

IN THE MATTER of the Gambling Act 2003
AND of an appeal by **PRIME
COMMUNITY TRUST**

BEFORE A DIVISION OF THE GAMBLING COMMISSION

Division: P Chin (Chief Gambling Commissioner)
P Stanley
G Reeves

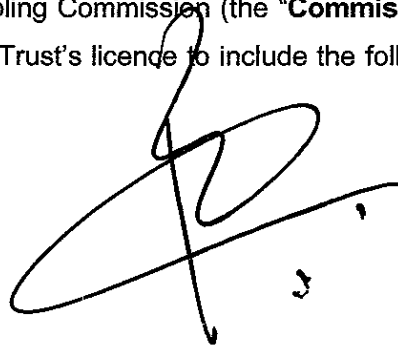
Date of Appeal: 12 November 2004

Date of Decision: 9 March 2005

**DECISION
ON AN APPEAL BY PRIME COMMUNITY TRUST**

1. APPEAL

- 1.1 Prime Community Trust (the "**Appellant**", "**Prime**" or "**Trust**") appealed under section 61(1)(d) of the Gambling Act 2003 (the "**Act**") against a decision by the Secretary of Internal Affairs (the "**Respondent**" or the "**Secretary**") to refuse to amend Prime's class 4 operator's licence. The decision of the Secretary was challenged on the grounds that it was based upon an incorrect interpretation of the Act and the Gambling (Class 4 Net Proceeds) Regulations 2004 (the "**Regulations**").
- 1.2 Prime is a class 4 gambling operator licensed pursuant to section 52 of the Act. Prime operates gaming machines from three sites in the Wairarapa. To date Prime has distributed grants to third party recipients in the Wairarapa region including sports clubs, charities and other not-for-profit community organisations. It would like flexibility to "apply" some of its net proceeds to worthy and beneficial projects that the Trust itself would initiate, for example the purchase of a "sports house" where individual sports could cluster.
- 1.3 In its submissions, Prime requested that the Gambling Commission (the "**Commission**") reverse the Secretary's decision not to amend the Trust's licence to include the following authorised purpose:

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In addition the Trust may apply funds to any charitable or non-charitable purpose that benefits the wider Wairarapa community.

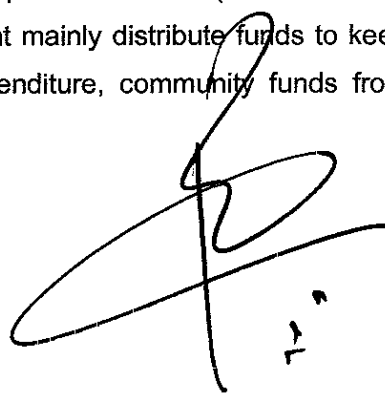
- 1.4 In its submissions in reply, Prime stated that, in order to achieve its funding objectives, it was prepared to “become a society that does *not* mainly distribute, ie to apply more than 50% of its net proceeds”. The relief sought was a referral back to the Respondent with directions that this amendment should be made to Prime’s licence.

- 1.5 In subsequent clarification Prime stated that it:

would like first and foremost for the Commission to allow the appeal as filed, namely that the Secretary erred in refusing to make the requested amendment to the Appellant’s class 4 operators licence If however the Commission is not persuaded by these arguments, the Appellant would be prepared to become a society that applies more than 50% and distributes less than 50% of net proceeds, thereby avoiding the troublesome condition 10

