

IN THE MATTER of the Gambling Act 2003

AND on appeal by THE LION
FOUNDATION

BEFORE A DIVISION OF THE GAMBLING COMMISSION

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

Date of Decision: 12 November 2010

Date of Notification of Decision: 16 December 2010

DECISION
ON APPEAL BY THE LION FOUNDATION

Appeal

1. The Lion Foundation (the "**Appellant**" or "**Lion**") appealed, under section 77 of the Gambling Act 2003 (the "**Act**"), against a decision by the Secretary for Internal Affairs (the "**Secretary**") to add a special condition to the Class 4 venue licence for the Kilbirnie Tavern, Wellington (the "**Venue**").
2. The special condition (the "**Condition**") is:

Gaming machines must not be capable of being played by people who are in areas where smoking is permitted.

3. The Commission was familiar with the issues raised, having considered whether a similar, but not identical, licence condition should be imposed on this Venue's licence in 2007.

The relevant provisions of the Act

4. The relevant provisions of the Act are as follows:

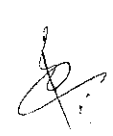
Section 3 Purpose

The purpose of this Act is to –

- (a) control the growth of gambling; and
- (b) prevent and minimise the harm caused by gambling; and
- ...
- (c) facilitate responsible gambling; and
- ..

Responsible gambling means lawful participation in gambling that is –

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



- (ii) without pressure or devices designed to encourage gambling at levels that may cause harm; and
- (iii) by informed participants who understand the nature of the activity and do not participate in ways that may cause harm

Problem gambler means a person whose gambling causes harm or may cause harm

Harm –

- (a) means harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and
- (b) includes personal, social, or economic harm suffered –
 - (i) by the person; or
 - (ii) the person's spouse, civil union partner, de facto partner, family, whanau, or wider community; or
 - (iii) in the workplace; or
 - (iv) by society at large

Section 67 Grounds for granting Class 4 venue licence

- (1) The Secretary must refuse to grant a Class 4 venue licence unless the Secretary is satisfied that –
 - (p) the risk of problem gambling at the Class 4 venue is minimised; and
 - (r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

Section 70 Content and conditions of Class 4 venue licence

- (1) ...
- (2) The conditions the Secretary may add to a Class 4 venue licence include –
 - (g) procedures to encourage responsible gambling at the venue;
 - (h) conditions specifying areas within a Class 4 venue as the only areas permitted for conducting Class 4 gambling;
 - (i) any other conditions consistent with this Act that the Secretary considers will promote or ensure compliance with this Act
- (3) The Secretary may—
 - (a) amend or revoke a condition of a Class 4 venue licence; or
 - (b) add new conditions to a Class 4 venue licence

Section 72 Renewal of Class 4 venue licence

- (1) A corporate society may apply to the Secretary for a renewal of its Class 4 venue licence before the expiry of the licence
- (4) Sections 66 and 67 apply to an application for renewal as if it were an application for a Class 4 venue licence.
- (5) The Secretary must refuse to renew a Class 4 venue licence if—
 - (a) the applicant does not hold the associated operator's licence; or
 - (b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 67; or
 - (c) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, licence conditions, game rules, and minimum standards



Relevant decisions

5. The background to the appeal arises from the effect of the Smoke-free Environments Amendment Act 2003 ("**smoke-free** legislation") on class 4 gambling activity in New Zealand. Section 13B of the smoke-free legislation provides:

13B Smoking in certain gaming machine venues

- (1) The holder of a class 4 gambling venue licence in respect of a place must take all reasonably practicable steps to ensure that no person smokes at any time in any part of the place that is not an open area.
- (2) Subsection (1) does not prevent the holder of a class 4 gambling venue licence in respect of a place from prohibiting smoking in a part of the place that is an open area
- (3) No person may smoke at any time in any part of a place in respect of which a class 4 gambling venue licence is held that is not an open area.

The effect of the section was to ban smoking in class 4 gambling venues **except** in what was defined as an "open area". The intended effect of the Condition is to prohibit gaming machines in those open areas so that there would be a total effective prohibition on gambling while smoking or smoking while gambling at class 4 venues.

6. A similar condition imposed by the Secretary under section 70 in relation to the Venue was the subject of an appeal by Lion to the Commission in 2007. In decision GC03/07, the Commission considered that the Secretary (and Commission on appeal) had jurisdiction under section 70 to impose conditions for harm minimisation purposes. Having decided that the Secretary had imposed the condition for the purpose of minimising harm, the Commission then considered whether the condition was sufficiently beneficial, proportionate and fair to be upheld. The Commission held that it was not, for the following reasons:

- (a) The Secretary's submissions were premised on two assumptions: that the condition would encourage breaks in play, and that breaks in play might help reduce problem gambling. However, the first assumption was not supported by evidence that problem gamblers who smoked would be more likely to take breaks if prevented from smoking while gambling, and even expert evidence regarding the benefits of breaks in play (the second assumption) was qualified.
- (b) Although there had been a reduction in both gambling expenditure and problem gambling presentations following the entry into force of smoke-free legislation, there was no basis before the Commission on which to conclude that the effect of the smoke-free legislation had been greater on problem gambling activity than on gambling activity generally



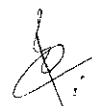
- (c) The evidence did not compare the proportion of class 4 gamblers who were daily smokers with the proportion of class 4 problem gamblers who were daily smokers. It was possible that greater numbers of non-problem class 4 gamblers smoked than other non-problem gamblers, and that the correlation between smoking and problem gambling in respect of class 4 gambling might not be so pronounced, and that the number of non-problem class 4 gamblers might be higher than assumed.
- (d) The Commission was dubious about directing restrictions to correlated activities (smoking) rather than to the activity intended to be affected (problem gambling). This was particularly so given that there were other well-known correlations. In particular, the correlation with alcohol is even greater but, in practice, the provision of alcohol in class 4 venues is effectively compulsory (to avoid the statutory requirement that gambling not be the primary activity)
- (e) The aim of the condition was to retain a perceived benefit arising as an unintended consequence of the smoke-free legislation. Its effect, however, was to ban gambling where smoking was permitted, something that the smoke-free legislation did not endeavour to do. Rather the smoke-free legislation had made express provision for smoking gamblers in "open areas".

