GC24/19

IN THE MATTER of the Gambling Act 2003

AND on an appeal by **NEW ZEALAND RACING BOARD** in respect of premises known as TAB Newtown

BEFORE THE GAMBLING COMMISSION

Members:	G L Reeves (Chief Gambling Commissioner) L M Hansen W N Harvey S C L Pearson
Date of Application:	26 June 2019
Date of Decision:	2 August 2019
Date of Notification of Decision:	28 August 2019

DECISION ON AN APPEAL BY NEW ZEALAND RACING BOARD

1. INTRODUCTION

1.1 This is an appeal under section 77(1)(a) of the Gambling Act 2003 (the "**Act**") by the New Zealand Racing Board ("**NZRB**"), against a decision made by the Secretary for Internal Affairs ("**Secretary**") on 18 June 2019 refusing NZRB's application for a new class 4 venue licence for TAB Newtown at 225 Riddiford Street, Newtown, Wellington ("**TAB Newtown**"). A related appeal from an alleged decision to refuse the same application made in a phone call, on 18 April 2019, between the Secretary's staff and NZRB's counsel was dismissed by the Commission on jurisdictional grounds on 5 July 2019.[1]

1.2 The sole substantive issue on this appeal is whether the proposed class 4 venue is part of a place at which another class 4 venue is located. The Secretary declined the application, under section 67(1)(l) of the Act, on the basis that TAB Newtown was part of the same place as the Zoo Bar, another class 4 venue. The two venues share a building with an internal access door between them. NZRB also seeks costs and a censure against the Secretary.

---

1 *Decision on an appeal by New Zealand Racing Board* GC17/19, 5 July 2019.

2. BACKGROUND

2.1 On 25 January 2019, NZRB applied for a new class 4 venue licence to operate seven gaming machines at TAB Newtown at 225 Riddiford Street, Newtown, Wellington.

2.2 Adjacent to TAB Newtown, and within the same building, is an existing class 4 venue, Zoo Bar. Its address is 227 Riddiford Street, Newtown, Wellington. The Lion Foundation is licenced to operate 18 gaming machines at Zoo Bar. TAB Newtown and Zoo Bar share interconnecting glass doors labelled "No Drinks Past This Point". The businesses are on the same certificate of title and have the same landlord, but different street addresses. There is a third business, a Thai restaurant, also located in the same building and adjacent to the other two businesses.

2.3 The covering letter accompanying NZRB's application stated:

> TAB Newtown has been a TAB Board Venue since 1995, and NZRB openly acknowledges that TAB Newtown is adjacent to, and has shared access between, the 'Zoo Bar' located at 227 Riddiford Street, Newtown, Wellington.

2.4 The floorplan submitted with the venue licence application displayed the internal doors between TAB Newtown and Zoo Bar and labelled the internal access as being "through to Zoo Bar".

2.5 On 20 February 2019, NZRB requested by email for the application to be assessed and a pre-approval issued before building work was undertaken. This pre-approval process is a standing arrangement between NZRB and the Secretary to allow building upgrade works to take place on TAB venues before the venue licence is granted. The email stated:

> ...
>
> The gaming room is yet to be built. As per previous new venue applications submitted by the NZRB, we were hoping to have the application assessed to a point whereby the Department would be satisfied to issue a licence but does not issue the licence to allow us to commence building works. The licence is then issued at a further date after a satisfactory inspection carried out by the Department.
>
> This is to ensure we don't breach the Act with respect to non-activity after 28 days of the licence being issued and to avoid incurring the building work costs, should it be unlikely a licence would be issued.

2.6 On 22 February 2019, the venue licence application was pre-approved, subject to a venue inspection (to be arranged by NZRB). The email stated:

> Please be advised that I am now able to provide pre-approval for this application. The approval however, is subject to a satisfactory compliance visit on completion of the gaming area at the proposed venue.

2.7 The Secretary's inspection took place on 25 March 2019. It gave rise to the Secretary's concerns that the venues would be in the same "place", especially having regard to the internal access doors, and the businesses being on the same certificate of title.

2.8 The Secretary, in a decision of 18 June 2019, refused the application because he could not be satisfied, under section 67(1)(l) of the Act, that TAB Newtown would not be part of a place at which another class 4 venue is located. He noted that "place" is defined broadly in section 4 of the Act and includes a building or structure, whether fully or partly constructed. As TAB Newtown is in the same building as Zoo Bar, the venues were in the same place.

