commission has not previously considered a renewal application for a casino venue licence in respect of a venue which is non-operational; no assumptions about the outcome of such an application should be made.

- 1.8 The decision by OCL to seek and obtain a casino venue licence for premises which it held on lease for less than the casino licence term meant that the possibility of losing access to, and control over, the defined casino venue was foreseeable from the outset and when OCL's shares were purchased in around 2013.
- 1.9 The present applications are made with the intention of enabling OCL to retain its venue and operator's licence without breach, even if it loses control over, and access to, the licenced premises and the casino operation remains closed. The applications to vary licence conditions raise three important issues:
- (a) Whether the Commission has jurisdiction to vary licence conditions by amendment or insertion of terms that would have the effect of suspending the ability of the licence holder to operate the casino.
  - (b) Whether it is necessary for the licence holder to retain control over any part of the authorised venue during the term of the licence.
  - (c) Whether the Commission can (or should) accept undertakings under the Act from licence holders and, if so, their effect.

## 2. RELEVANT LAW

- 2.1 The relevant sections of the Act are set below:

### 4 Interpretation

*gambling area means,— ....*

- (b) for a casino venue, that part of the venue that is specified by the Gambling Commission under section 139 or the Casino Control Authority under the Casino Control Act 1990 as an area where casino gambling is permitted or, if the Gambling Commission does not specify an area under that section or the Casino Control Authority has not specified an area, the casino venue.

*Responsible gambling means lawful participation in gambling—*

- (a) that is lawful, fair, and honest; and
- (b) conducted—
  - (i) in a safe and secure environment; and

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<sup>1</sup> Section 134(2)(a), Gambling Act 2003 (“Act”). An application to renew must be made at least 1 year but not more than 2 years before the licence is due to expire.

- (ii) without pressure or devices that encourage or may encourage gambling at levels that cause or may cause harm; and
- (c) by informed participants who understand the nature of the activity and do not participate in ways that cause or may cause harm; and
- (d) conducted in a manner that is consistent with the general law of New Zealand, including being consistent with the maintenance of law and order.

### **132 Approval of casino venue agreement**

- (1) Casino licence holders who propose to enter into a casino venue agreement must apply to the Gambling Commission for approval of the agreement before entering into it.
- (2) A party to a casino venue agreement who seeks to amend that agreement must apply to the Gambling Commission for approval of the amendment before the amendment is made.
- (3) An application for approval under subsection (1) or subsection (2) must be on the relevant form.

### **133 Consideration of application**

- (1) An application under section 132 for the approval of a casino venue agreement or of an amendment to a casino venue agreement must be considered by the Gambling Commission.
- (2) The Gambling Commission may require the applicant to provide a copy of the proposed agreement and any other relevant information to assist the Gambling Commission to consider the application.
- (3) In considering an application, the Gambling Commission must have regard to any suitability requirements specified in section 124 that the Gambling Commission considers relevant.
- (4) The Gambling Commission must not approve a casino venue agreement or an amendment to a casino venue agreement unless it is satisfied that the agreement is conducive to the conduct of responsible gambling in the casino.
- (5) A casino venue agreement expires according to its terms or when—
  - (a) a party to the casino venue agreement surrenders the party's casino licence; or
  - (b) the casino venue licence expires and is not renewed; or
  - (c) a casino licence of a party is cancelled; or
  - (d) the Gambling Commission approves a new casino venue agreement; or
  - (e) the casino venue agreement is entered into or amended without the approval of the Gambling Commission.

### **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).

#### **144 Suspension or cancellation of casino licence**

The Secretary may apply to the Gambling Commission for an order that a casino licence be suspended or cancelled if the Secretary is satisfied that—

- (a) the licence holder is breaching or has breached this Act or a condition of the licence or minimum operating standards; or
- (b) the licence holder or an associated person is no longer suitable to hold the licence or to be an associated person having regard to the suitability requirements in section 124; or
- (c) the licence holder or an associated person is failing or has failed, without good cause, to supply information requested by the Secretary or a gambling inspector or knowingly has provided false information; or
- (d) the licence holder—
  - (i) has failed to discharge its financial commitments; or
  - (ii) has entered into a compromise with its creditors; or
  - (iii) is being or has been wound up (voluntarily or by court order); or
  - (iv) is liquidated; or
  - (v) is subject to the appointment of a receiver or receiver and manager; or
  - (vi) is being or has been made subject to statutory management under Part 3 of the Corporations (Investigation and Management) Act 1989.