7. Ultimately, because the Commission doubted that imposition of the condition would deliver the intended benefit but the detriment to customers who smoked and to the operator was clear, it allowed the appeal.
8. Following the Commission's decision in GC03/07, the Secretary brought declaratory proceedings in the High Court, seeking declarations to answer a number of questions regarding the imposition of conditions. The Court held, in *Secretary for Internal Affairs v Kilbirnie Tavern Ltd & Ors* HC Wellington CIV 2007-485-1988 14 November 2008 ("**High Court Judgment**"), that the only question that was really in dispute was the following:

When imposing conditions on a Class 4 venue licence under s 70(2) in order to ensure that the risk of problem gambling at that venue is minimised pursuant to s 67(1)(p), is the Secretary required to balance that risk against the interests of non-problem gamblers who wish to simultaneously smoke and use gaming machines, or against the inconvenience that may be caused to those patrons as a result of the conditions imposed?

9. The Court held that at [63] as follows:

There can be, in my judgment, little doubt that the operators of gaming machines – and, through them, the community – and gamblers themselves have an interest in gambling being allowed in class 4 venues. At the same time, the Secretary has a duty to ensure that the risk of problem gambling, in particular, is minimised consistent with the way and extent to which the Gambling Act allows such gambling.



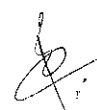
10. The Court made a declaration to that effect at [64]:

Relative, therefore, to the way in which Mr Cooke submitted Question Eight should be answered, in my view the position is that, in considering whether to impose a condition on a Class 4 venue licence under s 70(2) in order to ensure that the risk of problem gambling at the venue is minimised pursuant to s 67(1)(p), the Secretary needs to consider whether the imposition of that condition and its effect is consistent with the scheme of the Gambling Act to the extent that the scheme of the Gambling Act allows gambling to occur in Class 4 venues and that, in doing so, the Secretary is to have regard to the interests of the operators of gaming machines – and through them the community – and gamblers themselves in such gambling being allowed to that extent.

11. The Court declined to offer any view on the nature of the balancing act or the weighting to be given to different factors. The Court held, at [65], that that was an issue better considered in the context of an actual decision and by reference to relevant principles of administrative law as they apply to the Court's review of such decisions.

The parties' submissions

12. In its initial submissions, the Appellant took the view that the Secretary was trying to re-litigate a matter that had already been ruled upon conclusively by the Commission and the High Court. It therefore argued that it was for the Secretary to provide new evidence to support the Condition. Lion submitted that there was no new evidence and that the imposition of the Condition by the Secretary was an abuse of process prompted by the Secretary's refusal to accept the outcome of the two earlier proceedings. Lion argued that, if the Secretary had no new evidence, the Commission must inevitably come to the same conclusion as it did in the earlier appeal. The critical issue, therefore, was whether the Secretary could show any new evidence to support the imposition of the Condition. Lion contended that it should not have to "re-litigate" the matter and that it would seek indemnity costs if it were successful in its appeal.
13. The Commission does not agree with the Appellant's suggested approach to the appeal. Although, in practical terms, the Commission might be unlikely to reach a different conclusion on similar evidence, the Commission is not bound by its previous decision, nor bound to reach the same conclusion in the absence of further evidence. Once seized of an appeal, the Commission is obliged to review the information before it and consider the matter afresh. The Commission's decision on this appeal, therefore, is reached after consideration of all the information and arguments advanced by the parties, not simply "new" matters.
14. Because of the approach taken by the Appellant, the Secretary's submissions provided the structure of the issues on appeal and, together with the Appellant's submissions in reply (which mirrored the structure of the Secretary's submissions), gave rise to the bulk of the argument. The issues fall under two broad categories:



- (a) What is the correct test for considering the imposition of a condition under section 70 following the High Court Judgment?
- (b) Does the evidence support the imposition of a condition?

What is the correct test following the High Court Judgment?

Secretary's submissions

15. The Secretary submitted that the test for the imposition of a condition must be modified from that adopted by the Commission in decision GC03/07 in light of the High Court Judgment. He argued that three related points arose from the High Court Judgment:

- (a) The power to impose a condition under section 70 is inherently interlinked with the mandatory requirements set out in section 67, which are addressed on a renewal application under section 72. The key assessment is inherently constrained by the Act, and ultimately involves a narrow question – is the risk of problem gambling being minimised at the Venue in the absence of the condition?
- (b) There is no additional requirement to address the fairness, reasonableness or proportionality of the Condition. The High Court Judgment limited the consideration of the interests of participants (other than problem gamblers) to the extent that such interests were allowed under the Act. This meant that participants' interests were sufficiently catered for by the fact that the Act allowed gambling at all, despite the risk of problem gambling, and no broader fairness analysis was contemplated. If the evidence demonstrated the possibility of additional problem gambling arising from the reconfigured area, such that the risk was not reduced to the greatest extent practicable given the inherent risk in gambling itself, the Condition was necessary. The only relevant question, therefore, was whether the Condition was imposed for a proper purpose.
- (c) The Secretary does not bear a burden of proof to demonstrate that additional problem gambling will occur, or even that it is likely to occur in the absence of the Condition. The question is whether there is a risk that the historical reduction in problem gambling was a result of the smoke-free legislation. If it is *possible* that the reduction in problem gambling is not the consequence of a *pro rata* reduction in the amount of gambling itself, then the risk of problem gambling is not being minimised. The Secretary further submitted that, if anybody had a burden, it was the Appellant, who needed to prove that the



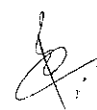
historical reduction in problem gambling shown by the evidence was completely explained by the reduction in gambling *per se*, as it then might be able to demonstrate that the risk of problem gambling was still being minimised at the Venue, notwithstanding the innovation that it had undertaken.