2. GAMBLING ACT 2003; GAMBLING (CLASS 4 NET PROCEEDS) REGULATIONS 2004 AND LICENCE CONDITIONS

- 2.1 The appeal is based upon the interpretation of words found in sections 50(2)(e), 52(1)(f), 109, 110 and 114(1)(a) and (b) of the Act and the meaning and effect of Regulation 11 of the Regulations and condition 10 of Prime’s licence.
- 2.2 The Act refers to the terms “apply” and “distribute” (sections 53(1)(c), 53(2)(c), 106, 111, 112 and 114). Other sections of the Act refer to funds that are “mainly distributed” (sections 50(2)(e), 109, 110). None of these terms (“apply”, “distribute”, “mainly distribute”) are defined in the Act or Regulations.
- 2.3 The Regulations set out requirements for the holders of class 4 operator’s licences relating to the application or distribution of net proceeds. Part 1 of the Regulations applies to all licence holders, whether they apply their net proceeds themselves or distribute their net proceeds to third parties. Part 2 (including Regulations 10 and 11) sets out additional requirements for class 4 licence holders that mainly distribute net proceeds to the community.
- 2.4 It is understood that the additional Part 2 requirements are aimed at achieving greater transparency and accountability in the distribution of funds to third parties. According to the Department of Internal Affairs’ Licensing and Compliance Manual (the “**Manual**”), “without specific regulatory requirement for societies that mainly distribute funds to keep records of their decisions or to account for their expenditure, community funds from gaming machine revenue would be at significant risk”.



- 2.5 As a licence holder that "mainly distributes" net proceeds, both Part 1 and Part 2 of the Regulations apply to Prime including Regulation 11 which provides:

11 Timing requirements for distribution of proceeds for authorised purposes

- (1) A licence holder must distribute for authorised purposes,-
- (a) during each of its financial years at least every quarter, all or nearly all of the net proceeds from the class 4 gambling during the financial year; and
 - (b) within 3 months after the end of each of its financial years, any remainder of the net proceeds from the class 4 gambling during the financial year.
- (2) The first financial year in relation to which a licence holder must comply with subclause (1) is the financial year that commences after the commencement of this regulation.

- 2.6 To similar effect to Regulation 11, licence condition 10 of the licence issued to Prime on 6 July 2004 states:

Condition 10 Timing requirements for distribution of net proceeds

The holder of a class 4 licence that mainly distributes net proceeds to the community must ensure that it distributes for its authorised purpose(s):

- (a) a substantial portion of the net proceeds received during a financial year on, at least, a quarterly basis; and
- (b) all net proceeds received during a financial year within three months following the end of that financial year.

3. FACTS

- 3.1 In an application dated 28 July 2004, Prime requested that its licence be amended by the deletion of its authorised purpose statement and substitution of it with the following:

The Prime Community Trust may distribute funds to charitable, sporting or other community based organisations in the Wairarapa to further the aims and objectives of those organisations so long as the distribution is for a charitable purpose or a non-commercial purpose that is beneficial to the whole, or a section, of the community. Examples may include:

- Grants to assist with the promotion and development of amateur sport through the provision of equipment, uniforms, training aids, or improvements to sporting or recreational facilities.
- Grants to educational facilities, such as schools, pre-schools, kindergartens and the like for educational, sporting or cultural equipment that benefits the development of children and young people.
- Grants to charitable or community organisations that provide welfare assistance, community care, support or training, relief of poverty or any other essential not-for-profit community service.

In addition the Trust may apply funds to any charitable or non-commercial purpose that benefits the wider Wairarapa community. Examples may include:

- The purchase of land and the development and maintenance of sporting or other facilities that are for the use of, and benefit of, the local community.
- The establishment of academic or sporting scholarships for children or young people that are fair, open and equitably assessed.
- Any other application of funds that is consistent with the Trust's deed and the definition of authorised purposes under the Gambling Act (2003).

3.2 This proposed amendment was initially assessed and approved on 9 August 2004 by the Secretary. However the Secretary substituted the words "In addition the Trust may apply funds ..." with "The distribution of funds ..." in the second paragraph, and deleted the final bullet point. Prime requested that the Department review these changes to its application to allow it to both distribute and apply net proceeds.