#### **145 Procedure for suspending or cancelling casino licence**

- (1) The Gambling Commission must decide whether or not to grant an order sought by the Secretary under section 144 after following the procedure outlined in this section.
- (2) The Gambling Commission must—
  - (a) send a copy of an application under section 144 to the holder of the casino licence affected; and
  - (b) notify the licensee and the parties to a casino venue agreement with the licensee of their right to make submissions under subsection (3); and
  - (c) notify the persons in paragraph (b) of their right to a hearing.

- (3) The persons referred to in subsection (2)(b) may—
  - (a) make written submissions to the Gambling Commission concerning the application for suspension or cancellation within 20 working days after the date of the notice under subsection (2), or within any longer period that the Gambling Commission allows if an application for an extension is made within the time period specified in this paragraph; and
  - (b) request a hearing about the application for suspension or cancellation.
- (4) If a hearing is requested, the Gambling Commission must—
  - (a) fix the earliest practicable date for the hearing; and
  - (b) give at least 20 working days' notice of the date, time, and place of the hearing to the persons referred to in subsection (2)(b).
- (5) The Secretary and the persons referred to in subsection (2)(b) are entitled to produce evidence and to appear and be heard at the hearing, personally or by counsel or agent, and to call, examine, and cross-examine witnesses.
- (6) The Gambling Commission may adjourn a hearing to allow the licence holder an opportunity to deal with any matters that the Gambling Commission requires the licence holder to deal with.

### **3. ORIGINAL APPLICATION**

3.1 On 16 December 2019, the Applicants applied for a number of variations to the conditions of the operator and venue licences that they hold and to the casino venue agreement between them.

#### *Variation to casino venue agreement*

3.2 The Applicants sought approval of a variation to the casino venue agreement under s 132(2) of the Act, so that it would terminate or be suspended automatically upon expiry of the Wharf lease.

#### *Variation to SCML's operator's licence*

3.3 SCML sought to specify, under s 139(1)(d), a new condition of its operator's licence suspending all conditions of that licence from the termination of the Wharf lease.

#### *Varying OCL's operator's licence and venue licence*

3.4 The Applicants submitted that, while a casino venue licence authorises a venue for use as a casino, the Act does not impose any obligation on a casino venue licence holder to use the venue for operating a casino. As a result, and in contrast to class 4 licences, cessation of operation of a casino does not put a licence holder in breach of the Act or, for that matter, any licence conditions (having regard to the conditions in place).

3.5 Orders were accordingly sought under s 139(1)(d) so as to vary and specify new conditions in OCL's operator's licence that suspend operation of the casino, and most of

the licence conditions, following termination of the lease, until reactivated by the Commission on application by OCL on 60 days' notice.

- 3.6 Additionally, orders were sought for variation to OCL's venue licence under s 139(1)(d) by insertion of a new condition suspending most of the licence conditions (which "will otherwise remain in full force and effect") until reactivated by the Commission on application by OCL on 6 weeks' notice.
- 3.7 An alternative variation, in which condition 9 (relating to the gambling area) would not be suspended but replaced by a new, nominal gambling area, was also included.

#### **4. SUBMISSIONS RECEIVED IN RESPONSE TO ORIGINAL APPLICATION**

- 4.1 The Secretary of Internal Affairs ("**Secretary**") did not oppose the variations sought, considering that the application to suspend licence conditions was different in objective from a suspension under s 144 of the Act for compliance reasons. The Secretary considered that the requirements of s 139(2) of the Act were met. The Secretary's submissions did not appear to draw any distinction between variation of the licence and variation of the conditions of the licence. It was submitted that the alternative variation was unnecessary (and that it would be unreasonable to hold OCL responsible for controlling access to premises that it holds no legal right to occupy).
- 4.2 Both Problem Gambling Foundation ("**PGF**") and Salvation Army Oasis ("**SA**") opposed the application, submitting that, if the conditions of the licences and casino venue agreement could no longer be met, the licences ought to be surrendered and the premises closed.
- 4.3 The Ministry of Health expressed concern that a suspension followed by a reopening of the casino could result in a statutorily prohibited increase in the number of casinos (s 10) or in opportunities for casino gambling (s 11).
- 4.4 Destination Queenstown had no objection to the application.

#### **5. ISSUES ARISING FROM ORIGINAL APPLICATION AND SUBMISSIONS**

- 5.1 Following a review of the submissions, on 8 April 2020, the Commission wrote to the Applicants and other parties, seeking further submissions from all parties who had made submissions on the original application. The parties were asked to address the following:
- (a) Some of the proposed amendments would have the direct effect of suspending the right to conduct casino gambling at Wharf Casino conferred by the casino venue licence (and the balance assumed that to be the state of affairs). The

Commission sought submissions on whether its powers to amend licence conditions extended to amendments which would have such an effect.

