


**IN THE MATTER** of the Gambling Act 2003  
**AND** on application by **OTAGO CASINOS LIMITED** to amend the Deed of Trust for the Wharf casino and to vary a licence condition

**BEFORE THE GAMBLING COMMISSION**

Members: G L Reeves (Chief Gambling Commissioner)  
L M Hansen  
R D Bell  
D C Matahaere-Atariki  
W N Harvey

Date of Application: 13 October 2014

Date of Decision: 5 December 2014

Date of Notification  
of Decision:  December 2014

**DECISION ON AN APPLICATION BY OTAGO CASINOS LIMITED TO AMEND THE DEED OF TRUST FOR THE WHARF CASINO AND TO VARY A LICENCE CONDITION**

**Introduction**

1. Otago Casinos Limited ("OCL") applied to the Commission:
  - (a) to amend, pursuant to condition 14 of OCL's venue licence, the Deed of Trust for the Wharf Casino Charitable Trust; and
  - (b) to vary condition 14 of OCL's venue licence, pursuant to section 139(1)(d) of the Gambling Act 2003 (the "Act").

**Licence condition**

2. The relevant licence condition, with the proposed variations in mark-up, is as follows:

**OCL's venue licence**

14. The Licence Holder shall establish and support financially an independent charitable trust established by the deed of trust, ~~the purposes and objectives of which shall include the funding of measures to prevent or treat gambling disorders, and related activities.~~ The Licence Holder shall pay to the ~~Trust~~ Trust, in respect of each full year of the operation of the Casino, no less than a sum calculated as follows:
  - (a) in respect of the first year of operation, 20% of net profit after deducting (i) tax, and (ii) 15% of \$3 million, being the shareholders' capital contribution to the casino project;

- (b) in respect of each subsequent year of operation, an additional 1% of net profit after the deductions referred to in subparagraph (a) until the figure of 30% is reached;
- (c) thereafter, 30% of net profit after the deductions referred to in subparagraph (a).

~~The deed of trust shall be in a form to be approved by the Authority or the Commission and will include express provision that the objects of the trust and the appointment of individual trustees (and any variation of either provision) shall require the prior approval of the Commission.~~

The Licence Holder is required to provide annually to the Commission, financial year end statements showing its profit/loss position arising from the operation of the casino and any consequential payments it has made to the Trust and confirming that payment by the Licence Holder to the Trust has been made in accordance with condition 14.

### Relevant section of the Act

3. The relevant section of the Act is as follows:

#### 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:

...

- (d) on application by the holder of the casino licence:

...

### OCL's submissions

4. OCL submitted, in summary, as follows:

- (a) Pursuant to condition 14 of the conditions attached to OCL's venue licence, OCL shall establish and support financially an independent charitable trust. The Deed of Trust shall be in a form approved by the Casino Control Authority ("CCA"), or the Commission, and will include express provision that the objects of the Trust and the appointment of trustees shall require the prior approval of the Commission.
- (b) OCL settled the Wharf Casino Community Trust pursuant to a Deed of Trust approved by the CCA, dated 30 June 2004.
- (c) In previous communications to the Commission, SKYCITY indicated that it intends to undertake a review of the Wharf Deed, in a manner similar to the reviews that it undertook for Auckland, Hamilton and Queenstown Deeds in 2012.
- (d) Following these reviews, the Commission approved amended Deeds for the Auckland, Hamilton and Queenstown casinos, the result of which was that Commission approval is no longer necessary for any variations to those Deeds,

nor is SKYCITY's power to appoint trustees to the Trusts subject to any potential restrictions or requirements by the Commission.