3. RELEVANT LEGISLATION

3.1 The key sections are sections 65 and 67. Section 65 of the Act provides, relevantly, that:

> (1) A corporate society may apply to the Secretary for a class 4 venue licence.
> (2) An application must be on the relevant standard form and be accompanied by:
> ...
> (k) if the application relates to a venue for which a class 4 venue licence was not held at the time of commencement of this section, evidence that the class 4 venue is not to be part of a place at which another class 4 venue or a casino is located.

3.2 Section 67 provides:

> (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that:
> ...
> (l) if the application relates to a venue for which a class 4 venue licence was not held at the time of commencement of this section, the class 4 venue is not to be part of a place at which another class 4 venue or a casino is located.

3.3 Section 4 defines "**place**" as including:

(a) A building, structure, or tent, whether fully or partly constructed; and

(b) A room in a building or structure; and

(c) A court or a mall; and

(d) Land; and

(e) A vehicle, vessel, or aircraft; and

(f) A caravan or a trailer or other conveyance.

Section 4 also defines "**class 4 venue**" as "a place used to operate class 4 gambling".

3.4 NZRB's submissions refer to the meaning of conduct under section 5:

> **Extended meaning of conduct**
>
> In this Act, **conduct**, in relation to gambling, includes any of the following activities:
>
> (a) organising, using, managing, supervising, and operating (but not playing) gambling or gambling equipment:
> (b) distributing the turnover of gambling (for example, by paying prizes, meeting costs, or making grants):
> (c) selling tickets to participate in gambling:
> (d) promoting gambling:
> (e) assisting in activities described in paragraphs (a) to (d).

3.5 NZRB's submissions also refer to section 235A which limits its entitlement to seek judicial review of the Secretary's decisions until any appeal right is exhausted:

> (1) A person who has a right to appeal to the Gambling Commission against 1 or more of the decisions specified in subsection (2) is not entitled to apply for judicial review of the decision unless—
> (a) that person exercises that right of appeal; and
> (b) the appeal is finally determined.
>
> (2) The decisions referred to in subsection (1) are—
> (a) a decision by the Secretary to refuse to grant a class 3 operator's licence, class 4 operator's licence, or class 4 venue licence:
> (b) a decision by the Secretary to cancel or suspend a class 3 operator's licence, class 4 operator's licence, or class 4 venue licence:
> (c) a decision by the Secretary to amend or revoke a condition of, or add a new condition to, a class 3 operator's licence, class 4 operator's licence, or class 4 venue licence:
> (d) a decision by the Secretary to refuse to renew a class 3 operator's licence, class 4 operator's licence, or class 4 venue licence:
> (e) a decision by the Secretary to refuse to amend a class 3 operator's licence, class 4 operator's licence, or class 4 venue licence.
>
> (3) In this section, *apply for judicial review* means—
> (a) to make an application for review of the decision under the Judicial Review Procedure Act 2016; or
> (b) to institute proceedings seeking any writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction, in respect of that decision.

3.6 In its submissions, the Secretary refers to the use of the term "place" in five other sections, namely:

> **19 Offences**
>
> A person who does any of the following commits an offence: …
>
> (b) is, without reasonable excuse, at a place where illegal gambling is occurring
>
> …
>
> (h) causes or permits a place to be used for illegal gambling;
>
> (i) advertises illegal gambling –
>
> (i) to inform the public of places where illegal gambling takes place or will take place.
>
> …

334 Power of gambling inspector to enter and demand information

(1) A gambling inspector may, for the purpose of carrying out his or her functions, enter, at all reasonable times, and remain at a place (not being a private residence) –

(a) to which a venue licence applies, or at which a gambling inspector has reasonable grounds to believe that gambling has been, or is being, conducted; or

(b) where the holder, or former holder, of an operator's licence ... has a registered office or keeps records that relate to the conduct of gambling by the holder, or former holder, of the licence.

(2) A gambling inspector must not enter a place under subsection (1) at any time that the place is not open to the public unless –

(a) the entry occurs with the knowledge of the owner or occupier of the place; or

(b) the inspector is accompanied by the owner or occupier of the place, or a representative, agent, or employee of the owner or occupier.

...

(4) A gambling inspector who exercises powers under this section must show his or her warrant of appointment to any person at the place who may be interested in, or affected by, the exercise of those powers.

...

