

IN THE MATTER of the Gambling Act 2003
AND of a proposal by **SKYCITY CASINO MANAGEMENT LIMITED**
to introduce Keno at the Auckland casino

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
P J Stanley
L M Hansen
R D Bell
A K Foote

Date of Decision: 7 December 2012

Date of Notification
of Decision:  December 2012

**DECISION
ON A PROPOSAL BY SKYCITY CASINO MANAGEMENT LIMITED
TO INTRODUCE KENO AT THE AUCKLAND CASINO**

Background

1. SKYCITY Casino Management Limited ("**SCML**") proposes to introduce Keno at the Auckland Casino. In 2010, it wrote to the Commission seeking the Commission's views on whether the addition of Keno to its existing games would increase opportunities for casino gambling. SCML stated that it was of the view that it would not be an increase in opportunities but considered that it would be prudent to obtain the Commission's view because the issue had not previously arisen. Before the Commission considered the proposal, SCML withdrew its request. It now wishes to revisit the matter. SCML submitted again that the introduction of Keno would not lead to an increase in opportunities for casino gambling but, as the matter had not been considered before, it sought the Commission's views. Because SCML sought the Commission's views on whether the proposal would lead to an increase in opportunities for casino gambling, the Commission has treated the request as a reference to it under section 12(1) Gambling Act (the "**Act**").
2. The Commission, in turn, sought the views of the Secretary for Internal Affairs ("**Secretary**"), Dunedin Casinos Management Limited, Christchurch Casinos Limited ("**CCL**"), Otago Casinos Limited, Lifeline, Problem Gambling Foundation ("**PGF**"), and the



Salvation Army. The Commission received submissions from the Secretary, CCL and PGF.

Relevant law

3. The relevant law is as follows:

Gambling Act 2003

11 No increase in casino gambling

A person must not increase the opportunities for casino gambling.

12 What is increase in casino gambling

- (1) Decisions on what constitutes an increase in the opportunities for casino gambling are a function and responsibility of the Casino Control Authority, until section 297 of this Act comes into force, and of the Gambling Commission after that.
- (2) An increase in the opportunities for casino gambling includes but is not limited to—
 - (a) an increase in the number of gaming machines unless the increase is accompanied by a reduction in the number of table games that the Casino Control Authority, or the Gambling Commission, believes is proportionate;
 - (b) an increase in the number of table games unless the increase is accompanied by a reduction in the number of gaming machines that the Casino Control Authority, or the Gambling Commission, believes is proportionate;
 - (c) an increase in total player space at table games unless the increase is accompanied by a reduction in other opportunities for casino gambling that the Casino Control Authority, or the Gambling Commission, believes is proportionate.
- (3) Opportunities for casino gambling are not increased—
 - (a) by increases, in the Auckland casino, that comply with the Order for the Variation of Conditions of Casino Premises Licence dated 6 December 2002;
 - (b) by gambling conducted by the New Zealand Racing Board referred to in section 120.

139 Condition of casino licence

- (1) The Gambling Commission may specify the condition of a casino licence or vary or revoke the conditions of a casino licence on the following circumstances:
 -
 - (d) on application by the holder of the casino licence;
 - (e) on its own initiative or on the request of the Secretary.
- (2) A condition of a casino licence specified under subsection (1)-
 - ...
 - (d) Must not permit an increase in the opportunities for casino gambling; and
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SCML's proposal and submissions