- (b) The alternative variation, namely designation of a smaller gambling area, did not fully address a concern that the reduced area designated would still be one over which OCL had no lawful means of control.

5.2 To assist the parties, the Commission noted the expressly limited terms of the Commission's amendment powers under s 139, and the expressly limited (and inapplicable) licence suspension powers under s 144. It noted that s 139 empowers it to vary "the conditions of a casino licence", that the Commission had first considered whether its amendment powers extend to amending the casino venue licence itself during the initial review of the SKYCITY Auckland licences (at which time, in reliance on the Court of Appeal and Privy Council decisions in *Glenharrow Holdings v Attorney-General*<sup>2</sup>, SKYCITY had argued strongly that the Commission's amendment powers were limited to amendment of licence conditions<sup>3</sup>) and that the Commission had held that its s 139 powers were so limited in a number of subsequent decisions.<sup>4</sup>

5.3 In addition to the limited power to amend casino licence conditions under s 139, the Commission noted that it had been given power to cancel or suspend a licence under s 144. That power is expressly limited to an application by the Secretary, after the Secretary is satisfied of one of four states of affairs (none of which are applicable in the present circumstances). The Commission queried whether s 144 was a statutory indication that the s 139 conditions amendment powers could not be used to suspend a casino licence.

5.4 In relation to the alternative variation, the Commission indicated that it was unclear whether, in the circumstances, OCL would be willing or able to negotiate terms under which it could maintain sufficient control over the proposed reduced gambling area so as to meet the associated statutory and licence condition obligations.

5.5 On 29 April 2020, the Applicants sought clarification from the Commission regarding which of its proposed amendments would have the effect of suspending the right to gamble at Wharf Casino. The Commission provided the requested clarification on 1 May 2020.

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<sup>2</sup> [2003] 2 NZLR 328 (CA); [2005] 2 NZLR 289 (PC).

<sup>3</sup> As recorded in an interim decision of the Commission dated 23 December 2005.

<sup>4</sup> GC05/09 at paragraph 17, GC25/10, GC25/13 and GC29/13, GC21/15 and GC27/15 at paragraph 28.

## 6. 5 MAY 2020 – AMENDED APPLICATION

- 6.1 On 5 May 2020, the Applicants made further submissions to the Commission and gave notice amending their applications.
- 6.2 The Applicants proposed a minor amendment to the casino venue agreement that would provide for it to terminate when the lease expires, terminates or otherwise comes to an end.
- 6.3 In their further submissions, the Applicants maintained that no variations to the existing licence conditions were now required and the associated amendment removed the originally proposed amendments to terminate or suspend the Wharf Casino conditions appended to SCML’s operator’s licence.
- 6.4 The amendments to the applications relating to OCL’s licences involved a proposal for an undertaking by OCL (given of its own volition) not to use the OCL operator’s licence to operate the Wharf Casino from the expiry or termination of the lease until OCL gives 90 days’ notice to the Commission of intention to operate the Wharf Casino. The Applicants suggested that the undertaking could, if the Commission wished, be included as a separately scheduled new condition of the operator’s licence, and that the undertaking would render the conditions of OCL’s venue and operator’s licences “inoperative”, but otherwise “in existence”.
- 6.5 If the Commission did not adopt the Applicants’ undertaking proposal, in the alternative, the Applicants maintained the applications for suspension of the conditions of the operator’s and venue licences sought in the original application.
- 6.6 If the Commission did not accept either the Applicants’ undertaking proposal or the proposal to suspend the OCL licence conditions, the Applicants proposed an alternative condition 9 to designate a smaller, nominal, gambling area and variations of other conditions to facilitate reduced compliance obligations in relation to this area. The Applicants conceded however that no matter how much the gambling area was reduced, OCL would have neither access to it nor control over it.

### *Submissions received on amended application*

- 6.7 Unfortunately, no submissions were received from the Secretary on the matters raised by the Commission.
- 6.8 The Ministry of Health expressed concern that granting the application might set a precedent. It also observed that, if the licence were rendered inoperative and later reactivated, arguably the result would be a prohibited increase in the opportunities for casino gambling and increased gambling harm contrary to the Act.

- 6.9 PGF and SA advanced the same arguments as in their earlier submissions. SA further submitted that it is outside the Commission's mandate to put OCL's licence on hold temporarily in order to resume operations at a new premises in the future and that this would amount to granting SCML a new casino licence or at least create an expectation that SCML would be granted a new venue in which to use the licence in the future. SA also submitted that the alternative nominal gambling area proposal appeared not to offer a workable solution if SCML was unable to retain control of the reduced area; such an "artifice" would not be consistent with efficient administration of the Act.