340 Search warrants

(1) A gambling inspector or constable may apply for a search warrant to search a place or thing.

...

(3) The issuing officer may issue a search warrant to a gambling inspector or a constable if there are reasonable grounds for believing that –

(a) An offence has been, or is being, committed at the place or involving the thing;

(b) There is in, on, over, or under the place or thing, any thing that is evidence of an offence.

344 Police may arrest persons found at a place

A constable who is executing, or assisting in the execution of, a search warrant at a place may, without further warrant, arrest any person found at the place if he or she has reasonable grounds to believe that the person is committing, or has committed, an offence.

361 Evidence of Gambling

(1) The presence of gambling equipment at a place is, in the absence of evidence to the contrary, sufficient proof that the owner or occupier of the place was conducting illegal gambling in contravention of section 19(1).

...

4. SUBMISSIONS

4.1 NZRB submitted, in summary, as follows:

(a) Section 4 defines "place" as including both "a building" and "a room in a building". The fact that both venues are in the same building is not determinative. Instead, the "place" in question depends on the facts of the case and the terms of the particular licence. The Commission has previously confirmed that it is permissible to limit a class 4 venue to part of a building.[2] The correct test, derived from the Commission's *Decision on an appeal by Perry Foundation*, is whether the consumer would view the two venues as the same place. In making that assessment, regard must be had to whether the activities in the entire building are co-ordinated so as to appear as one business.[3]

(b) The definition of a "class 4 venue" was amended by the Gambling Amendment Act 2015 from a place used to "conduct" gambling to a place used to "operate" gambling. Operating suggests a narrower scope including having available gaming machines installed in a gaming room, but not organising, managing, supervising and promoting that gambling. The place used to operate gambling at Zoo Bar is different from the place intended to operate gambling at TAB Newtown.

(c) From a consumer's perspective, the two venues are clearly separate businesses that are not coordinated. They have separate street addresses, external entrances names, ownership, leases, management, fit outs, entertaining offerings, services contracts, trading hours and days, and primary activities. The two businesses are independent and have a significant history of being so. TAB Newtown's tenancy is also clearly defined. It is a large square in shape, with four large partition walls and an independent main entrance and address. Both have separate harm minimisation policies and venue managers.

(d) There is an internal door between the two venues, but the door is labelled with a "No Drinks Past This Point" sign. The door is self-closing and lockable. It is not an integral part of TAB Newtown's operation as the vast majority of its customers enter from the street.

(e) There is no overlap between the Zoo Bar's licence and TAB Newtown's proposed or existing licence description. The Zoo Bar's licence is expressly

---

2 *Decision on an appeal by New Zealand Community Trust,* GC 10/05, 26 April 2005 ***[Isobar]***;

3 *Decision on an appeal by Perry Foundation* GC 14/06, 9 June 2006 ***[Perry Foundation].***

limited to its tenancy area, as shown in its floorplan where the TAB Newtown's area is crossed out (as is the restaurant area). It also includes a defined gambling area, which is a narrower area than the tenancy of the bar. Zoo Bar's licence expressly describes the venue as a "tavern". TAB Newtown's proposed area is similarly limited.

(f) NZRB's view is consistent with the High Court's decision in *ILT Foundation v Secretary for Internal Affairs [Waikiwi]*.[4] Both venues have different names and fully independent ownership and management. It is clear to the public that they are separate venues.

(g) The natural and ordinary meaning of "place" includes an area that a person has exclusive occupation or control over, as NZRB has over the TAB Newtown area. TAB Newtown has exclusive occupation and control over its tenancy.

(h) Its interpretation is consistent with legislative intent. The purpose of the restriction is not to prevent multiple gaming venues being established in close proximity, but to prevent the 9 and 18 machine limits being usurped by a single business being granted multiple licences. It does not prevent class 4 venues being located side by side within central business districts. Such concentration is common and positive from a harm minimisation standpoint as it means class 4 venues do not proliferate in suburban areas. Indeed, the Wellington City Council has approved the proposed venue under its policies. If the intention were to ensure class 4 venues were spaced out within a city, the Act would include a provision preventing a class 4 venue being established within a specified distance from another venue.