- (e) OCL has now completed its review of the Wharf Deed, and identified a number of proposed changes. These changes are modelled on those made to the Auckland, Hamilton and Queenstown Deeds, and include updates to legislative references and the modernising of some procedural rules and powers.
- (f) To the extent that the proposed changes to the Wharf Deed require Commission approval under condition 14 of OCL's venue licence, OCL seeks that approval.
- (g) In conjunction with the proposed amendments to the Deed, OCL also wants to vary licence condition 14 of its venue licence, so that it is consistent with each of the corresponding conditions attached to the venue licences for the Auckland, Hamilton and Queenstown casinos.
- (h) However, unlike the conditions for the Auckland, Hamilton and Queenstown casinos, condition 14 for the Wharf casino does not require the Licence Holder to provide annually to the Commission an audited statement certifying the relevant percentage of net profit of the casino, and confirming that such payment has been made to the Trust.
- (i) OCL is reluctant to propose a variation to include this requirement. The Wharf Trust's principal funding stream, as set out in condition 14, is based on a portion of OCL's profits. OCL has never made a profit, so the Wharf Trust has never received any funding. In these circumstances it would be unreasonable for OCL to incur additional expenditure associated with the provision of audited statements. Instead, and in order to provide the Commission with visibility in this area, it wants to provide annually to the Commission, financial year-end statements showing Wharf casino's profit/loss position and any consequential payments made to the Wharf Trust. The information contained in the financial statements will be sourced from SKYCITY's audited group accounts.
- (j) The equivalent licence conditions for the Auckland, Hamilton and Queenstown casinos also do not create any obligations in relation to the objects of the Trust and the appointment of Trustees.

#### **The Secretary's submissions**

5. The Secretary submitted, in summary, as follows:

- (a) The proposed amendments to licence condition 14 are threefold. OCL proposes:



- (i) To delete the requirement that the Deed include in its objectives the "funding of measures to prevent or treat gambling disorders, and related activities";
  - (ii) To delete the requirement for the Deed to be in a form approved by the Commission including the "express provision that the objects of the trust and the appointment of individual trustees (and any variation of either provision) shall require the prior approval of the Commission"; and
  - (iii) To include a requirement for OCL to report annually to the Commission, financial year end statements attesting to the profit/loss of the casino and any consequential payments to the Trust but not include a requirement, unlike other SKYCITY casinos, that the report be audited.
- (b) He does not strongly object to the first proposal, to remove reference in the licence to the funding of prevention and treatment of gambling disorders, but questions the necessity of its removal. Particular reference was obviously considered important by the CCA in granting the initial licence and its retention would not cause any apparent mischief. However, as it stands, the definition of "charitable purpose" contained in the Deed includes reference to "identifying and addressing negative health and welfare effects arising from gambling". This object appears immutable considering the proviso in clause 10 of the Deed, albeit providing the Courts with the technical discretion to allow an amendment as to the Deed's objects. He notes that the application makes no specific reference to the rationale for this particular change.
- (c) The second amendment to licence condition 14 seeks to remove the Commission's approval mechanism for changes to the Trust's objects and the appointment of trustees. It is apparent from the application that, in 2012, the Commission approved amendments to the Trust Deeds of the other SKYCITY casinos giving effect to similar changes (not reflected in licence conditions). As such, he does not object to this proposed amendment to the licence condition.
- (d) He supports the third proposed amendment requiring the provision to the Commission of financial year end statements and any consequential payments to the Trust. However the statements provided should also be audited, as is the case for the other SKYCITY casinos. OCL has argued that the absence of profits to date means it would be unreasonable for it to incur additional expenditure associated with the provision of audited statements. In its 2013 annual report, the previous owner of the Wharf casino, Lasseters, reported a net loss of AUD\$30,000 on revenue of approximately AUD\$3 million (similar to FY 2012) so,



with SKYCITY's local expertise, a profit may soon be forthcoming. In any event, it also noted that, according to its Annual Report, Lasseters had its OCL accounts audited.

- (e) The provision of audited financial statements provides an important level of transparency and is not an onerous expectation. While the licence conditions governing the charitable trusts at Dunedin and Christchurch casinos contain no corresponding requirement for audited statements, the Commission has the ability under their licence conditions to request that an audit be conducted. Should the Commission be minded to agree with OCL's proposed licence condition 14 as drafted, in the absence of the direct provision of audited financial statements as occurs with other SKYCITY casinos, it may wish to consider adding a licence condition that provides it with similar discretion to institute an audit as exists with respect to Dunedin and Christchurch casinos.