3.3 In a letter dated 6 September 2004, the Department acknowledged that it had acted outside its powers in amending the application and in issuing an approval for an amendment containing the alteration. After reconsidering Prime's original application de novo, the Department advised that it proposed to refuse Prime's application, on the basis that it was inconsistent with Condition 10 of the subject licence which expressly required Prime to distribute all of its net proceeds. It was pointed out that:

Section 57 of the Gambling Act authorises the Department (acting on behalf of the Secretary) to consider an amendment to a class 4 operator's licence when a corporate society proposes to change its authorised purpose statement. Section 57 requires the Department to consider the application in the light of sections 51 and 52 of the Act as if the amendment application was an application for a new licence. Under section 52(1)(f) the Department must refuse to grant an application unless it is satisfied that the applicant is "able to comply with applicable regulatory requirements".

3.4 As was its right, Prime made further submissions to the Secretary noting that the Act recognised that class 4 operators may both distribute and apply funds for authorised purposes, and that an operator could do both. Prime pointed out that the licence conditions were standard rather than specific to each licence, and that Condition 10, which related to the timing of distribution of funds by the holder of a class 4 licence that mainly distributed, was arguably *ultra vires*, and therefore null and void by requiring that Prime distribute all proceeds, thereby prohibiting something the Act expressly contemplates.

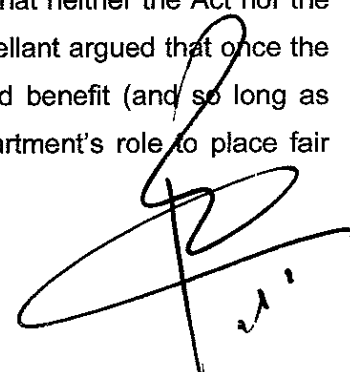
3.5 It was further noted that the Secretary had discretion under section 53(3)(a) to amend or revoke conditions. In order to avoid the conflict which concerned the Department, it was suggested by Prime that condition 10(b) be amended to read:

All proceeds received during the financial year, **that are allocated for distribution**, within three months following the end of that financial year

- 3.6 In a letter dated 22 October 2004, the Department confirmed the Secretary's decision to refuse the amendment. The Secretary did not accept that condition 10 was *ultra vires* and declined to amend condition 10(b) in the manner suggested, referring in particular to the Regulations which had been gazetted the day before. The Secretary stated that to amend the licence conditions as requested would result in non-compliance with the impending regulatory framework, and in particular Regulation 11, which would supersede condition 10.
- 3.7 The Commission observes in passing that the reasoning set out in paragraph 3.3 above, which did not seem to have application to mere conditions and would not of itself have prevented the requested change in conditions, now seemed to have more relevance, if the effect of Regulation 11 was indeed to require all available net proceeds to be distributed (as none would be left to apply).
- 3.8 Pursuant to section 61(1)(d) of the Act, Prime appealed the Secretary's refusal to amend the Appellant's class 4 operators licence on the grounds that the decision was based on an incorrect interpretation of the Act and the Regulations.

4. SUBMISSIONS BY THE APPELLANT

- 4.1 The Appellant argued that the issue turned on the interpretation of the words "mainly to distribute" in the Act and in the Regulations. The Appellant submitted that it is legally permissible for it to "apply" as well as "distribute" net proceeds and requested that the Commission reverse the Secretary's decision not to amend the Trust's authorised purpose.
- 4.2 In essence, Prime argued that the words "mainly to distribute" should be given their ordinary and natural meaning and that it should therefore be permitted to apply net proceeds, provided that the funds were applied to authorised purposes within the definition contained in section 4(1) of the Act. Prime effectively asserted a right for organisations that mainly distribute funds to apply some funds. It argued that the legislative language is permissive and that licence conditions and the Regulations should not foreclose that possibility.
- 4.3 The Appellant submitted that it is for an individual corporate society to determine whether and to what extent it distributes or applies net proceeds, and that neither the Act nor the Regulations gave the Department this responsibility. The Appellant argued that once the applicant identified the means by which the community would benefit (and so long as what is proposed is an authorised purpose), it was the Department's role to place fair

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conditions around those distribution or application processes, to ensure they are conducted lawfully and subject to reasonable audit scrutiny.