(i) As section 235A prevents judicial review until the appeal process is spent, the Gambling Commission can rule on judicial review grounds. The pre-approval granted, with full knowledge of the fact that the venues were adjacent with shared internal access, gave rise to a clear legitimate expectation that a venue licence would be granted. The representation was clear that the venue licence would be issued subject only to a routine compliance visit to confirm the layout as per the plans provided. Significant costs have been incurred by NZRB in direct reliance on the pre-approval in anticipation of the licence being granted. Further costs would be incurred in reinstating it if the licence application were refused. It is a breach of natural justice, and clear procedural misconduct, to fail

4 *ILT Foundation v Secretary of Internal Affairs* [2013] NZHC 1330 ***[Waikiwi].***

to give effect to that pre-approval. The Commission should therefore require the Secretary to issue the venue licence.

(j) NZRB alternatively requests that, if the Commission considers that TAB Newtown's proposed licence is not sufficiently detailed to enable the licence to be limited to the 187.52 square metres occupied, it should *de novo* grant a venue licence that is narrowly defined to include only the 187.52 square metres that is leased.

(k) Further, if the Commission considers that the existence of the internal entrance between the two venues is determinative and fatal to the application, NZRB consents to a licence condition being included requiring doors to remain locked and/or the internal doorway being removed.

4.2 The Secretary submitted, in summary, as follows:

(a) The appeal turns on the meaning of "part of a place" under section 67(1)(l). "Place" expressly includes "a building" under section 4. On its face, section 67(1)(l) prohibits two venues in the same building. The question is not whether the businesses overlap (and he accepts that they do not), what the specific licences specify, or what consumers think.

(b) This reading is consistent with controlling gambling growth, preventing and minimising harm, and authorising some gambling but prohibiting the rest (s 3(a)-(c)). It prevents more than the maximum machines being split across multiple venues in the same place, or the creation of a multiple venue casino-like area with internal access between the venues. The presence of multiple venues and high numbers of gambling machines within a confined area such as a single building presents a risk of harm. Here, this would allow 25 gaming machines to be available to a patron without setting foot outside.

(c) Previous decisions on the meaning of "place" or "venue" are of little relevance as they do not involve consideration of section 67(1)(l), but other sections in the Act, in particular concerning venue relocations. There has been no direct consideration by the Commission or any judicial body of the meaning of place within the context of section 67(1)(l). In saying that, the Commission has interpreted "venue" in broad terms, irrespective of the specifics of a venue licence, where context requires it.[5]

---

5 *Decision on an appeal by Air Rescue Services Ltd* GC 35/11, 11 November 2011 **[*Lord Barrington*]**; *Waikiwi*, above n 4.

(d) Even without the internal doors, the two venues would be part of the same place and locking or blocking it does not change this. However, the internal door highlights the risk of allowing multiple venues to operate within a single building.

(e) NZRB's interpretation would mean there would be little practical effect in the "part of the place in which another class 4 venue is located" prohibition. There would be no limit to side-by-side venues provided each licence was limited to part of a particular room within a building. NZRB confuses the meaning of "venue" and "place". The test is not whether one venue is part of another, but whether it is part of the same place. NZRB's position also creates uncertainty, as outcomes would turn on the precise terms of each particular licence. Indeed, it asks the Commission to amend Zoo Bar's licence to ensure that the prohibition in section 67(1)(l) does not apply to TAB Newtown. It emphasises that the Commission has warned against the technical construction of issued licences.[6]

(f) The Secretary referred to other parts in the Act where the word "place" is used in a broader and general sense, for example in sections 19, 334, 340, 344 and 361. These sections, which include search powers and criminal offence provisions, among other things, are important in administering the Act in controlling the growth of gambling and limiting the opportunities for crime and dishonesty associated with gambling and the conduct of gambling. The broad use of "place" in those provisions suggests that a similar wide meaning be given here to fulfil the purposes of limiting gambling growth and harm.

(g) Section 235A does not give the Gambling Commission judicial review jurisdiction. Whether or not there has been a legitimate expectation breach has no bearing on the Commission's function, which is to determine whether the Secretary was right or wrong to refuse the licence. In any case, the Secretary cannot be compelled to grant a licence based on legitimate expectation when section 67(1)(l) prohibits a licence being granted in the circumstances.

