

IN THE MATTER of the Gambling Act 2003

AND on an application by **SKYCITY CASINO MANAGEMENT LIMITED**
to amend a licence condition

BEFORE THE GAMBLING COMMISSION

Members: P Chin (Chief Gambling Commissioner)
M M Lythe
P J Stanley
G L Reeves
M J Richardson

Date of Application: 5 September 2008

Date of Decision: 14 November 2008

Date of Notification
of Decision: 26 November 2008

**DECISION
ON AN APPLICATION BY SKYCITY CASINO MANAGEMENT LIMITED
TO AMEND A LICENCE CONDITION**

Introduction

- 1 SKYCITY Casino Management Limited ("**SCML**") applied, under section 139(1)(d) of the Gambling Act 2003 (the "**Act**"), to vary condition 11 of SCML's operator's licence for the Auckland casino
- 2 Condition 11 provides that the Licence Holder must operate in accordance with approved floor layouts showing the position of gaming tables and gaming machines, and must obtain the approval of the Commission for new floor plans prior to relocating or installing tables or machines in positions not specified in approved floor layouts
- 3 SCML's proposed variation, in mark-up, is as follows:

- 11 ~~The Licence Holder shall operate in accordance with approved floor layouts showing the position of gaming tables and gaming machines. The Licence Holder shall obtain the approval of notify the Inspectorate and the Commission of proposed changes to the floor layout of tables and machines, submitting fresh layout plans when it does so, for new floor plans prior to relocating or installing tables or machines in positions not specified in approved floor layouts. When applying, the Licence Holder must submit fresh plans showing the floor layout for the Gambling Area and details of the proposed CCTV layout for the consideration of the Commission. Any changes must comply with the Surveillance Standard. For the avoidance of doubt, the Licence Holder is not required to obtain the approval of the Commission to reposition tables and~~

machines within the Gambling Area unless the proposed changes involve an alteration of the approved game mixes.

- 4 The proposed variation was intended to enable it to amend its layout of table games and gaming machines following notification of these changes, rather than obtaining Commission approval of any changes. The deletion of the first sentence would have removed much of the operational force and effectiveness of the entire condition. None of the submissions addressed or supported this aspect and the Commission has proceeded on the basis that the proposed deletion was accidental and its potential effect unintended.
- 5 The Secretary for Internal Affairs (the "**Secretary**") and potentially affected persons comprising Ministry of Health ("**MoH**"), Problem Gambling Foundation ("**PGF**"), Gambling Helpline ("**GH**"), the Salvation Army ("**SA**") and Gambling Watch ("**GW**") were notified of SCML's proposal, and invited to make written submissions on it, in accordance with section 140 of the Act. Submissions were made by PGF, SA, MoH and the Secretary.

Submissions by SCML

- 6 SCML stated, in summary, that:
 - (a) It is currently required to obtain the Commission's approval for new floor plans before relocating or installing tables or machines in positions not specified in approved floor layouts. It wants to vary condition 11 of its operator's licence to enable it to amend its floor layout without needing to obtain Commission approval, rather it would notify the DIA and the Commission of the changes.
 - (b) It currently needs to lodge applications for approvals 30 working days before a Commission meeting. This presents challenges for the effective management of its floor layout, requiring a lead-in time of up to eight weeks before it can transition to a new plan. In these eight weeks, further changes are sometimes identified, necessitating the submission of fresh applications, often before the original application has been determined.
- 7 SCML submitted, in summary, that:
 - (a) With a defined Gambling Area, and specific standards governing CCTV for monitoring, the rationale to seek approval before implementing new floor plans is not clear.
 - (b) Its Host Responsibility Programme requires it to assess the impact of proposed changes to the floor layout, including the locations of gaming machines and table games on gambling harm, before determining the suitability of any such proposal.

- (c) Notification of changes should be adequate to alert the Commission and the Secretary to any regulatory concerns
- (d) Notification will remove the forward planning challenges associated with the current lead-in times
- (e) None of its floor plan applications have been declined, or raised any issues of concern
- (f) Regular changes to floor layouts are commonplace at large casinos

Submissions by Problem Gambling Foundation

8 PGF submitted, in summary, that it was opposed to the application as:

- (a) The Commission imposed this condition on all casinos for good reason, and SCML has not provided a good reason to remove it.
- (b) Allowing the application would be contrary to section 139(2)(d) of the Act in that any changes to the layout of table games and machines could permit an increase in the opportunities for casino gambling
- (c) The appropriate regulatory authorities must be given the opportunity and authority to consider a redesign when the consequence could be contrary to the provisions of the Act

Submissions by Salvation Army

9 SA did not support SCML's proposed variation, and offered the following queries and comments:

- (a) Altering the floor layout may lead to an environment that maximises gambling harm
- (b) If prior approval is not required, how are any concerns signalled, and what action could be taken after any change?
- (c) The HRP addresses environmental design and considerations to be applied when assessing changes to floor plans, but there would not be an objective assessment if prior approval is not first sought from the Commission