*Reply submissions of Applicants*

- 6.10 The Applicants observed that there is currently no application by OCL to amend its venue licence, saying that they were simply flagging that it may not yet be settled whether the Commission has implied power to amend a casino licence. In response to SA, the Applicants stated that it is the operation of the Wharf Casino and not the licence that would be put on hold – the application is not to suspend the Wharf venue licence, but rather, to render the conditions of OCL's operator's and venue licences temporarily "inoperative", which is not the same thing as a suspension of the licence.

## **7. ANALYSIS**

*Requirements for the lawful operation of a casino*

- 7.1 Section 119 governs the requirements for lawful operation of a casino – a casino may be operated only by a person who holds both a casino operator's licence and a casino venue licence or if a licensed casino operator has an approved casino venue agreement with a casino venue licence holder.
- 7.2 The Act imposes no restriction on the grant of new operator's licences; they are only usable if the holder already holds a venue licence or if the Commission approves an enabling casino venue agreement. That is why the Commission has power under s 130 of the Act to issue new casino operator's licences but the Act prohibits the grant of new casino venue licences. It also explains the statutory flexibility around operator's licences – new operator's licences can be granted at any time, there is no limit on the number of operator's licences in existence at any time, and new or amended casino venue agreements can be approved under s 132. In contrast, there is no similar flexibility around casino venue licences.
- 7.3 The Commission has express powers to suspend or cancel casino licences, both venue and operator's, following an application made under s 144. That power is expressly limited to an application by the Secretary, after the Secretary is satisfied of one of four expressed states of affairs.

- 7.4 The Commission also has express power to specify, vary or revoke the conditions of a casino licence, again both venue and operator's, under s 139 on the express conditions set out in s 139(2).
- 7.5 The Applicants submitted that, while a casino venue licence authorises a venue for use as a casino, the Act does not impose any obligation on a casino venue licence holder to use the venue for operating a casino. As a result, and in contrast to class 4 licences, cessation of operation of a casino does not put a licence holder in breach of the Act or, for that matter, any licence conditions (having regard to the conditions in place). The Commission concurs. It proceeds on the basis that casino licence holders are not required to exercise the authorisation granted by a licence in order to be compliant with either the Act or licence conditions.
- 7.6 However, although there is no express or implied obligation under the Act for a licence holder to make use of a licence to operate a casino, the Commission's earlier decision GC43/13 made clear that all licences capable of use should have adequate conditions, consistent with a holder's rights under its licence to operate a casino if it elects to do so and to control the potential exercise of that right. For that reason, the Commission declined to remove the conditions of OCL's operator's licence when approving the casino venue agreement and imposing Wharf conditions on SCML's operator's licence in decision GC43/13. It noted that, if OCL operator's licence conditions were removed, OCL's statutory entitlement to operate the casino would continue but would be unrestrained by any of the usual conditions attaching to operator's licences, which would be an unacceptable position.
- 7.7 Licence holders who choose not to operate a licensed casino will still have to comply with ongoing compliance obligations. In that regard, not all obligations arise from licence conditions which are capable of variation by the Commission. Casino licence holders are also subject to direct statutory obligations, such as the obligation of the casino operator to keep all books, records and documents relating to the casino in the casino venue,<sup>5</sup> and, specifically in relation to the gambling area, obligations relating to compliance with age restrictions,<sup>6</sup> the display of problem gambling identification policy,<sup>7</sup> and compliance with exclusion orders.<sup>8</sup> Some of both the statutory and licence based compliance obligations refer to the "gambling area" and the default legislative position is that, if no

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<sup>5</sup> Section 177, Act. Although this is subject to the Secretary's power to approve otherwise.

<sup>6</sup> Section 303, Act.

<sup>7</sup> Section 308, Act.