4.3 NZRB submitted in reply, in summary, that:

(a) A modest increase in gambling, proportional to population growth, is consistent with controlling growth. Allowing TAB Newtown to host seven machines is not contrary to the purpose of controlling the growth of gambling. Territorial authority consent was sought and obtained from the Wellington City Council, which has adopted a detailed gambling venue policy that expressly sets out the

6 *Lord Barrington*, above n 5, at [39].

number of machines allowed in seven different zones and has, as one of its objectives, controlling the growth of gambling. There is also no statutory mandate to reduce gambling generally, only harm;[7] nor is there evidence to suggest that spacing gaming venues out reduces harm. On the contrary, accessibility, such as proximity to residential areas, is a factor in increasing harm. If Parliament had intended to prevent multiple venues within a building it would not have defined "place" as including smaller areas.

(b) It disagrees with the Secretary that the purpose of section 67(1)(l) is to prevent multiple venues from being established adjacent to one another or in close proximity, creating a large casino-like gambling area. If this were the purpose, the Act would have included a provision preventing class 4 venue being established within a specified distance from another venue.

(c) Section 67(1)(l) retains its effect if NZRB's position is adopted, as the question is still fact-specific. One large business cannot operate multiple gaming licences on a single site. The applicable meaning of "place" in this case is not just the gaming area, but Zoo Bar's whole business. As "place" relates to the business as a whole, and each "place" requires its own separate primary activity, it would not be possible to have unlimited side-by-side individually licenced gambling operations.

(d) A tweak in licencing wording would not allow multiple venues next to each other when the test is a factual assessment about both the licence and the business as a whole, including both the gaming area and where the primary activity is carried out. In any case, NZRB is not asking the Commission to amend Zoo Bar's venue licence but to ascertain what constitutes Zoo Bar's "place" through the factual assessment of the consumer's point of view. Because the "place" relates to the area occupied by the business as a whole, and each "place" requires its own separate primary activity, it would not be possible for an unlimited number of rooms, located side-by-side, with interconnecting doors, to be individually licensed.

(e) The other sections referred to by the Secretary support a limited interpretation of "place", as they concern intrusive powers such as search warrants and powers of entry, as well as offences committed under the Act. Those sections would, on the Secretary's interpretation, give a gambling inspector the right to enter or search into and remain in the Thai Restaurant located in the same

---

7 *Decision on an appeal by the Lion Foundation* GC31/10, 16 December 2010 ***[Kilbirnie Tavern]*** at [20].

building, or enter a different business on a different floor of a building with a class 4 venue within it. NZRB's interpretation of "place" will enable a much more sensible outcome, with authorisation only to access the particular business where gambling takes place.

(f) The offer to close or remove the interconnecting doors does not, as the Secretary suggests, illustrate an illogicality. The test is a factual assessment based on the point of view of a consumer. If the Commission is concerned that the interconnecting doors may result in consumers gaining the impression that both businesses are one common enterprise, the NZRB will close the doors and then remove the doorway to eliminate this impression.

5. ANALYSIS

Jurisdiction and judicial review grounds

5.1 The Commission deals first with the submission that, by virtue of section 235A which limits a potential appellant's right to seek judicial review, the Commission's appeal jurisdiction includes the remedy of judicial review. The Commission did not have powers of judicial review conferred on it by section 235A of the Act.

5.2 The Commission's powers on appeal are set out in section 77. They extend beyond the conventional limits of judicial review. On appeal, the Commission may seek new information and must consider any new information received. Its jurisdiction extends to making a new *de novo* merits assessment of the application.

5.3 The Commission's appeal powers are sufficiently broad that matters that might be considered by the High Court on judicial review, such as legitimate expectation, may be relevant to its appeal decisions. However, legitimate expectation is usually only relevant to the exercise of decision-making power which is conferred broadly enough to amount to an exercise of a discretion. That is not the case on this appeal. The Secretary's decision is the result of a factual assessment which has an automatic legal consequence, which leaves the Secretary with no discretion. Section 67(1) provides that the application for licence must be refused unless the decision maker is satisfied of certain matters. If not satisfied, regardless of what might have been done to create a legitimate expectation of the opposite result, refusal is inevitable. Courts do not give effect to substantive legitimate expectations when doing so would require the decision maker to act contrary to law.[8]

---

8 *Talleys Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 at 48.

The meaning of "place"

5.4 The central issue is the applicable meaning of "part of a place" under section 67(1)(l). That section specifies a matter of which the Secretary (or the Commission on appeal) must be satisfied if the licence is to be granted. Its effect is that a licence must be refused if the proposed class 4 venue is part of the same place as an existing class 4 venue, the Zoo Bar.