Appellant's submissions in reply

16. The Appellant did not make any submissions in reply to the Secretary's argument regarding the relationship between sections 67 and 70. In relation to the proportionality and fairness question, the Appellant submitted that the Secretary's interpretation of the High Court Judgment was incorrect. The Appellant submitted that Clifford J had expressly declined to rule on the balancing exercise required.
17. Lion argued that the key question remained whether the Commission considered that the potential harm minimisation benefits of the Condition, which would always be limited to smoking problem gamblers, were sufficiently established to justify the restrictions imposed. In response to the Secretary's submissions on the burden of proof, the Appellant submitted that there was a burden of proof on the Secretary to demonstrate that the harm associated with problem gambling would occur in the absence of the Condition. In the Appellant's view, the Secretary was therefore required to establish a causal link between the condition and the prevention gambling.

Discussion

18. The Commission considered that the Secretary's submission relating to the relationship between sections 67 and 70 aimed to address what seemed to be a misconception of the Commission's approach in decision GC03/07. The Commission recognised in that decision that it made no difference whether one focused on section 67 or section 70 and therefore saw it as confusing to focus on a section other than the section that was subject to the appeal. In the Commission's view, the two provisions are indeed related and the issue under section 67 and section 70 reduces to the same question: should the operator be required to prevent customers from gambling where they can smoke in order for the risk of problem gambling to be minimised?
19. The Commission considered that the Secretary's submissions regarding the reasonableness or proportionality test involved a misinterpretation of the High Court Judgment. The Secretary's argument, if correct, would mean that there would be no need for the Secretary (or Commission on appeal) to consider the interests of participants other than problem gamblers, because they were relevantly addressed by the Act's allowing gambling despite the risks of problem gambling. However, in the High Court Judgment, the Court expressly rejected the Secretary's argument that, having



determined the condition imposed was for a proper purpose, that was the end of the matter and no attention needed to be paid to other considerations. The Court made it clear (at [62]) that what was at issue were the considerations that the Secretary (or Commission on appeal) must take into account “*when considering whether to impose a condition*” (emphasis added), and concluded that:

when considering whether to impose a condition . . . the Secretary is to have regard to the interests of the operators of gaming machines – and through them the community – and gamblers themselves in such gambling being allowed to that extent [the extent to which gambling is allowed under the Act].

Although the High Court declined to express a firm view on the nature of the balancing exercise required, it did so in such a way that assumed that a balancing exercise was necessary.

20. The need for the balancing act arises from the tension, recognised in the High Court Judgment, between allowing gambling at all (giving rise to an inherent risk of problem gambling) and the requirement to minimise the risk of problem gambling. The only sure way to eliminate (or minimise to the greatest extent possible) the risk of problem gambling would be to ban gambling altogether. The Commission needs to be careful in deciding upon measures for the minimisation of the risk of problem gambling, that the measures do not simply reduce gambling generally, with a proportionate effect on problem gambling, as such an approach would be inconsistent with the purpose of the Act.

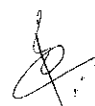
21. The Secretary referred to this tension at several points in his submissions. The Secretary also emphasised, in parts of his submissions, his view that the Condition was specifically targeted at problem gamblers. However, there were several other points of his submissions at which he referred to “the risk of gambling” and the “harm caused by gambling” as opposed to the harm caused by problem gambling. Similarly, the Secretary submitted that, if there were a risk that the historical reduction in problem gambling (assuming one is established) cannot be proven **not** to be a result of the smoke-free legislation, then there would be a risk that problem gambling were not being minimised at the Venue absent the Condition. If the Commission were to adopt the approach that everything that **might** minimise the risk of problem gambling must be done, so long as there was a possibility that the minimisation might not solely be caused by a proportionate reduction in gambling overall, it would logically lead to measures which would effect a major reduction in all gambling, if not an effective ban on gambling.

22. However, the Commission considered that the Appellant’s submissions also overstated the case in relation to the burden of proof. In the Commission’s view, there is no burden of proof on the Secretary to demonstrate that harm will materialise in the absence of the



Condition In making this submission, the Appellant failed to give enough weight to the concept of risk. It is the minimisation of the *risk* of problem gambling, and not simply problem gambling itself, of which the Secretary must be satisfied. Nor, in the Commission's view, was the Secretary required to prove that the focus of the Condition (smoking) had a causative effect on problem gambling.

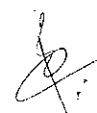
23. The Commission considered that the correct position is that it must be satisfied on the evidence that the Condition proposed by the Secretary was necessary to minimise the *risk* of problem gambling to the extent practicable under the Act. The Commission must be so satisfied, because its power to uphold conditions under section 70(2) on appeal is limited, as is the Secretary's power to impose conditions, to the matters identified in the sub-paragraphs of that section (or, if approached from the perspective of section 67(1)(p), the obligation to refuse to grant or renew the licence reduces to the same assessment). The question whether a condition minimises the risk of problem gambling to the **extent practicable** is informed by a balancing of the relevant statutory objectives and interests. The Commission does not need to be satisfied by the Secretary that the Condition addresses a cause of problem gambling, but evidence of a positive effect on the risk of problem gambling specifically (as opposed to the incidence of gambling generally) is necessary. The Commission may base its finding on any of the evidence before it. However evidence demonstrating how the Condition is likely to minimise the risk of problem gambling or is reasonable is logically more likely to be proffered by the Secretary.
24. Overall, the Commission considered that the test for whether a condition should be imposed involved assessing the likelihood that the measure would reduce the risk of problem gambling and to balance that against its assessment of the detriment that others might suffer in relation to the permitted activity of class 4 gambling, including any diminution of the enjoyment of gambling by the Venue's customers. The Commission considered that the position was as follows:
- (a) There is a power under section 70 to impose a condition for the purpose of minimising the risk of problem gambling.
 - (b) The key issue is whether the operator should be required to prevent customers from gambling where they could smoke in order for the risk of problem gambling to be minimised.
 - (c) If so, the imposition of the Condition would be justified under section 70 and required by section 67. If not, it would neither be justified by section 70 nor required by section 67.