Submissions by the Secretary for Internal Affairs

10 The Secretary submitted, in summary, as follows:

- (a) While he agrees that the current process is time-consuming and resource intensive, he has concerns with a blanket notification process
- (b) A different proposal could be considered, whereby approval of floor plans is delegated to an individual Commissioner, or the Executive Director, with any contentious matters being referred to the Commission for a full hearing

Submissions by the Ministry of Health

11 The MoH submitted, in summary, as follows:

- (a) It previously opposed a proposal at the Hamilton and Queenstown casinos for mere notification to the Commission of floor plan changes (rather than Commission approval), and maintains that a blanket notification process would be inappropriate as it provides no immediate facility for resolution in the event of disagreement
- (b) It supports the DIA's proposal for an individual Commissioner or the Executive Director having the ability to provide a delegated approval
- (c) If the DIA's proposal is not agreeable to the Commission, the current approval process should be maintained

Submissions in reply by SCML

12 In reply, SCML submitted, in summary, as follows:

- (a) It had no objection to the Secretary's proposal, and noted that there is precedent in licence conditions for certain construction and design changes to be approved by the Executive Director
- (b) Some of the objections of PGF and SA would be met by a delegated approval process which would allow the regulatory bodies to assess and determine the suitability of the proposed changes to the floor plan prior to their implementation

Analysis

13 SCML has applied to vary condition 11 of its operator's licence to enable it to amend its layout of table games and machines by notifying changes to the DIA Inspectorate and the Commission, rather than obtaining Commission approval of any changes, as is presently required. In the alternative, SCML stated that it would accept the Secretary's proposal for the Executive Director or a Commissioner having delegated authority to approve straightforward applications

- 14 The Commission has previously considered whether it should allow floor layouts to be amended by mere notification or delegated approval, but concluded that full Commission approval should be required. SCML's application has brought the matter back before the Commission
- 15 The Commission first considered SCML's proposal for notification of floor plan changes. It rejected the proposed condition for the following reasons:
- (a) First, while the Commission had some sympathy with SCML's submissions about the delay and resources required for uncontroversial applications, there would be inadequate regulatory oversight if the notification proposal were adopted, a point made with vigour by the Secretary, MoH, PGF and SA
 - (b) Secondly, while none of SCML's floor plan applications have been problematic to date, they have all been presented to the Commission against a background that they would be fully considered by the Commission and the DIA for issues such as harm minimisation, or compliance with Host Responsibility Programme obligations. The advantage of requiring an application is that it imposes a discipline on an operator to give these matters proper consideration in advance
 - (c) Thirdly, if there were no prior external consideration of a change, the earliest that the Commission would be likely to consider any issue with it would be in the context of a punitive application for breach of licence conditions, following the occurrence of some serious harm. The Commission did not consider that this would be appropriate because the purpose of the Act includes preventing and minimising harm caused by gambling
- 16 The Commission next considered the Secretary's counter-proposal whereby an individual Commissioner, or the Executive Director, could be provided with delegated authority to approve straightforward applications, with anything of a controversial nature being considered by the full Commission. The Commission considered that this proposal had merit and would address both the oversight concerns expressed above, and the operator's concerns about unnecessary delay
- 17 The Commission saw the control of floor plans as more central to its functions than building construction and design changes, and accordingly preferred that rather than providing delegated approval to either the Executive Director or a Commissioner, approval should be granted by the Executive Director *and* a Commissioner, and amended condition 11 accordingly

Other observation

- 18 The Commission noted submissions made in relation to section 139(2)(d) and "opportunities for casino gambling" and addresses the issues raised in order to enable submitters to better focus their submissions on future applications
- 19 The Commission has developed its thinking about what comprises "opportunities for casino gambling" over several years. From the outset, the Commission noted the legislative decision to modify the initial draft provision, which originally would have prohibited increases in casino gambling, to a prohibition on increasing the opportunities for casino gambling. The change in legislative drafting indicated that increases in actual activity or turnover were not intended to be prohibited. Such a prohibition would have far-reaching effects, requiring casinos to manage operations to existing levels of turnover, banning marketing, customer service or improvements of any kind which would increase customer satisfaction and the appeal of the facilities
- 20 In the course of a declaratory judgment proceeding brought by SKYCITY Auckland Limited and SCML challenging the Commission's interpretation of "opportunities", the Commission filed evidence from Dr Paul Delfabbro which, among other matters, advanced a distinction between opportunities (the theoretically available maximum level of activity) and accessibility or attractiveness (whether people are more or less likely to take up the chance presented). Dr Delfabbro's affidavit stated:
 - 12 Opportunity is a theoretical construct which is concerned with the *potential* (the maximum possible) for gambling consumption rather than with *actual* gambling consumption. Opportunity concerns what is available for potential consumption, not what is actually consumed in any particular circumstances. I would distinguish opportunity from accessibility which, I consider, is concerned with a person's ability or desire to utilise opportunity. Gambling is more accessible where people have to overcome fewer impediments (physical, cultural, social or financial) in order to engage in the activity
 - 13 As a result, opportunity would be increased by the introduction of extra gaming machines at a venue, even if *actual* gambling consumption did not increase following their introduction (for instance because people did not play the new machines or because the existing level of gambling consumption was spread over the existing and additional machines). The point is that the *potential* for gambling consumption would have increased
- 21 The submissions on behalf of the Commission advanced such a distinction and the Commission's view was ultimately upheld, initially by the High Court and subsequently by the Court of Appeal: *Skycity Auckland Ltd v Gambling Commission* [2008] 2 NZLR 182 (CA)
- 22 The Commission has, unsurprisingly, adopted the above distinction in its own decisions. In decision GC10/06 it stated:

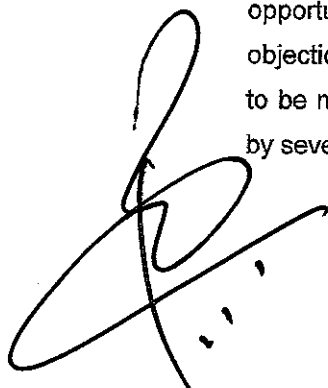
- 20 The Commission has continued to reflect upon its approach to the assessment of opportunities for casino gambling, including considering the view expressed in evidence by an expert witness, Dr Paul Delfabbro, in declaration proceedings currently before the High Court. The Commission considers that there is merit in his view that opportunity is concerned principally with the theoretical maximum level of permitted gambling activity, irrespective of the absolute or relative attractiveness or accessibility of each of those potential activities

and in decision GC36/06 it stated:

- 10 In decision GC10/06 (an application by Otago Casinos Limited for an amendment of licence condition and approval of alternative game mix) the Commission noted that it continues to reflect upon its approach to the assessment of opportunities for casino gambling, and considered there is merit in the view that opportunity is concerned principally with the theoretical maximum level of permitted gambling activity, irrespective of the attractiveness or accessibility of the potential activities

- 23 The Commission sees no reason to depart from its prior reasoned approach and nothing in submissions provide a basis for it to do so. The submissions confuse opportunities (what people have the chance to do) with attractiveness (whether they are more or less likely to take up the chance presented). In the Commission's view, Parliament did not intend to constrain growth in actual gambling activities or turnover. It did not intend to prevent casino operators from maximising the use of the opportunities which already existed, as opposed to increasing the opportunities themselves. The ability to increase attractiveness and turnover is nevertheless constrained by provisions intended to mitigate problem gambling and casinos are not permitted to increase turnover by targeting and facilitating problem gambling. However, problem gambling is gambling conducted by problem gamblers, not simply gambling in any of its forms and the Commission sees no indication in the Act that permit or require it to take steps to limit or reduce gambling activity as opposed to increases in the opportunities for casino gambling or problem gambling.

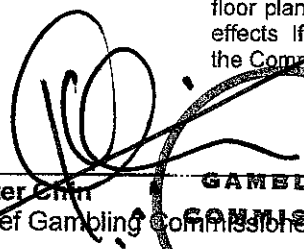
- 24 Some submissions made the error of confusing increases in gambling activity and turnover with increases in opportunity or increases in problem gambling. While the latter would probably increase the former, it is not the case that any increase in the former results in the latter. It follows that the Commission rejects the submissions that permitting casinos to alter layout to place existing gambling products in optimal positions from the perspective of customer demand is an increase in opportunities for casino gambling. The opportunities would remain the same but would be likely to be more utilised, not in itself objectionable. The Commission accepts however that layout changes should not be able to be made without regard to their potential effect on problem gambling, a matter raised by several of the parties making submissions on the proposed amendment.



Decision

25 The Commission decided unanimously to vary, under section 139(1)(d) of the Act, condition 11 of SCML's operator's licence as follows:

- 11 The Licence Holder shall operate in accordance with approved floor layouts showing the position of gaming tables and gaming machines. The Licence Holder shall obtain approval for new floor plans prior to relocating or installing tables or machines in positions not specified in approved floor layouts. When applying, the Licence Holder must submit fresh plans showing the floor layout for the Gambling Area and details of the proposed CCTV layout for consideration. Any change must comply with the Surveillance Standard. The Executive Director and a single Gambling Commissioner may approve the new floor plans if they are satisfied that the floor layout has no potentially adverse effects. If they are not so satisfied, the proposed floor plan must be referred to the Commission for a decision on approval.


Peter Chin

Chief Gambling Commissioner

GAMBLING

COMMISSION

for and on behalf of the
Gambling Commission

 November 2008