5.5 The statutory definition of "place" in section 4 is expressly non-exhaustive. The use of the word "includes" in section 4 means that the relevant place is not necessarily limited to one of the extensive lists of structures and places set out there. The Commission considers that the applicable definition of "place" or "part of a place" depends on a consideration of the facts relevant to the application. It rejects the submission that the mere inclusion of "building" in the list of potential "places" is determinative, any more than the inclusion of "room in a building or structure" would be determinative.

5.6 In the light of the broad and non-exhaustive definition of the term "place", the Commission considers that determining the appropriate application of the term requires a flexible, fact-specific approach.

5.7 In the *Perry Foundation* appeal,[9] the Commission was concerned with other criteria under section 67(1), primarily venue suitability. Accordingly, like appeals relating to relocation,[10] which arise from section 67(1)(f) and the requirements of section 98 for territorial authority consent, the focus was on "venue", rather than "place". As the Secretary says, relocation decisions are not of direct application as they do not directly arise from a reference to "place", but rather to "venue". Although it ultimately determined the appeal on other grounds, the Commission observed in the *Perry Foundation* appeal:

> A "class 4 venue" is defined in section 4 of the Act as "a place used to conduct class 4 gambling". The definition of "place" includes a building and a room (amongst other things). Accordingly, what constitutes the class 4 venue in any given instance will vary from case to case depending on the facts and the terms of the particular licence. As noted by the Commission in its decision *GC10/05*, relating to an appeal by the New Zealand Community Trust, the Secretary has the ability to licence individual parts of a building as class 4 venues, if that is necessary or desirable.

5.8 The Commission considers that determining what constitutes the relevant "place" or "part of the place" under sections 65 and 67 should be approached in a flexible, non-technical manner, taking into account the specific circumstances of the application to achieve the best practical fit. That approach is consistent with declining to treat the manner in which a venue is described in a licence as determinative, as such an approach can produce

---

9 *Perry Foundation*, above n 3.

10 See *Isobar,* above n 2; *Lord Barrington*, above 5; *Decision on an appeal by New Zealand Community Trust* GC 04/19, 26 February 2019 ***[Counties Inn]***.

unpredictable outcomes and encourage highly technical constructions of "venue" and "place".[11]

5.9 While the Commission agrees with the Secretary that decisions relating to whether a venue can relocate are of limited application to the present appeal, the approach adopted in those decisions suggests that the meaning of "venue" or "place" is context specific and may be informed by likely consumer perception. That conclusion is supported by the use of the term "place" in other sections of the Act, as referred to by the Secretary. The meaning of "place" in sections 19, 334, 340, 341 and 361 is clearly intended to depend on the context in which it will be applied.

5.10 While the Act's purposes are generally relevant to questions of interpretation, how "part of a place" should be applied in the present context is not necessarily informed by consideration of the statutory purposes. Minimising harm (not gambling) is a statutory purpose but there is no compelling evidence that adopting one application over another would affect harm outcomes. The statutory purposes also include controlling the growth of gambling and facilitating community involvement in decisions about the provision of gambling, but those purposes are consistent with the decision of Wellington City Council to approve the TAB Newtown venue under a gambling venue policy, which has as one of its objectives reducing gambling harm.

5.11 The Commission could see nothing material to the matter before it in the change in the definition of class 4 venue from "conduct" to "operate" gambling. While "conduct", as defined in section 5, is broader and includes "operate", the distinction has no useful application to the issue in hand. There is no indication in the legislation, or its history, to suggest that Parliament intended to narrow the scope of "place". Ultimately the applicable part of the meaning of "place" within the non-exhaustive list set out in section 4 is determined in the light of the factual circumstances.

5.12 The Commission considers that the Secretary erred in making the assessment required by section 67(1)(l), by treating "place" as "building" because section 4 includes "building" within its definition of "place", when the definition also includes "room in a building". The Secretary should have made a selection from the non-exhaustive list having regard to all aspects of the factual context.

---

11 *Lord Barrington*, above n 5, at [39].

Are the Zoo Bar and TAB Newtown part of the same place?

5.13 The central question for the Commission is whether the proposed class 4 venue (TAB Newtown) is part of a place at which Zoo Bar, another class 4 venue, is located. The surrounding context was largely common ground.