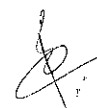
- (d) The answer to the question does not simply involve a consideration of the risk of problem gambling and the mere possibility that a step might reduce the risk. If the proposed measure would affect the interests of non-problem gamblers, operators and, through them, the community, then the Secretary and the Commission must balance the likelihood of the reduction of problem gambling risk (benefit) against an adverse consequence for the other participants (detriment).
- (e) That is the case because it is difficult to differentiate between gambling and problem gambling (other than at an individual level) – if problem gambling is defined as gambling which may cause harm, then the definitions are co-extensive at the level of generic activity (as the Commission is unaware of any form of gambling which carries no risk of harm). There is an inevitable tension between allowing class 4 gambling and minimising the risks arising from it. An absolute and unqualified focus on risk minimisation at all costs cannot be reconciled with the statutory decision to permit class 4 gambling.
- (f) There is no relevant burden of proof, but the Commission must be satisfied that the Condition should be imposed taking into account the factors discussed at (d) above.
- (g) It does not matter that the Commission has made a decision on similar issues in GC03/07. The Commission is required to consider the matter afresh on a new appeal in the light of the submissions and information before it.

Does the evidence support the imposition of the Condition?

- 25. Most of the parties' submissions regarding the evidence to support the imposition of a condition can be summarised under two broad issues:
 - (a) Whether a ban on gambling in open areas at the Kilbirnie Tavern is necessary to minimise the risk of problem gambling at the Kilbirnie Tavern; and
 - (b) The relative impact of the Condition on the Venue's gambling clientele.
- 26. The parties, and in particular, the Secretary, provided a large volume of materials. Rather than attempt to summarise the extensive material in this decision, the Commission refers to it generally in relation to the particular submissions made by the parties.
- 27. The Secretary made the following submissions regarding whether the Condition was necessary:

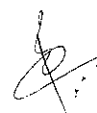


- (a) It is now more difficult than it was before the layout changes for the venue manager to see whether a person is in the Venue in breach of an exclusion order, and more difficult for bar staff to observe whether any of the players of the outdoor machines in the outdoor area may be experiencing difficulty. As a result, the outdoor gambling area is also likely to attract at risk and problem gamblers, whether they are smokers or non-smokers, than the indoor area was before the changes. The evidence from Dr Townshend supports the view that problem gamblers are likely to prefer venues where they cannot easily be observed.
- (b) As far as the Secretary is aware, there were no venues with outdoor gambling areas prior to the smoke-free legislation. There are now seven such venues, including Kilbirnie Tavern. One such venue appears to have been specifically designed so that patrons can smoke while playing the machines in an area that is well inside the premises and "relatively immune to climatic extremes". In the Secretary's view, the Commission's decision in this case, together with venue operators' assessment of the costs and benefits of making the alterations, is likely to determine whether or not there is a proliferation of such venues.
- (c) It is not necessary for the Secretary to prove a causal relationship between smoking and problem gambling. The question is whether there is evidence that there are links between problem gambling and gaming machines and smoking and problem gambling, and whether, by allowing gaming machines that were previously in a smoke-free area to be placed where people can smoke while playing them, the risk of problem gambling (ie the risk of gambling that causes or may cause harm) is increased.
- (d) The outdoor area at the Venue involves an association between two addictive behaviours, which increases the risk of problem gambling. That risk is not diminished simply because the Act contemplates the association of another addictive behaviour (drinking alcohol) with gambling. The risk must simply not be greater than that contemplated by the Act. Thus, although the Act contemplates a certain level of risk inherent in permitting drinking while gambling, this was not the end of the analysis. If a venue operator took an innovation associated with drinking that increased the risk of problem gambling, the risk at problem gambling might well no longer be minimised.
- (e) Because there is no burden of proof on the Secretary, it is not necessary for him to justify the Condition prescriptively but, in any case, the evidence shows that the Condition would assist in minimising the risk of problem gambling.



Requiring gamblers to interrupt their play if they want a cigarette might, and often does, prompt them to reconsider their gambling and decide to stop gambling earlier than they otherwise would have. The Secretary referred to:

- (i) an Auckland University Centre for Gambling Studies review of research into proposed gaming machine changes in New South Wales, which concluded that the modification of note acceptors, if implemented together with the removal of ATMs from close proximity to gaming machines, would be an effective harm minimisation measure;
 - (ii) anecdotal evidence of health professionals to the effect that clients had reported deciding not to continue gambling after stopping to have a cigarette; and
 - (iii) a small experimental study that suggested that even very short breaks in play might effectively offer players the opportunity to reconsider their gambling
- (f) There is evidence that the introduction of smoke-free legislation caused reductions in problem gambling:
- (i) Ministry of Health figures show substantial reductions in help-seeking for problems associated with non-casino machine gambling immediately after New Zealand's smoking ban came into effect. The percentage reductions in help-seeking were much larger than the percentage reductions in non-casino machine gambling expenditure.
 - (ii) Evidence from health providers suggested that fewer people sought first time help for problems associated with non-casino gaming machines following the introduction of the smoke-free legislation. Evidence from one health provider also suggested that a smaller percentage of new clients seeking help were nicotine-dependent following the smoke-free legislation. Dr Townshend gave evidence that at risk and problem gamblers were effectively treated by the smoke-free legislation.
 - (iii) Smoking bans in several Australian states were followed by significant reductions in expenditure and by reductions in presentations. Results from the 2006/07 Queensland Survey revealed that greater percentages of low-risk and problem gaming machine gamblers



reported spending a little or a lot less on gambling following the smoking ban, than did non-problem gaming machine gamblers. A survey from Victoria suggested the ban had little effect on the frequency of gambling for non-problem and problem gamblers but had led to net reductions in frequency for at risk groups.