<sup>8</sup> Section 312, Act.

gambling area is specified in the conditions, the entire defined casino venue is deemed to be the gambling area.<sup>9</sup>

*Casino venue agreement variation*

- 7.8 The Applicants proposed a minor amendment to the casino venue agreement that would provide for it to terminate when the lease expires, terminates or otherwise comes to an end.
- 7.9 The Commission sees no issue with approving an amendment which provides for termination of the agreement on expiry or termination of the lease. In considering a s 132 application, the Commission must have regard, under s 133(3), to such suitability requirements specified in s 124 as the Commission considers relevant and, under s 133(4), the Commission must not approve an amendment unless it is satisfied that the result is conducive to the conduct of responsible gambling in the casino.
- 7.10 As OCL holds both the casino's operator's licence and casino venue licence for Wharf Casino, it has a statutory right to conduct gambling at Wharf Casino regardless of the Casino Venue Agreement with SCML. In contrast, SCML's lawful authority to operate Wharf Casino depends on both its operator's licence and the approved Casino Venue Agreement.
- 7.11 The effect of the amendment would be that, upon the lease coming to an end, SCML would cease to have a right to operate Wharf Casino,<sup>10</sup> leaving OCL as effectively the sole licensed operator. As the effect of terminating or suspending the agreement would be reversion of legal operational control to another currently licensed party (and, in fact, the originally licensed operator and the holder of the venue licence), such of the s 124 requirements as may be relevant are satisfied by the information provided. There is also no issue under s 133(4).
- 7.12 As indicated by the outcome of decision GC43/13, there would be no reason to think that SCML would not get approval for a new agreement if that proved to be desirable in the future. As a result, there is no need to confront the complexities that might arise from suspension of the venue agreement. It does not represent rights which are in danger of being lost permanently.

*SCML's operator's licence*

- 7.13 In their further submissions, the Applicants maintained that no variations to the existing licence conditions were now required and the associated amendment removed the

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<sup>9</sup> Section 4, Act – definition of “gambling area”.

<sup>10</sup> Section 119, Act.

originally proposed amendments to terminate or suspend the Wharf Casino conditions appended to SCML's operator's licence.

- 7.14 The Commission has no issue if SCML wishes to retain the Wharf Casino conditions appended to its casino operator's licence as currently proposed. SCML is only lawfully permitted to operate the Wharf Casino by virtue of the Casino Venue Agreement. The conditions are appropriate while the venue agreement remains in effect. Once it has ceased to have effect, the conditions alone will not confer on SCML a right to operate Wharf Casino.
- 7.15 Because decision GC43/13 made clear that appropriate operator's licence conditions would be re-imposed if SCML regained the right to operate the casino in the future, the Commission is surprised that SCML decided to abandon termination or suspension of its Wharf Casino licence conditions, leaving them apparently operative. The Commission would have been prepared to terminate or suspend SCML's Wharf Casino conditions, although it would regard termination of the venue agreement (not the termination of the OCL lease) as the appropriate trigger for their termination or suspension (although the Commission appreciates that SCML's intention was to make those two events contemporaneous).

*Jurisdiction – does the Commission have the power to amend casino venue licences or casino operator's licences outside that set out in s 139?*

- 7.16 The application as amended (the new proposed undertaking by OCL or the suspension of conditions as previously proposed) aimed to address the jurisdictional concerns raised by the Commission as outlined in paragraph's 5.1 to 5.3 above.
- 7.17 On jurisdiction, the Applicants acknowledged that SKYCITY had previously argued that the amendment power in s 139 applied only to the *conditions* of a casino licence and not to the granting of a licence itself, relying on the *Glenharrow* decisions.<sup>11</sup> However, they argued that *Glenharrow* could be distinguished from the present circumstances because the purported variation in that case related to extending the term of the licence (as opposed to suspending its operation for a period or amending the premises description). They also submitted that *Glenharrow* had not been recently considered, impliedly suggesting that it may no longer be current law. The Applicants pointed to a more recent English case, *Dean v The Secretary of Business, Energy and Industrial Strategy*,<sup>12</sup> as authority that a power to amend a licence may be implied whenever necessary and not prohibited by the provisions of the statute. They suggested that the Commission should

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<sup>11</sup> [2003] 2 NZLR 328 (CA); [2005] 2 NZLR 289 (PC).

<sup>12</sup> [2017] EWHC 1998.

not begin its analysis with an assumption that it has no power to amend casino licences (as opposed to their conditions).