4. SCML proposes to install four terminals of Keno at the Auckland casino in addition to the table games and electronic gaming machines in its regulatory benchmark. Keno is a type of lottery, in which twenty numbers are drawn. In order to avoid any suggestion that it is a gaming machine, SCML proposes to use a manually operated ball drawing device to draw the numbers.
5. SCML seeks the Commission's view as to whether the installation of the game would be considered an increase in opportunities for casino gambling (and therefore prohibited by section 11 of the Act unless accompanied by offsetting reductions elsewhere). SCML argued that it would not result in an increase for the following reasons:
 - (a) SCML operated Keno at the Auckland casino until 1999.
 - (b) The licence conditions at the time did not require it to get any approval to offer Keno.
 - (c) It was not required to specify the location of Keno on its floor plans at the time.
 - (d) The current licence conditions restrict the number of gaming machines and gaming tables at the casino. They also restrict the game types and game mixes that may be operated on gaming tables. Proposed game mixes for table games are assessed against the regulatory benchmark, set out as game mix A in SCML's operator's licence in order to determine whether the proposed game mix would result in an increase in casino gambling opportunities.
 - (e) Because SCML was at liberty to operate Keno prior to 19 September 2003 (the day after the Act was enacted), without requiring regulatory approval, and there have been no express conditions since which might limit that opportunity, re-introduction of Keno would not increase opportunities for gambling in comparison to what was available on 19 September 2003. Keno should therefore be recognised as part of the Auckland casino's maximum permitted level of gambling opportunities as at 19 September 2003.
 - (f) Compliance with section 11 should be considered according to theoretical opportunities. In decision GC17/10, the Commission said that its consistent approach had been to consider what is or was possible theoretically, whether in its initial assessment of opportunities as at 19 September 2003, for fixing the benchmark game mix or in subsequent comparisons between that mix and new proposed mixes.

- (g) The situation was no different to a casino licence holder which did not have its maximum number of permitted tables and machines on the floor as at 19 September 2003.
- (h) CCL operated Keno and the Racing Game until 2007 and the Commission took this into account in setting CCL's game mix benchmark (decision GC04/09). There was nothing in CCL's licence conditions providing for Keno or the Racing Game. The fact that CCL availed itself of the opportunity to operate Keno for a longer period than did SKYCITY should not differentiate how Keno is assessed at each casino when determining compliance with section 11.
- (i) The fact that CCL may have chosen, on occasion, to show additional detail regarding Keno on the floor layouts is not indicative of permitted opportunities or an arrangement unique to that casino.
- (j) The Commission stated in decision GC04/09 that approved floor plans were not completely decisive in respect of permitted opportunities.

Secretary's submissions

- 6. The Secretary considered that, because there had been no opportunity to play Keno at the Auckland Casino since 1999, and there was therefore no opportunity to play it on the date sections 11 and 12 became effective (19 September 2003), the introduction of Keno would constitute an increase in gambling opportunities, compared with the opportunities available when section 11 became effective.
- 7. The Secretary made the following comments on SCML's arguments:
 - (a) It did not follow that, just because the Casino Control Authority ("CCA") would have permitted an activity under the Casino Control Act, the Commission should permit the same activity. The CCA was not concerned with gambling opportunities, and its regulatory methods reflected this.
 - (b) The lack of historical floor plans representing Keno under the previous Act was a reflection of the different requirements of a now repealed Act and was not relevant to this application.
 - (c) CCL operated Keno on 19 September 2003. It was therefore appropriate to recognise that the opportunities then represented by the operation of Keno should be reflected in the starting point for its subsequent regulatory benchmark game mix.



- (d) Every decision to date by the Commission on casinos' benchmark game mixes had been made on the basis of what was in operation on 19 September 2003.
 - (e) Decision GC17/10, from which SCML quoted, was about theoretical opportunities that existed within the established benchmark (which is based on the games that were in operation at the Auckland casino on 19 September 2003).
 - (f) If SCML's interpretation were correct, this would bring into question the validity of all current game mix benchmarks. SCML could argue that, because the floor plans in force on 19 September 2003 had only generic table shapes, it had the right to operate 110 Black Jack tables. The arguments raised by SCML would apply to the Racing Game and, theoretically, unlimited Keno terminals or installations. Such an open-ended view of theoretical opportunities could not have been Parliament's intent and could potentially render one of the Act's purposes, to control the growth of gambling, meaningless in the casino context.
 - (g) The Commission had approved proposals by SCML to expand its gambling area on the basis that no additional gambling activities would be introduced. If the post September 2003 expansions had resulted in the ability to operate additional gambling activities, which could not have been operated in September 2003 due to limited floor space, this would be another reason why allowing Keno would increase the opportunities for casino gambling.
8. The Department was unable to form a view on whether Keno, using a manual ball-drawing device, is a gaming machine until the particular product is submitted for approval with sufficient technical detail.