#### **OCL's submissions in reply**

6. OCL submitted, in reply, as follows:

- (a) The Secretary does not strongly object to the first proposed amendment to condition 14, but he questioned the necessity for its removal. He noted that the CCA considered it important and that its retention would not cause any mischief. He also noted that the application itself does not specify a rationale for this proposed change.
- (b) The proposed removal of this reference, and linking the establishment of the Trust to the deed of trust, is consistent with the approach adopted in the corresponding licence conditions for the Auckland, Hamilton and Queenstown casinos, and that is the sole rationale for the change.
- (c) As to the importance placed on this issue by the CCA, the approach adopted by that body was generally to invite licence holders to identify draft conditions for its consideration. It is highly likely that the inclusion of the purposes for which the Trust was to be established was at the behest of the licence holder otherwise one would expect similar provisions to have been included in the licence conditions of all other licence holders. In fact only Dunedin casino has a similar provision.
- (d) Removing the reference to the purposes and objectives of the trust from the licence condition as proposed would have no substantive effect for the reasons noted by the Secretary. The deed of trust includes in its charitable purposes the making of grants aimed at identifying and addressing negative health and welfare effects arising from gambling in the Queenstown Lakes District Area. Those



charitable purposes cannot be set aside without the consent of the Court. Thus the deed provides for the matters specified in the licence condition and amending the condition in the manner proposed has no real significance (other than to align it with corresponding conditions at the other SKYCITY properties).

- (e) It acknowledges the Secretary's submission that the retention of the condition in its current form would not cause any apparent mischief but nor so would its removal. That said, if the Commission is minded to retain the current wording then it would have no real objection.
- (f) It notes the Secretary does not object to the second proposed amendment to licence condition 14, which is the same as that previously approved in respect of other casino venue licence holders.
- (g) In terms of the third proposed amendment, the Secretary supports the provision of statements showing payments to the Trust, but believes that these should be audited, consistent with the requirements at other SKYCITY properties. As noted in the application, there is no existing requirement for the licence holder to provide annual statements to the Commission certifying the amount that has been paid to the trust. The proposed variation was designed to provide the Commission with greater visibility in this area consistent with the corresponding conditions attached to the venue licences for the Auckland, Hamilton and Queenstown casinos. However the rather unique circumstances on which payments to the Trust are premised, and the fact that OCL has never been able to generate sufficient funds to require it to make such payments, suggests that any further requirement to provide audited statements certifying the amount paid is unnecessary and would subject the licence holder to unreasonable expenditure.
- (h) Unlike the Auckland and Queenstown conditions, which specify minimum payments to the respective trusts, and the Hamilton conditions, where the funding formula for trust payments is based on a small percentage of revenue (ensuring payments are made each year), OCL must first generate a net profit after specified deductions before it is required to provide financial support to the Trust. Its failure to do so since the commencement of casino operations in 1999 suggests that the introduction of a new requirement now to provide an audited statement certifying the amount paid to the trust would represent an unreasonable regulatory burden.
- (i) The Secretary is correct in asserting that the OCL accounts were previously audited as required by relevant New Zealand legislation. Following the acquisition of OCL by SKYCITY, there is no legislative requirement for this audit.



However, as part of the audit of the SKYCITY Entertainment Group Financial Statements, all business units within the SKYCITY portfolio are subject to an annual auditing process. While the SKYCITY audit focuses on the Group rather than each property, the audited Group accounts provide the basis for developing year-end financial statements for each property showing their respective profit/loss. The provision of year-end financial statements in respect of Wharf casino together with advice from OCL that it has made any required payments to the trust in accordance with the relevant licence condition should ensure that the Commission has the appropriate level of confirmation regarding compliance with the licence condition.

- (j) The Secretary has proposed that, if the Commission is minded to approve this application in its current form, then it may wish to consider the inclusion of a further condition similar to that adopted in the venue licence conditions applicable to Dunedin and Christchurch casinos which would provide it with discretion to institute an audit of the licence holder's casino business. If the Commission is minded to include such a condition, OCL would have no object to it.