- 7.18 Whether there is such a power is not only relevant to the jurisdiction issue raised by the Commission in the light of its earlier decisions on the issue. It would also be critically important for the future of the Wharf Casino, including whether relocating the casino elsewhere would require a statutory amendment to the Act (as the respondents assume, based on the Commission's earlier decisions) or whether venue relocation could be achieved by the Commission exercising its powers of amendment.
- 7.19 Having considered the authorities cited, the Commission confirms its earlier view regarding the limitations of its powers of amendment. The *Glenharrow* decisions are decisions of the New Zealand Court of Appeal and Privy Council on subsequent appeal. They are clear and binding authority, irrespective of how recently they have been considered since. They draw a clear distinction between a licence and its conditions and the importance of identifying whether a statutory power to amend or alter a licence is limited only to its conditions or extends to fundamental aspects of a licence. In *Glenharrow*, the Court of Appeal held that the term of the licence was not a condition to which the amendment powers in s 103D(3) of the Mining Act applied but an essential element of the mining licence. The Privy Council on appeal confirmed that the statutory amendment powers were limited to the conditions subject to which the licence had been granted and the term of the mining licence was part of the licence itself, not a condition to be observed following the grant.
- 7.20 The primary analysis in both decisions involved drawing a principled distinction between a licence (the grant of legal authorisation) and the conditions of a licence (the obligations with which a licence holder was required to comply in order to avoid the possibility of early forfeiture). In both decisions, the distinction in principle was reinforced by supporting contextual considerations arising under the relevant statute, including express restrictions on granting new licences which would be undermined by construing the condition amendment powers so as to affect the grant itself. The decisions drew a distinction between the licence and the conditions and applied the distinction to categorise the term as part of the former, not the latter. The decision reasoning does not apply only to the term of a licence.
- 7.21 The current contextual considerations support a similar analysis even more strongly than those in *Glenharrow* – the Act prohibits the grant of any new venue licences, prohibits increasing the opportunities for casino gambling, contains expressly limited powers of suspension, cancellation, and amendment of conditions, and contains provisions for surrender. The statutory context points strongly against implying an additional power to

alter the fundamental grant, whether that be to suspend the right to conduct casino gambling on the premises during the licence term or to alter the location of the authorised premises.

- 7.22 The decision in *Dean* has far fewer similarities to the current application than *Glenharrow*. The licence in that case was granted under s 3 of the Petroleum Act 1998. The legislation contained no express statutory power to amend the licence or its conditions after grant. The Court held that the licence in question was not entirely governed by the statutory code relating to such licences; rather it was a grant of exclusive property rights, which contained the normal incidents of property ownership insofar as they are not excluded or modified by the terms of the legislation or the relevant licence. Those rights included the right to assign the interest created by the licence and the ability of the parties to the licence to agree to vary its terms, and neither the terms of the licence nor legislation prohibited the variation.
- 7.23 In addition, the express objective of the licensing regime under the 1998 Act was to encourage Applicants for licences prepared to take on the substantial risks involved in exploring for and getting petroleum and the unforeseen changes of circumstances likely to arise during the lifetime of a licence. Against that background, the Court held that, even if the licence were regarded as a statutory licence governed entirely by legislation and public law principles, there is implicit in, or incidental to, the power under s 3 of the 1998 Act to grant such a licence, a power to vary that licence subsequently with the licensee, provided that any such variation is not prohibited by an express provision of legislation.
- 7.24 The *Dean* decision is not only not binding authority in New Zealand in preference to *Glenharrow*, in the Commission's view it is distinguishable on all of the matters which were held to justify the implication of a power to amend:
- (a) In *Dean*, there was no express power to amend anything in the licence, including the conditions, after grant, whereas under the Act there is an express but limited power to amend licence conditions under s 139(2) and to suspend licences under s 144. As a result, no negative indication against implication of powers to amend arose from express but limited powers to do so.
  - (b) The licence regime in *Dean* was held not to be governed entirely by statute but comprised property rights which could be assigned, and which involved the ability to negotiate variations, whereas the Act prohibits the former and does not provide for the latter.

- (c) The legislation in *Dean* had expansive rather than restrictive statutory purposes, whereas the Act is restrictive on new venue licences being issued and prohibits increase in gambling opportunities and contains nothing comparable to the English legislation.
- 7.25 The Commission also does not consider that a power to amend can be implied by necessity. The concept of necessity, which applies to implication of contractual terms as well as in a statutory context, involves requirements that are much higher than merely practicable, desirable or convenient. While unexpected circumstances might make implied powers desirable or convenient, that is never regarded as sufficient for implication. Implication of a broader power of amendment is inconsistent with the express provisions of sections 139 and 144.
- 7.26 It is understandable that the current situation is not one which Parliament thought it would need to provide for, aside from making provision for surrender. It is doubtful that Parliament envisaged that any of the limited number of casino licences issued following competitive hearing processes would be for premises which the successful applicant would not have secured access to for the licence period.
- 7.27 The Act did not anticipate the Christchurch earthquakes or the more recent NZICC fire either. However, it is clear also that, in those events, Parliament did not expect bodies like the Commission to rely on broad implied powers. Rather, in the former case, Parliament passed emergency legislation to allow an appointed Minister to waive legislative requirements whenever necessary. In fact, neither circumstance created any compliance difficulties. It is common ground that casino licences are permissive in nature and contain no requirement to operate the casino, so no compliance issues arose from closing the casino. However, the rapid legislative response to the earthquakes shows that Parliament is capable of responding to unexpected events by conferring new broad legislative powers quickly. Citing the possibility of unexpected events is no justification for the implication of broad statutory powers inconsistent with the limited express powers conferred.
- 7.28 In reliance on the law stated in the *Glenharrow* decisions, the Commission has previously held that the premises description of a licence is a fundamental aspect of the grant and not a condition capable of amendment.<sup>13</sup> The Commission considers that its earlier decisions were correctly decided.