Problem Gambling Foundation

9. PGF took the view that the installation of Keno would involve an increase in the opportunities for casino gambling. It argued that the fact that SCML could operate Keno at the Auckland casino prior to 2003 was irrelevant given the change in licensing regime. It submitted that the question of whether or not Keno was a gaming machine did not affect the question of whether it represented an increase in opportunities for gambling. Finally, PGF was of the view that the introduction of Keno might increase the risk of gambling-related harm as it provided an instant prize and would be a novel attraction to some customers.



Christchurch Casino Limited

10. CCL supported SCML's application. It submitted that the appropriate view for determining gambling opportunities as at 19 September 2003 was by reference to what was theoretically available on that date.

SCML's submissions in reply

11. In reply, SCML submitted that:
- (a) The opportunity to operate Keno had existed since the rules were first made in respect of it.
 - (b) The situation was analogous to the use of automatic shufflers on Black Jack, Baccarat and Caribbean Stud Poker. The game rules for these provided for the operation of automatic shufflers, allowing more rounds to be dealt per hour, thus allowing more opportunities for casino gambling per hour, in comparison to situations in which the cards were manually shuffled. The CCA directed that casino operators should not operate automatic shufflers on more than 50% of Black Jack tables. Apart from in relation to Black Jack, there were no regulatory limits on the use of automatic shufflers. This was reflected in SKYCITY Auckland's regulatory benchmark, which provided for the maximum number of automatic shufflers on these games. The number of automatic shufflers actually deployed as at 19 September 2003 was irrelevant.
 - (c) Similarly, different dealing styles for Baccarat had a significant effect on the speed of the game. The gambling opportunities for the benchmark had been calculated on the basis of the style which allowed the maximum number of opportunities and not that which was actually in use in September 2003.
 - (d) Likewise, Keno should be recognised as part of SKYCITY's regulatory benchmark. Realising an existing opportunity for casino gambling was not the same as increasing the opportunity.
 - (e) There was no difference between recognising the casino's right to use a particular dealing style that the rules provided for on 19 September 2003 and recognising the casino's right to deploy a particular game for which rules had been approved. Both scenarios were designed to realise opportunities that existed at that time, neither of which required prior approval or were subject to restrictions in the licence conditions.
 - (f) The same arguments did not apply to the Racing Game, because this game would be deemed a gaming machine under the Act's definition of gaming



machine (therefore SCML could not add it without reducing the number of other gaming machines, as the number of gaming machines is capped by the licence conditions).

- (g) The Secretary's comments concerning the CCA were incorrect. The CCA was not disestablished until 1 July 2004 and until this time it was responsible for determining what constituted an increase in casino gambling opportunities.
- (h) The conditions specified in licences as at 19 September 2003 should not be so easily dismissed.
- (i) Under the Casino Control Act, floor plans were limited to certain matters. They did not extend to the location of Keno equipment, and they were not determinative of casino gambling opportunities.
- (j) The expansion of the gambling area had not created the opportunity to install Keno (which took up very little space); the opportunity had always existed.