- (g) The reductions in expenditure and presentations following the smoke-free legislation are unlikely to be the result of other regulatory change because, amongst other things:
 - (i) the reduction in expenditure in New Zealand followed immediately after the smoke-free amendments and after many years of sustained growth.
 - (ii) every gaming machine jurisdiction in Australia that implemented smoking bans immediately experienced large reductions in non-casino gaming machine expenditure, even after years of sustained growth, and whether or not there were other regulatory changes at the time; and
 - (iii) the greatest reduction in the number of licensed non-casino gaming machines occurred immediately after Gambling Act came into force in September 2003, yet expenditure on the machines continued to rise until December 2004, when the smoke-free amendments came into force.

28. The Appellant submitted, in response, as follows:

- (a) Any submissions or evidence relating to venues other than the Kilbirnie Tavern are irrelevant.
- (b) There is no requirement that machines be in direct line of sight of the main working area of the bar. In fact, the Department's Operational Policy for 2009 anticipates that machines within a gaming room will be out of direct line of sight by providing for regular "sweeps" of the gaming area.
- (c) The expert evidence from the Secretary is equivocal and does not confirm any causal link between banning simultaneous smoking and class 4 gaming, and a reduction in problem gambling.



- (d) Dr Abbott's evidence mentions a correlation between smoking and problem gambling but does not provide any evidence to support a causal link between the Condition and a reduction in problem gambling.
- (e) Dr Abbott also repeats his earlier comments that he would like to see more research on the relationship between smoking and smoking bans, and gambling, problem gambling and help-seeking.
- (f) The evidence from Ms Ferguson repeats the evidence that she gave in the earlier Kilbirnie Tavern appeal. Her evidence is inconsistent with other statements that she has made about gambling and help-seeking presentations – in 2008 she stated that smoking gamblers appeared to have readjusted their behaviour and that breaks in play no longer represented a significant disruption to them.
- (g) The Act does not address any aspect of smoking while gambling – there is no restriction in the Act on simultaneous smoking and gambling.
- (h) The Secretary submits that it is not incumbent on the Commission to determine whether smoking causes gambling related harm, or even whether smoking causes problem gambling, or vice versa. That is not the issue. The issue is that the Secretary must demonstrate a causal link between the banning of simultaneous smoking and gambling and a corresponding minimisation of the risk of problem gambling.
- (i) The Secretary's proposition that "the Commission need only determine whether the condition and its effect are consistent with the scheme of the Act" is simplistic and would lead to absurd and unlawful results if taken to its logical conclusion. On the Secretary's approach, he would be required to impose a condition based on personal characteristics associated with an increased risk of problem gambling, such as age, ethnicity and gender.
- (j) The essence of the Secretary's argument is the same as his arguments in the earlier appeal; namely that there is a "correlation" between smoking and problem gambling and that a decrease in help-seeking presentations and gambling expenditure is evidence of a corresponding decrease in problem gambling. However, the Secretary has not demonstrated a correlation between smoking and problem gambling as actual evidence of causation. A decline in help-seeking does not prove a decline in the presence of problem



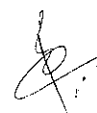
gambling. Nor does a decline in gaming machine expenditure prove a corresponding decrease in the presence of problem gambling

- (k) The Secretary relies upon a number of studies to assert a link between a smoking ban and a reduction in problem gambling. However it is significant that those studies fall short of establishing a causal link and show that causation is a more complex issue.
- (l) The 2010 Australian Productivity Commission report is used by Mr Markland to summarise the Secretary's belief that the smoking bans have caused a reduction of expenditure. However the Productivity Commission has reservations about such a conclusion, and was unable to conclude that the smoking bans have reduced problem gambling

29. The Secretary's submissions and evidence generally consisted of deductions from statistics regarding the reductions in expenditure and presentations following the smoke-free legislation. There was some evidence other than such deductions, for example, the evidence in the affidavits of some health professionals to the effect that clients have cited the smoking ban as a reason for no longer needing an appointment. Similarly, the results of the 2006/07 Queensland survey (see paragraph 26(f)(iii) above), which asked whether spenders had changed their spending as a result of the smoking ban, was positive evidence of the effect the smoking ban on particular groups of gamblers. However, such evidence formed only a small part of the Secretary's overall argument.
30. The Commission considered, as it also noted in decision GC03/07, that there was a great deal of evidence both in New Zealand and Australia that showed that the imposition of smoking bans resulted generally in an immediate reduction in gambling expenditure in casinos and class 4 venues and in presentations from persons citing class 4 gambling as their primary mode of gambling.
31. The smoke-free legislation was enacted in December 2004. According to statistics compiled by the Department, the total expenditure from non-casino gaming machines reached its peak in 2004 at \$1,035m (estimated using gaming duty figures and information from the Department). In 2005 that figure dropped to \$1,027m and in 2006 to \$906m. The number rose (to \$950m) in 2007, then fell to \$938m in 2008 and \$889m in 2009. Casino expenditure also fell from a peak (of \$484m) in 2004 to \$472m in 2005 then rose (to \$493m) in 2006. The annual total of casino gaming machine expenditure in the subsequent years, 2007-2009, remained in the range, \$465m to \$477m.