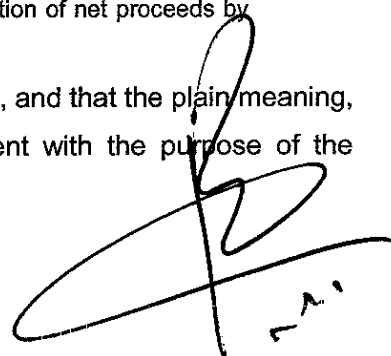
- 4.4 The affidavit of Greg Scobie, a trustee of Prime, filed with the submissions, set out why the ability to “apply” funds as well as “distribute” them is important to Prime. It was stated that the Trust operates in a limited geographical area, with a small population and pool of grant applicants. Prime would like to strike a balance between distributing to worthy applicants, and being able to apply the residual amount to worthy projects initiated by the Trust. Mr Scobie provided examples of such projects in his affidavit.
- 4.5 In his affidavit, Mr Scobie noted that “like all holders of class 4 operators’ licences, the Trust is required to apply or distribute 37.12% of its GST-exclusive gross proceeds” under condition 1 of its licence and Regulation 10 (with effect from the financial year beginning 1 October 2005). Mr Scobie went on to state that “if the Trust has to rely solely on grant applications from the general community, we would be placed in a position where we were obliged to grant to less deserving applicants, just so we could meet this 37.12% threshold”.

5. SUBMISSIONS BY RESPONDENT

- 5.1 The Secretary traversed the history of the licensing regime, which originally, in 1977, provided for the issue of two sets of standard licence conditions. Set A was for clubs with their own premises and Set B for societies that operated gaming machines and public premises. Set A allowed for societies or clubs both to apply and distribute while Set B only allowed for societies to distribute. The broad division of licences between “clubs” and “trusts” resulted as a consequence of their relationship with the venue operator.
- 5.2 The Secretary noted that these distinctions had been carried over to the current Act and Regulations. It was noted that, if a club moves away from applying funds to distributing more than 50% of net proceeds, it will be subject to the more rigorous accountability regime that applies to those who “mainly” distribute net proceeds.
- 5.3 The Secretary submitted that the words “mainly to distribute” or “mainly distribute” are used in a descriptive sense to describe a certain type of society. The term by itself does not confer any rights or responsibilities on such a society. It was submitted:

The Act is silent on the question of the application or distribution of net proceeds by such a society which is a matter left for the Regulations.

- 5.4 The Secretary asserted that Regulation 11 is plain on its face, and that the plain meaning, given the way the licensing regime developed, is consistent with the purpose of the



Regulations. The Secretary questioned, in any event, whether the Commission had power to hold a regulation *ultra vires*. In the Secretary's view, the High Court is the proper forum for that decision.

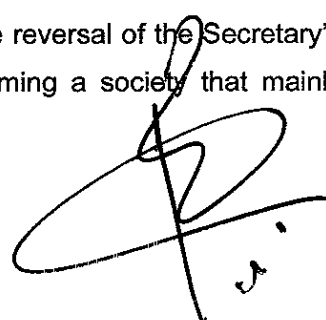
- 5.5 The Secretary submitted that, if the Commission were not minded to dismiss the appeal and confirm the decision of the Secretary, the matter should be referred back to the Secretary with directions to reconsider the matter on its merits. It was submitted that the decision of the Department should not be varied or reversed as it had not considered questions of risk or public benefit in an application of funds such as proposed by Prime.

6. APPELLANT'S SUBMISSIONS IN REPLY

- 6.1 Prime maintained its position that licence condition 10 and Regulation 11 were ambiguous (without indicating the nature of the ambiguity) and arguably *ultra vires*. However, to achieve its funding objectives, Prime indicated that it was prepared to become a society that applied more than 50% of those proceeds to the community. It was submitted that, in this way, Part 2 of the Regulations (including Regulation 11) would cease to apply, as Prime would no longer "mainly distribute". Accordingly, if the Commission was not minded to reverse the decision of the Secretary, Prime requested that the matter be referred back to the Secretary with directions that the licence should be amended to provide that more than 50% of the net proceeds would be applied rather than distributed.