### **Analysis**

7. OCL's application comprised two parts; first, to align its Deed of Trust for the Wharf Casino Charitable Trust with the Deeds in place for the Charitable Trusts at the other SKYCITY casinos, and secondly, make three variations to condition 14 of OCL's venue licence.
8. OCL submitted that the amendments proposed to the Deed of Trust would update the document, as well as removing the need for the Licence Holder to obtain Commission approval in relation to certain (non-contentious) matters under the Deed.
9. Approving the proposed amendments to the Deed raised no issues of regulatory concern for the Commission. The Commission has previously considered similar proposals by SKYCITY in relation to the Deeds of Trust for the Auckland, Hamilton and Queenstown casinos. On each proposal, the Commission approved the variations, including variations which removed the Commission from maintaining an oversight over particular approval decisions, on the ground that the Trusts should be left to conduct their own affairs in the manner that they see fit. The Commission saw no reason to adopt a different position in relation to the Deed of Trust for the Wharf casino.
10. The Commission also approved the amendments to condition 14 as proposed by OCL. The first amendment, to remove the specific reference to the Trust "funding ... measures to prevent or treat gambling disorders," raised no issues of concern for the Commission. As identified by the parties, the terms of the Deed, including the definition of "charitable



purposes”, contains reference to the making of grants “aimed at identifying and addressing negative health and welfare effects arising from gambling in Queenstown Lakes District Area.” The Commission considered that the Trust Deed provisions, which cannot be amended without the consent of the Court, was sufficient to ensure that problem gambling would continue to remain a focus of the Trust.

11. The second amendment to condition 14 also raised no issues of regulatory concern given that the Commission has already determined that it need not retain any oversight over the Trust.
12. In relation to the third amendment, the Secretary supported the proposal, with the addition either of a requirement for the financial statements to be audited, or the inclusion of a licence condition which would allow the Commission itself to institute an audit. In relation to this second option, neither the Secretary nor OCL appeared to be aware that an audit licence condition already exists for the Wharf casino. Condition 19 of OCL’s venue licence provides as follows:
  19. The Commission may at any time request access to the Licence Holder’s internal audit information or institute an audit of the Licence Holder’s Casino business.
13. Condition 19 is identical to the audit licence conditions identified by the Secretary for the Dunedin and Christchurch casinos, and is also present in licence conditions for the Auckland, Hamilton and Queenstown casinos.
14. In any event, the Commission was comfortable with the amendment proposed by OCL. OCL’s licence conditions do not presently require it to provide to the Commission an annual audited statement certifying the relevant percentage of net profit at the casino, and the Commission saw no need to impose such a requirement now. The Commission is satisfied that it will receive sufficient and accurate information from OCL based upon the drafting of the third amendment.

#### **Decision of the Commission**

15. The Commission:
  - (a) approved the proposed amendments to OCL’s Deed of Trust, under condition 14 of OCL’s venue licence; and
  - (b) varied condition 14 of OCL’s venue licence, under section 139(1)(d) of the Act, in the manner proposed. Condition 14 now reads as follows:

14. The Licence Holder shall establish and support financially an independent charitable trust established by the deed of trust. The Licence Holder shall pay to the Trust, in respect of each full year of

the operation of the Casino, no less than a sum calculated as follows:

- (a) in respect of the first year of operation, 20% of net profit after deducting (i) tax, and (ii) 15% of \$3 million, being the shareholders' capital contribution to the casino project;
- (b) in respect of each subsequent year of operation, an additional 1% of net profit after the deductions referred to in subparagraph (a) until the figure of 30% is reached;
- (c) thereafter, 30% of net profit after the deductions referred to in subparagraph (a).

The Licence Holder is required to provide annually to the Commission, financial year end statements showing its profit/loss position arising from the operation of the casino and any consequential payments it has made to the Trust and confirming that payment by the Licence Holder to the Trust has been made in accordance with condition 14.

### Right of appeal

16. Pursuant to section 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.



Graeme Reeves  
Chief Gambling Commissioner

for and on behalf of the  
Gambling Commission

17 December 2014