Analysis

The Commission's approach to assessing opportunity

12. Since the commencement of the Gambling Act, the application of section 11 and section 139 has required an assessment of what the increase in casino gambling referred to in those sections is relative to. As applications to amend licence conditions have come before it, the Commission has had to determine the level of opportunities beyond which there can be no increase. The Commission did this by first considering, in relation to each casino over a series of decisions, the opportunities available for gambling on 19 September 2003, the day after the Act came into force. It was faced with the difficulty that the licensing regime under the prior Act did not involve controls or restrictions on growth of opportunities for gambling. Therefore the Commission had to work out the principles and tools to measure and control opportunities which had both previously been limited or controlled. The Commission did this initially by reference to licence conditions under the previous Act which limited the numbers of gaming machines and table games and to floor plans, which depicted the location of tables and gaming machines (and for which CCA approval was required). In addition, the Commission received submissions on the types of table games played at that time.
13. Although floor plans had to be approved by the CCA, under the Casino Control Act, there was no prohibition on increases in opportunities for casino gambling, and only limited regulatory oversight affecting the number of opportunities for gambling. The floor plans did not aim to regulate gambling opportunities, but rather the location of tables and other matters relating to security. Their usefulness in relation to the question of

opportunities, therefore, was as a guide to types of table games permitted at casinos when the Act came into force. The regulatory effect that they had on opportunity was unintended, as they were not imposed for the purpose of limiting gambling opportunities.

14. Once it had established the table games that each casino had available at 19 September 2003, the Commission then considered the opportunities for gambling available to the casino at that date. Because the prohibition relates to opportunities for casino gambling, rather than actual casino gambling, it considered what was available to each casino, rather than to what it actually used. The Commission described its approach in decision GC24/11 (an application by SCML to have extra tables on the gaming floor, while still maintaining a maximum of 110 tables in use at any given time) at paragraph 13:

The Commission's thinking on this issue is well settled. An increase in opportunities for casino gambling involves an increase in the theoretically available maximum level of activity. It differs from an increase in the attractiveness or accessibility of currently available opportunities for gambling, and it is not to be confused with the maximisation or realisation of existing activities, nor with what activity actually takes place.

15. In a series of decisions updating licence conditions over several years, the Commission set new regulatory benchmark game mixes in respect of each casino which was additional to maximum numbers of gaming machines and table games provided for in each casino's operator's licence. Anything beyond the opportunities for gambling available on that benchmark configuration would be an increase in the opportunities for casino gambling. The purpose of the game mix benchmarks was to provide a current and concrete measure against which to assess what might amount to an increase in opportunities for casino gambling, without constantly revisiting the position on 19 September 2003. The Commission's reasons for this approach are set out at paragraph 27 of decision GC23/05:

This follows from the natural meaning of the language of the section, and the absence of an express reference to a specific alternative benchmark. The position is also supported by the following factors:

- (a) There is, both legally and factually, an absence of a readily ascertainable and definable position as at 19 September 2003. The previous legislation did not contain the same prohibition and the state of opportunity on 19 September 2003 was neither specified by law nor already ascertained as a matter of fact.
- (b) The problem of ascertaining the benchmark (a problem at the outset at least, irrespective of which construction is adopted) would worsen with time. The greater the passage of time, the harder would it be to know and prove the state of affairs on 19 September 2003. The difficulty could not be cured by changes (whether additions or amendments) to licence conditions to provide the requisite degree of certainty, as only the increasingly distant past circumstances would be relevant.
- (c) Working to a 19 September 2003 baseline makes regulation, and compliance and enforcement difficult. All issues potentially relevant to

increase, including rates of play, would potentially need to be referenced back to this historical baseline.

- (d) If a 19 September 2003 benchmark were adopted, it would render irrelevant all changes in circumstance since then, including subsequent condition variations and approvals given by the Commission.
 - (e) A construction whereby the Commission assesses a proposal in terms of the circumstances prevailing at the time of an application is easier and does not raise the same compliance and enforcement issues. It will enable the Commission to provide increased clarity regarding the opportunity benchmark over time by variations to licence conditions and approvals.
16. The Commission made its assessment on the appropriate benchmark using a combination of the best available information, including licence conditions, floor plans and other CCA approvals and, in cases where they were not determinative in limiting opportunity, what was in fact in place on 19 September 2003.
17. In the case of Christchurch casino, the Commission was also required to consider how to incorporate Keno and the Racing Game into the benchmark, because it was clear that the casino had operated both games at 19 September 2003 although they were neither mentioned in its licence conditions nor invariably shown in floor plans. Although the casino later ceased offering the games, in decision GC04/09, the Commission considered how the opportunities represented by Keno and the Racing Game, as installed on 19 September 2003, should be converted to equivalent table games, and incorporated the equivalent table games into the regulatory benchmark game mix.
18. SCML's regulatory benchmark for the Auckland casino is set out in game mix A, attached to its operator's licence for the Auckland casino. The licence conditions provide for a maximum of 1,647 gaming machines in the Gambling Area and 110 tables (not including fun play tables and substitutable tables). The game mix across table games was largely determined by what games were installed on 19 September 2003.