5.14 The Secretary accepted that TAB Newton and Zoo Bar are independent businesses. Their licence terms suggest that they are in different places. There is no overlap between Zoo Bar's licence and TAB's Newtown's existing or proposed licence. The Zoo Bar's licence is limited to its tenancy, with TAB Newtown and the Thai restaurant crossed out. The Zoo Bar's licence also expressly describes the venue as a "tavern", and not more broadly.

5.15 The Commission considers that ordinary members of the public would think that TAB Newtown and Zoo Bar were separate businesses; they have different street addresses, external entrances, names, management, fit out, entertainment offerings, trading hours and days and primary activities. The look and feel of the two venues is distinct. They have operated independently for a considerable period under separate tenancies. With one exception (discussed below), they are physically separated. The TAB Newtown tenancy is clearly defined and separated from Zoo Bar, with four large partition walls.

5.16 The exception is the presence of the internal doors between TAB Newtown and Zoo Bar. The Commission considers that the doors may create an impression in the minds of patrons of either venue that the two premises are part of the same business or associated businesses, or that they have a close commercial arrangement. This element conflicts with other aspects of the two businesses which make them appear separate. In other words, while the look and feel of the two premises diverges in most respects, the shared accessway suggests that the bar, gaming rooms and sports betting areas may be distinct parts of one overall commercial operation, rather than distinct operations. The "No Drinks Past this Point" sign underscores the concern and suggests that what otherwise looks like separate premises comprise a shared or coordinated business.

5.17 NZRB appears to have anticipated the concern, indicating that it is willing to accept a licence condition requiring the doors to remain locked and or the internal doorway being removed. In order to reach a conclusion that the two venues are not part of the same place, the Commission considers it necessary for the access door to be removed completely. The Commission considers that, but for the internal accessway, the TAB Newtown and Zoo Bar are not part of the same place under section 67(1)(l). If the doors are removed, the licence could be granted.

5.18 The Commission's powers under sections 77(4) include confirming, varying or reversing the decision of the Secretary and also referring the matter back for reconsideration. While the Commission's powers extend to reversing the decision and issuing the licence itself with a condition requiring the removal of the connecting door, for the reasons recorded below, the Commission considers that the preferable course is to refer the matter back to the Secretary, under section 77(4)(b), with directions to reconsider the decision in the light of the reasoning set out above.

5.19 The Secretary refused the application by reason of sections 67(1)(l), having made what the Commission considers to have been an erroneous assessment in the circumstances. That is the only matter considered by the Commission on the appeal. Accordingly, it is not clear whether full consideration was given to the other prerequisites for a class 4 venue licence under section 67. Rather than assuming that all other matters are satisfactory, the Commission considers that the Secretary should reconsider the application in full in light of this decision and NZRB's signalled acceptance of a licence condition requiring the internal accessway to be removed. As the application was made in January 2019, the Secretary is asked to undertake the reconsideration with urgency.

6. COSTS

6.1 NZRB sought costs against the Secretary, and an order that he be censured, on the following grounds:

(a) The delay in issuing the decision. The Secretary failed to comply with his commitment in the *Counties Inn* appeal to "improving efficiency in decision-making in the future and to improve processes in the regard".[12] The application has been plagued by delay, indecision and broken promises. The application was a simple one of statutory interpretation with no factual disputes, and clear precedent in favour of NZRB.

(b) Inconsistent decision making, in particularly failing to follow a clear precedent from a case involving the Cambridge TAB. That case involved a similar situation with two venues in the same building on the same certificate of title and with internal access between them. The Secretary declined to cancel the Cambridge TAB's licence because, in summary, the two venues were separate business operations.

12 *Counties Inn*, above n 10.

(c) Failing to act in accordance with the pre-approval given. NZRB emphasises that it openly disclosed that TAB Newtown was adjacent to and shared an internal accessway with Zoo Bar.

6.2 The Secretary submitted:

(a) The total time between application and decision was four and a half months. This was not a case with lengthy periods of inaction or deliberate delay. To the contrary, his Department was actively trying to bring the matter to resolution. While he acknowledges that, in ideal circumstances, the decision would be made more quickly, the delay was not so excessive or exceptional as to warrant costs.

(b) It was not a straightforward application given:

(i) The venues being in the same building.

(ii) The internal access between the venues.

(iii) The need to consider whether a licence condition removing the internal access could enable the licence to be granted.

(iv) The fact that the application could not be progressed until a venue inspection was conducted on 25 March 2019 (a date chosen by NZRB).

(v) The fact that a pre-approval for the grant of a licence was given, the consequences of which were only realised after the on-site inspection took place.