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<sup>13</sup> Decisions GC05/09; GC25/10; GC25/13; GC29/13.

7.29 For the reasons set out above, the Commission considers that it does not have the power to amend licences themselves under s 139 nor to suspend the operation of licences outside the power conferred by s 144. The essential elements of a casino licence are the licence holder, the venue description, the authorisation to use the venue as a casino or to operate the casino, and the term of the licence. The Commission's powers extend only to varying licence conditions, being the associated obligations placed upon the licence holder for the term of the licence, breach of which may result in suspension or cancellation of the licence.

7.30 To the extent that the applications seek amendments (no matter where they are placed) which suspend the authorisation to operate a casino at the defined premises or to move the premises from those originally described to another location, they are beyond the Commission's powers and are declined accordingly.

*A nominal gambling area: must the licence holder retain control over any part of the authorised venue during the term of the licence?*

7.31 One of the Applicants' alternative applications was that of a licence condition amendment reducing the size of the gambling area. The alternative variation aimed to address in part the obligations that a licence holder must comply with regardless of whether the licence holder chooses to operate the casino or not, whether statutory or condition based, as identified above at paragraph 7.7.

7.32 The gambling area under the current licence conditions is smaller than the entire defined venue. The proposed alternative variation apparently aims to reduce the risk of breaching obligations tied to the gambling area by reducing the area over which compliance is required. This raises the issue of control over the authorised venue, specifically, whether, practically speaking, the licence holder must retain control over some part of the authorised venue during the term of the licence.

7.33 While there is no express statutory obligation that casino licence holders exercise control over the licensed premises, the content of the statutory obligations and the nature of the licence conditions that the Act expressly authorises means that no licence holder could comply with those obligations without the ability to exercise such control.

7.34 Control over the venue is a practical requirement both to exercise the right conferred and to meet the conditions of its grant. If a licence holder is not in control over the specified venue, in addition to not being able to enjoy the rights granted, it will not be able to discharge the associated licence obligations. The result is likely to be breaches of both statutory obligations and licence conditions. The consequence of such breaches is not automatic forfeiture, however. Loss of licence rights can only arise under s 144, which initially requires a decision by the Secretary (after satisfaction of express conditions) to

bring an application to suspend or cancel, a hearing and an adverse decision by the Commission. Even if breach occurs, the licence would not necessarily be lost.

- 7.35 Although OCL does not wish to surrender its licence under s 147, if it permanently loses access to and control over the premises, it must accept that the loss of access and control makes it vulnerable to breaches of the Act and of licence conditions and to the potential consequences.
- 7.36 A smaller, nominal, gambling area with reduced conditions could potentially reduce the risk of breach, but even that would require OCL to negotiate terms under which it could maintain control over the reduced gambling area. The Applicants have now indicated that they are unlikely to retain control over any part of the Wharf premises to allow for a nominal gambling area. This effectively closes off the possibility of avoiding breach by a reduced gambling area. The Commission accordingly declines the alternative application for a nominal gambling area.
- 7.37 The Commission also notes that changing the conditions of the licence to reduce the possibility of gambling activity materially may face future difficulties in the event of a later application to restore the possibility, because of the general prohibition on increasing gambling opportunities and the express restriction in that regard in the Commission's powers of amendment of licence conditions.

#### *Undertaking*

- 7.38 The Applicants reframed their primary application to constitute a proposal that OCL undertake to the Commission that it would not conduct gambling at the casino for a specified period. The proposal rests on the proposition that the voluntarily given undertaking would not amount to a suspension imposed by the Commission by means of a licence condition amendment. However, the proposition also apparently rests on the unstated assumption that the undertaking (and the consequent period of non-operation) would result in the licence conditions being "inoperative", presumably by operation of law, so they would not need to be suspended or otherwise varied under s 139 to avoid non-compliance.
- 7.39 The Commission is not required to determine whether either the giving of an undertaking not to operate a casino for a period or the fact of non-operation for a period would render associated licence conditions "inoperative" so as not to require compliance. Outside of determinations regarding increases in opportunities for casino gambling under s 12, the Commission has no jurisdiction to make declarations. To issue a determination, such a question would need to arise within the Commission's jurisdiction, such as in the course of a s 144 application. It is not a matter which arises for determination on the present

applications under s 139 and is not a matter on which the Secretary has made submissions. The Commission expresses no view on the matter.