SCML's application

19. SCML's application seeks to apply the Commission's reasoning, developed in relation to table games (which were usually subject to controls as to number prior to September 2003 but not invariably deployed for use) to other types of games which were not subject to any controls. In so doing, the application demonstrates the problem with applying to uncontrolled games the principle of theoretical opportunity that the Commission had previously applied to table games which were controlled by number. If the theoretical opportunity principle is applied to opportunities for gambling which were not subject to any control, then the statutory prohibition on increasing opportunities for casino gambling would be rendered ineffective.

20. As at 19 September 2003, for the reasons set out by SCML, all casinos were technically able to introduce Keno without first obtaining regulatory approval. Unlike gaming machines and table games, there were no regulatory limits on the number of Keno terminals which could be installed. The same would be true of any other non-table and non-machine games for which game rules were in place. If casinos' regulatory benchmarks included these potential activities as "opportunities", the opportunities incorporated into the benchmark would be practically limitless. Why this is so can be seen from the CCL benchmark decision (GC04/09) as it demonstrated that opportunity in one form may be substituted for opportunity in other forms (as provided by section 12). Therefore, if all casinos have an unlimited number of Keno games notionally in their regulatory benchmark, then those games can be endlessly substituted for table games and gaming machines reflecting the same opportunities. Section 11 is premised on the number of opportunities being limited; in order for a prohibition on increases in opportunities to be effective, opportunities must, in the first place, be limited.
21. Therefore, although SCML's argument is a logical application of the theoretical opportunity principle in a technical sense, its application in the absence of prior specific limits on opportunity would lead to a result which would be absurd and which cannot be sustained in light of the clear statutory prohibition on increases in gambling opportunities. Use of the principle, previously applied only to controlled opportunities, for assessment of previously uncontrolled opportunities would produce an outcome inconsistent with clear legislative intent.
22. In the Commission's view, the approach taken in relation to CCL demonstrates the appropriate answer for such situations. Whereas theoretical, rather than actual, opportunities, are relevant in determining the benchmark for gambling activities that were controlled as at 19 September 2003, the determining factor for uncontrolled forms of gambling such as Keno (and for insufficiently detailed floor plans which did not adequately limit opportunity), must be whether the gambling actually occurred at that time, and to what degree. In the CCL case, it was possible to determine the number of Keno and Racing Game terminals which CCL offered and to approximate broadly the opportunities represented by them in terms of equivalent table games for the purposes of setting the new regulatory benchmark.
23. In contrast to CCL, it is clear that SCML did not operate Keno at its Auckland casino on 19 September 2003 and that it had not done so for a number of years. If the Commission were to amend its benchmark to include Keno, on the basis of what was theoretically available (which was limitless opportunities for Keno gambling because it was not controlled), in the Commission's view, the result would be contrary to common sense and to the intent of section 11.



Decision of the Commission

24. For the reasons set out above, the Commission rules that the regulatory benchmark at the Auckland casino is that set out in the current licence conditions, without any additional games of Keno, and that the addition of games of Keno at the casino would be an increase in the opportunities for casino gambling, unless accompanied by an offsetting reduction in other opportunities for casino gambling (as provided for in section 12).



Graeme Reeves
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

30 December 2012