- 32 The years following the smoke-free legislation also saw a drop in presentations to health providers by clients reporting non-casino gaming machines as their primary mode of gambling. However, the Commission noted that the smoke-free legislation was unlikely to be the only environmental change that might have contributed to the reduction in presentations. In particular, the Ministry of Health has in the last 7 years invested considerable resources in a public health initiative addressing problem gambling and, as part of that, considerable changes were made to way in which presentations were reported.
- 33 The issue for the Commission was, as it had been in decision GC03/07, whether the reductions were likely to be a proportional reflection of the reduction in expenditure overall or the result principally of a reduction in problem gambling. It is only if the latter is the case that the statistics suggest that conclusion might help to minimise problem gambling specifically. If the former were the case, the statistics would not support the imposition of the Condition, because the cause of the reduction in problem gambling would simply be the overall reduction in gambling activity. The rationale for the Condition would, in turn, be that reducing gambling overall reduces problem gambling, which would not be a legitimate basis for the Condition. Taken to its logical conclusion, any condition that would have the effect of reducing gambling overall could be justified as minimising the risk of problem gambling, but this would be inconsistent with the purpose of the Act, which permits class 4 gambling.
- 34 The Secretary recognised this distinction and attempted to address it by reference to the following evidence:
- (a) The percentage reduction in presentations in the 2005 statistics was greater than the percentage reduction in expenditure.
 - (b) Problem gamblers contribute to a disproportionate share of problem gambling expenditure overall (therefore reductions in expenditure overall are likely to come disproportionately from problem gamblers).
 - (c) Similar reductions in expenditure and presentations occurred in Australian states.
- 35 The Commission found it difficult to draw much from the comparison between the percentage reductions in presentations with the percentage reduction in expenditure in 2005. It seemed from the evidence provided that the periods for comparison were not the same. Moreover, although class 4 presentations fell by 26% by number, they fell far less by proportion, remaining approximately 75% of total presentations. The



Commission was also reluctant to assume that reductions in presentations correlated to reductions in problem gambling, given that it is generally accepted that presentations are a small, and possibly unrepresentative, proportion of the total population of problem gamblers

36. The Commission did not think that the fact that problem gamblers may contribute a disproportionate share of total gambling expenditure necessarily meant that any reduction in gambling expenditure must have disproportionate beneficial effect on problem gamblers. Such an analysis effectively equates gambling with problem gambling and would lead logically to measures to reduce gambling overall because of the disproportion.
37. The results from Australian surveys and analyses were mixed. Victoria, Queensland and New South Wales data all show reductions in presentations following the introduction of the smoking ban. However, the Victorian report cautioned that the estimated effect of the smoking ban was uncertain and, in relation to the New South Wales and Queensland data, there was no analysis to suggest that the smoking ban particularly affected problem gambling as opposed to gambling overall.
38. The Commission was also concerned that the Condition rested on the unverified assumption that the compulsion to smoke (for smoking problem gamblers) would override the compulsion to gamble. The Secretary submitted that the Condition would have more of an impact the more problematic the gambling behaviour. In the Commission's view, however, the likely effectiveness of a smoking ban to achieve breaks in play would be inversely proportionate to the seriousness of an individual's gambling addiction; the greater the gambling addiction, the less likely it is that the desire to smoke will compel a person to interrupt play in order to smoke a cigarette. The Condition would seem more likely to interrupt the play of those without serious gambling compulsions. The Commission noted that Mr Markland, upon whose affidavit the Secretary's submissions relied heavily, appeared to reach a similar conclusion at paragraphs 415 and 423 of his affidavit, stating for example, at para 415 in relation to one of the Queensland surveys:

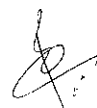
As might be expected, those who are already problem gamblers have shifted far less than those who are non-problem or in either of the two at risk groups

39. The Commission repeats the doubts that it expressed in decision GC03/07, that the targeting of correlatives for problem gambling, rather than problem gambling itself, was an effective means of addressing problem gambling. If there were compelling evidence that breaks in play helped to minimise the risk of problem gambling, the Commission would expect to see conditions directly requiring breaks in play. This would be a much



more justifiable approach than imposing a measure that only hopes to induce breaks in play by smoking gamblers whose compulsion to smoke is stronger than their compulsion to gamble. Nor did the Commission accept the Secretary's argument that the benchmark for the minimisation of harm was the level of harm contemplated by the Act. The Commission rejected such an argument in decision GC03/07; it does not consider that the Act provides a right to maintain the same level of harm as before. In any case, the argument is not helpful to the Secretary as smoking while gambling was contemplated at the time of the Act, prior to the smoke-free legislation

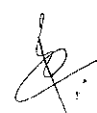
40. The Commission also noted, as it did in decision GC03/07, that the smoke-free legislation provides for the possibility of smoking while gambling. The Amendment Act banned smoking indoors at class 4 venues but specifically allowed for smoking in open areas at class 4 venues. For this reason, the High Court noted at [63] of the High Court Judgment, that the scheme of the legislation would appear to allow, and perhaps even contemplate, that class 4 gambling and smoking may co-exist in open areas.
41. Standing back from the detail, the Commission was struck by the lack of focus in the submissions and evidence on the risk of problem gambling at the Venue. The Secretary's evidence was largely directed at the national effect of the smoke-free legislation as if the facilities at the Kilbirnie Tavern could be extrapolated nationally. No evidence was presented about the history of problem gambling at the Venue nor about the impact of the smoke-free legislation and the subsequent introduction of the current open air facilities on the incidence of problem gambling among the clientele. Nor was evidence directed at the pattern of behaviour of the Venue's clientele and the use of the current facility for outdoor gambling. No consideration seemed to have been given to potential positive aspects of open air gambling from a harm minimisation perspective. Concern is frequently expressed about the problems which arise from facilities which are dark and dingy. Neither of these attributes applies to the facilities under discussion. It may be reasonable to expect a higher standard of vigilance by operators about unbroken periods of play in such facilities.
42. Having regard to the totality of the evidence before it, the Commission considered that the Condition imposed by the Secretary would not materially reduce the risk of problem gambling at the Venue (or elsewhere for that matter) and that it was neither necessary to meet the requirements of section 67(1)(p) nor justified by section 70, especially when the following is taken into account.