- 7.40 More broadly, however, the Act makes no provision for the giving or receiving of undertakings or for any consequences for a breach of an undertaking. Enforcement of obligations owed by casino licence holders is generally by way of suspension or cancellation under sections 144 to 146. The grounds cover breaches of the Act, licence conditions or minimum operating standards; breach of an undertaking to the Commission is not a ground for suspension or cancellation. The only potential ground arising from breach of an undertaking under s 144 would be lack of suitability to hold a licence having regard to the suitability requirements of s 124. Section 124 includes the honesty of the applicant and any other matter which the Commission considers relevant. They are likely broad enough to support a breach of undertaking as a finding of unsuitability. However, unlike a breach of the Act, conditions or standards, which would normally result in suspension, a finding of lack of suitability would more likely result in cancellation of the licence.
- 7.41 While the provision of a voluntary undertaking differs from a licence condition imposed by the Commission with regard to the characteristic of voluntariness (and is therefore distinguishable from suspension of the right to operate either by virtue of a licence condition or s 144 suspension), that distinction indicates that it would be inappropriate and potentially confusing to record such an undertaking on OCL's licences as suggested by the Applicants. Recording it would leave unclear its legal status. If it were later held to be legally effective (as if it were a licence condition), it could lead to arguments that, on its expiry or withdrawal, there would be a prohibited increase in opportunities for casino gambling.
- 7.42 Ultimately, the Commission considers that accepting an undertaking would offer no clear benefit to the applicant but would lead to doubt and uncertainty. Adding it to the licence would not satisfy the requirements of s 139(2)©.

*A possible solution?*

- 7.43 Having considered the issues raised by the applications, the Commission does not consider that the solution to the Applicants' present difficulties lies in the exercise of the Commission's limited powers to amend licence conditions. However, as noted above, the mere existence of licence obligations which cannot be met does not automatically bring a licence to an end.

- 7.44 Although the Department made no submissions on the important matters of the Commission's jurisdiction and the amended applications, it earlier indicated that it had taken a pragmatic attitude in supporting the original application. The pragmatic consideration was the fact that the casino would not be operating. As the Department supported the Commission altering the licence obligations for pragmatic reasons, it seems to the Commission that, if the Wharf Casino in fact ceased to operate, it may similarly be prepared to adopt a pragmatic attitude to policing and enforcement. If OCL gave an undertaking to the Secretary (without seeking amendment to the conditions of its casino licences) and if operational discretion were pragmatically exercised, as indicated, the Applicants might well achieve their goal of retaining OCL's licences after losing control of the Wharf premises. That is, of course, entirely a matter for the exercise of the Secretary's operational discretion.
- 7.45 Such an approach would leave the conditions of the licence in place, the threat to the loss of the licence by an application to suspend or cancel would be avoided, while future resumption of casino operations at the venue would remain possible without running the risk of a resulting increase in gambling opportunities (since those opportunities would never have been removed).
- 7.46 Irrespective of the Secretary's operational decisions, OCL's licences will remain in force until the earliest of surrender of the licences, expiry of the term (without application for renewal), a decision declining renewal or a successful application by the Secretary for suspension or cancellation under s 144. The first two are in the hands of OCL. The last two depend on whether applications are made in the future to the Commission.

## **8. DECISION**

- 8.1 The Commission approves the application to vary the casino venue agreement, as sought in Amended Appendix 1 and Schedule 2 of Appendix 1, by providing for its termination on expiry of the premise lease or if the premise lease earlier terminates or otherwise comes to an end.
- 8.2 The Commission declines to grant any of the remaining applications, whether in primary or alternative form. It declines to make any amendment to licence conditions which would amount in effect to suspension of the right to operate casino gambling. It declines to remove the usual licence conditions from any licence which is capable at law of being operated. It declines to accept an undertaking by the licensee not to operate the casino (or to record such an undertaking in either licence). It also declines to reduce the gambling area because doing so would not achieve the compliance which the Applicants seek and may create undesirable future complexity.

**9. RIGHT OF APPEAL**

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



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**Lisa Hansen**  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

20 August 2020