(vi) The demands of a concurrent OIA request requiring significant document collation (over 70 documents) by the same person responsible for processing the application.

(vii) The frequent emails and phone calls from counsel for the NZRB to multiple staff members, ranging from Gambling Inspectors to the Secretary himself.

(viii) The need to seek senior management and legal input before reaching a final decision.

(ix) The fact that a notice of appeal was lodged part-way through the decision-making process, and submissions required from both parties, diverting resources from the application itself.

(c) There is no inconsistency with the TAB Cambridge case. The Secretary in that case also considered that the two venues were in the same place but exercised his discretion not to cancel under section 74 of the Act for reasons set out in his decision of 30 October 2018. The requirement under sections 65 and 67 is mandatory and there is no failure to follow precedent.

(d) He submitted that the pre-approval is not directly relevant to costs as it neither relates to the Secretary's conduct on appeal, nor can it properly be described as conduct which brought about the appeal. The reason the decision is before the Commission is because of the Secretary's decision to refuse the licence, which was not influenced by the pre-approval, but rather the Secretary's view on the correct interpretation of the word "place". Discussion relating to the recovery of costs resulting from the pre-approval should occur outside the appeal process.

6.3 In response, NZRB submitted:

(a) The OIA request was made after the Secretary's staff had advised that the application would be declined and after a letter had been drafted refusing to grant the venue licence.

(b) The majority of emails and calls from Counsel were follow-up communications after timeframes put forward by the Secretary were not honoured.

(c) The Secretary's view on awarding costs is narrow and technical. The Commission has the ability to consider all of the Secretary's actions in reviewing and determining an application that is subsequently the subject of appeal, including in relation to the pre-approval.

(d) The granting of the pre-approval without properly considering the information provided with the application and undertaking the standard due diligence checks is a clear example of procedural misconduct. Several standard key persons checks were not undertaken before the pre-approval was given, and the standard process of obtaining legal advice was not followed. The Secretary admits the pre-approval was given in error and that this caused complications and delay.

(e) NZRB is only seeking a modest contribution to its appeal costs, to deter the Secretary from acting similarly in the future

Should costs be awarded or a censure be imposed?

6.4 The Commission has jurisdiction to determine its own procedures and considers that that extends to awarding costs. The relevant Commission Practice Notes are as follows:

> 33. The Commission will not normally award costs but reserves its right to do so.
>
> 34. Factors which will be relevant in considering whether to order payment of costs, and in fixing the amount of an award, include whether any party, in the Commission's opinion, has demonstrated bad faith or procedural misconduct.

6.5 The leading decision is the *Kilbirnie Tavern* case, where the Commission said: [13]

> [An] award of costs may be appropriate to deter parties from ignoring the Commission's prior decisions and treating them as ineffective. While costs should remain exceptional and will generally involve bad faith or procedural misconduct, the Commission will not restrict itself to considering only conduct during an appeal and, in awarding costs, may take into account conduct which brought about an appeal.

6.6 The Commission is satisfied that no award of costs should be made. This is not an exceptional case for which a costs award would be justified:

(a) While it is arguable that the potential section 67(1)(l) issue should have been apparent on receipt of the application with the result that pre-approval should not have been given without reaching a preliminary conclusion on section 67(1)(l), there is nothing in the Secretary's actions which suggests any bad faith or misconduct.

(b) Awarding costs to deter hasty pre-approvals might incentivise more than care in issuing pre-approvals; it might equally discourage the practice of pre-approvals which appears, in most cases, to be desirable and to promote efficiency.

(c) NZRB's attempts to use pressure to hurry a decision contributed to the delay.

(d) NZRB's appeal has succeeded but the merits were not as clear and obvious as it submits. There was an arguable basis for the Secretary's concerns.

(e) The Commission's consistent approach to costs is that they are not awarded for compensatory purposes but reserved for punitive purposes, to deter bad conduct.

6.7 For the same reasons, the Commission is satisfied censure would not be appropriate and it does not need to consider whether and to what extent it can censure parties appearing before it.

---

13 *In the matter of an appeal by the Lion Foundation Ltd* GC16/11, 15 April 2011 ***[Kilbirnie Tavern]*** at [13].

7. DECISION

7.1 The application is to be referred back to the Secretary for reconsideration in light of this decision. There is no order as to costs or censure.

Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

28 August 2019

GAMBLING COMMISSION