The impact of the Condition on non-problem gamblers relative to the impact on problem gamblers

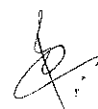
43. The Secretary submitted as follows:

- (a) Mr Markland's affidavit detailed evidence demonstrating that the Condition was likely to have a negligible impact on recreational gamblers as long as their gambling behaviour remained non-problematic. Conversely, it demonstrated that the Condition was likely to have a substantial impact on any smoker who was a class 4 gambler whose gambling behaviour was problematic. Therefore the Condition was precisely targeted at the risk of problem gambling albeit only for those class 4 gamblers who also smoke.
- (b) The Condition would have no impact on gambling behaviour unless a person was both a smoker and a class 4 gambler. Its impact on anyone who was both a smoker and a class 4 gambler would be negligible unless that person both smoked at least moderately heavily and played machines both frequently and for long periods of time. This was because someone who was a heavy player but a light smoker could readily fit his or her smoking around playing. Conversely, someone who was a heavy smoker but a light player could readily fit his or her playing around smoking.
- (c) The Condition would have a negligible impact on non-problem gamblers because the vast majority of them do not play machines at all. Of those non-problem gamblers who do play class 4 gaming machines, only a small percentage played the machines frequently, only a small percentage played machines for long periods at a time, and only a "miniscule" percentage is likely to play both frequently and for long periods at a time. Further, many non-problem gamblers who play class 4 gaming machines do not smoke, few smoke moderately heavily and virtually none smoke very heavily. Mr Markland calculated that, even without taking into account the frequency or typical length of gaming machine sessions, non-problem gamblers made up only 64% of those who had played a non-casino gaming machine at least once in the past year and smoked more than 10 cigarettes a day.
- (d) The position is the converse for at risk and problem gamblers. The great majority of at risk and problem gamblers play non-casino gaming machines. Further, many of those who play non-casino gaming machines play frequently and play for long periods and smoke. Moreover, many of those problem gamblers who smoke, smoke at least moderately heavily. Indeed, the percentage of non-casino gambling machine gamblers who are daily smokers



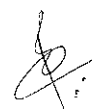
increases with problem gambling status, as does the percentage who are moderately heavy smokers

- 44 The Secretary referred to a number of studies from New Zealand, Australia and Canada to support the propositions that problem gamblers and at risk gamblers play non-casino gaming machines more frequently and for longer periods of time than non-problem gamblers and that problem gamblers are more likely to smoke.
- 45 Surprisingly, the Appellant did not make submissions in response to the Secretary's argument that the Condition would have very little impact on the venue operator and non-problem gamblers. The Appellant submitted that, because the Secretary had not identified a causal link between smoking and problem gambling, the balancing exercise did not fall for consideration on this appeal.
- 46 The Appellant is fortunate that the Commission has made the assessments that it has concerning the likely impact of the Condition, because its submission is flawed. It was not necessary for the Secretary to establish a causal link between smoking and problem gambling. The Commission would have expected the Secretary to demonstrate a positive correlation between the Condition and a likely reduction in or minimisation of problem gambling. While the Secretary did not produce convincing evidence regarding a causal link between smoking and problem gambling, he provided some evidence of a correlation and the question of proportionality therefore arose. The Commission did not think that the Secretary was precluded from taking the approach that, although the positive effects of the Condition might not be convincingly demonstrated, this might be counterbalanced by the fact that the Condition was unlikely to affect non-problem gamblers and operators so that it would be justified even if the likely benefits were minimal.
47. However, notwithstanding the failure of the Appellant to address the issues properly, the Commission considered that the Secretary's argument concerning the negligible impact of the Condition prohibiting gambling in open areas on non-problem gamblers suffered from some serious problems. The Secretary assumed that the context in which to compare the relative effects on participants in gambling was not at the Venue but rather within the total spectrum of gambling in New Zealand. The Secretary began by comparing the percentage of all non-problem gamblers affected. Because very few non-problem gamblers play on non-casino gaming machines, it is unsurprising that the percentage of that total which he estimated would be affected was small. Even when comparing the likely effect on non-problem class 4 gamblers specifically, with the likely effect on problem class 4 gamblers, the Secretary focused on the effect on non-problem class 4 gamblers generally in their lives and not when they were at a venue gambling.



Thus his submissions were based on the assumption that only those non-problem gamblers who played class 4 gaming machines frequently would be affected. Just as was the case with the contended benefits, at no point was the analysis of detriment focussed on the Venue

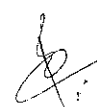
48. The Secretary recognised in his submissions that, given that the non-problem gaming machine gambler group was so much larger than the at risk and problem groups, even a very small percentage of the non-problem group might be a larger number than very large percentages of the at risk and problem groups. He addressed this with the submission that 62.7% of frequent non-casino gaming machine gamblers were at risk or problem gamblers. This figure was based on the result of a 2006/07 Queensland survey, in response to which 62.7% of those who played non-casino gaming machines at least once a week answered that there had been a day in the previous year when they had overdone it
49. However this analysis assumes that the relevant effect is on gamblers generally rather than on persons actually gambling at the Venue affected by the Condition. The assumption is that only frequent gamblers will be affected because only frequent gamblers will frequently be (potentially) subject to the Condition, whereas infrequent gamblers will be less affected in their daily lives. Just as the potential benefits of a single venue condition have been overstated by national extrapolation, the potential detriment has been similarly understated by such extrapolation.
50. The Commission considered that the appropriate basis for comparison was not the total population of gamblers, but rather those who were likely to be affected by the Condition at any given time, regardless of whether the individuals affected while gambling are frequent gamblers or not. As noted at paragraph 41 above, the Commission was disappointed at the lack of evidence specific to the Kilbirnie Tavern. The Commission considered that, given the Condition was imposed in order to minimise the risk of problem gambling at the Venue, the Secretary's submissions and evidence should have been more focused on the Venue specifically. Little of the evidence dealt specifically with the situation at Kilbirnie Tavern.
51. The Commission also considered that the Secretary took too narrow a view of what might constitute an adverse effect on the affected gamblers. The Secretary's submissions assumed that the only way in which a non-problem class 4 gambler would be affected by the Condition would be through compulsion to cease gambling in order to have a cigarette. In other words, the Secretary assumed that a non-problem smoking gambler would only be affected by the Condition if he or she could not manage his or her smoking cravings while gambling. Approaching the issue simply as a matter of



competing compulsions overlooks the fact that gambling is a form of entertainment, undertaken for pleasure, that some of a venue's clientele may enjoy combining gambling and smoking and prefer that to separating those activities and that this preference does not of itself make them problem gamblers (any more than a preference to smoke while consuming alcohol would make them alcoholics). The Condition seeks to prevent customers of the Venue combining two lawful activities undertaken for pleasure. The fact that the outdoor gambling facility exists and is utilised indicates that it has value to the Venue's clientele and therefore to the venue operator (and thereby to the community). The Commission is surprised that neither party focussed on the likely effects which would be experienced by those attending and operating the Venue.

Conclusion

52. For the reasons set out above, the Commission has concluded that the Condition is not appropriately imposed and allows the appeal. In the Commission's view, the Condition is unlikely to have any materially beneficial effect on the risk of problem gambling at the Venue but its imposition will detract from the enjoyment of the Venue's customers who like to be able to play gaming machines in open areas, where they are permitted by law to smoke. Interfering with the enjoyment of customers carrying out lawful activities for entertainment and thereby with the interests of the operator and, through it, the community, should only be contemplated if it offers tangible benefits. In the Commission's overall assessment, that is not the case here.
53. The Commission considered that the potential benefits and detriments of the Condition should be assessed primarily by reference to the Venue. The basis for the imposition of a condition at a venue is for the minimisation of the risk of problem gambling at the Venue, not at class 4 venues generally. For this reason, much of the evidence regarding the proportion of all class 4 gamblers likely to be affected was irrelevant and understated the detriment, much like the evidence and submissions tended to overstate the potential benefits.
54. While the primary focus of the assessment should be on the Venue, the Commission considered that it was appropriate to have regard also to the precedent effect of the Kilbirnie Tavern decision and its open air facilities on potential developments at other class 4 venues. Although more than three years have elapsed since the decision in GC03/07, the evidence is that the Venue is one of only seven class 4 venues in the country with open area gambling facilities. The Commission did not consider that the outcome of the present appeal would be likely to have significance for many other venues.



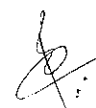
55. The Commission's view of the appropriateness of the Condition does not prevent the Secretary from dealing with concerns about the specific implementation of open area facilities, including such matters as visibility of the gaming machines to staff (a matter referred to in paragraph 26(a) above). If the introduction of open area facilities at a particular venue causes specific concern about the risk of problem gambling at the venue, the imposition of something like the Condition may be appropriate
56. What the Commission does not expect to see in the future, however, is the imposition of similar conditions based simply on the sort of generic thinking that underlies the decision to impose the Condition in this appeal. The Commission considered that the Secretary was attempting, by the imposition of the Condition at the Venue, to effect a change that was essentially legislative in nature. Although the Secretary recognised at parts of his submission that the issue was whether the condition was necessary to minimise the risk of problem gambling at the Venue, the nature of much of the submissions and evidence appeared directed at achieving a form of national regulation to close off a statutory exception created by the smoke-free legislation.

Costs

57. The Appellant indicated in its submissions that, if the appeal were allowed, it would seek indemnity costs on the basis that the Secretary was trying to relitigate the matter and the Secretary's participation in the appeal was an abuse of process.
58. The Commission's Practice Note deals with costs at paragraphs 38 and 39:
38. The Commission will not normally award costs but reserves its right to do so
39. Factors which will be relevant in considering whether to order payment of costs, and in fixing the amount of an award, will include whether any party, in the Commission's opinion, has demonstrated bad faith or procedural misconduct

It has previously dealt comprehensively with its approach to awards of costs in decision GC 03/06

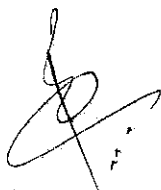
59. As the Commission has allowed the appeal and the Appellant has indicated an intention to seek costs on an indemnity basis, the Commission makes the following directions:
- (a) The Appellant is to file written submissions on the issue of costs by 21 January 2011.
 - (b) The Secretary is to file written submissions in response by 28 January 2011.
 - (c) The Appellant may file submissions strictly in reply by 4 February 2011



60. The issue of costs will be dealt with by a different division of the Commission as the terms of two of the members of the division will come to an end before the foregoing timetable is concluded.

Decision

- 61 For the reasons already provided, the Division allows the appeal and makes directions for the determination of costs.



Peter Chin
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission



16 December 2010