7. RESPONDENT'S SUBMISSIONS IN REPLY TO APPELLANT'S REPLY, AND THE FURTHER REPLY OF THE APPELLANT

- 7.1 The Secretary responded to the suggestion that Prime was now prepared to become a society that mainly applied more than 50% of its net proceeds to the community by submitting that the appeal should be dismissed.
- 7.2 The Secretary submitted that the Commission should invite Prime to make a fresh application to amend its statement of authorised purposes. The Secretary would then make a further decision on the application which, if declined, could be the subject of a separate appeal to the Commission.
- 7.3 In response to the Secretary's submission that the appeal should be dismissed, Prime clarified that it was not discarding the original relief sought (ie reversal of the Secretary's decision) by raising the alternative prospect of Prime becoming a society that mainly applied rather than distributed net proceeds.

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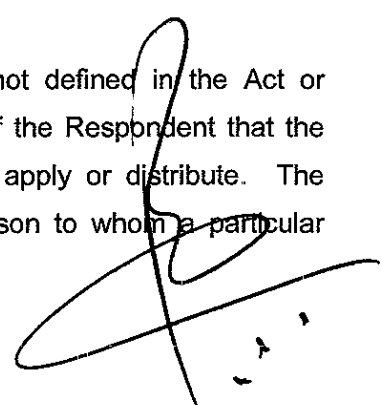
8. PRELIMINARY MATTERS

- 8.1 After consideration of the reply submissions, the Commission decided to proceed to hear the original appeal as submitted to it. The submissions regarding the proposed change in the Appellant's operation (to mainly apply funds) is a new matter, not a submission in reply. It was not appropriately raised in a reply submission or, for that matter, on an appeal from the Secretary's decision on a different application. If the Appellant now wishes to make a new (or amended) application to vary its licence conditions, it may do so in the normal way but it is not appropriately done by way of submission on appeal. The Secretary has had no opportunity to consider and decide an application in the form now proposed and, in the circumstances, the Appellant should make an application to the Secretary for consideration of any revised proposal which it may wish to advance.

9. KEY ISSUES

- 9.1 The key issues identified by the Commission are:
- (a) does the Act confer a right to **apply** partially rather than **distribute** solely?
 - (b) does Regulation 11 prohibit the making of conditions which would permit the application of less than half of the net proceeds?
 - (c) if Regulation 11 does prohibit the making of a condition permitting partial application, is it *ultra vires* the Act?
 - (d) if Regulation 11 is arguably *ultra vires*, does the Commission have power to consider and determine whether it is *ultra vires* in the course of dealing with the appeal?

Right to apply proceeds

- 9.2 The Act refers to the terms "apply" and "distribute" which equate with licence holders using proceeds for their own approved purposes on the one hand, and giving them away to others to use for approved purposes, on the other. Some sections of the Act refer to both the application and/or distribution of funds (sections 53(1)(c), 53(2)(c), 106, 111, 112 and 114). Other sections of the Act refer only to funds that are "mainly distributed" (sections 50(2)(e), 109 and 110).
- 9.3 The terms "apply", "distribute", and "mainly distribute" are not defined in the Act or Regulations. The Commission agrees with the submission of the Respondent that the statutory references do not, of themselves, create rights to apply or distribute. The references are no more than descriptive of the class of person to whom a particular
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obligation or restriction is to apply. Indeed the statutory scheme creates duties rather than rights. Licence holders have duties to distribute or apply funds for approved community purposes. The Act, the Regulations, and the licence conditions set out how those duties are to be implemented and the acts of licence holders accounted for.

- 9.4 While the Act does not confer a right to apply or distribute funds, the Commission considered that its language contemplates the possibility of those who mainly distribute funds also applying some funds (less than 50%). Such a possibility is consistent with the language of both the Act and the conditions of licences for class 4 operators.
- 9.5 The term “mainly distribute” is used on a number of occasions in the Act and the Regulations. As the Appellant argued, the term “mainly” in its ordinary and natural meaning connotes “chiefly”, “principally”, “more than half”. The extract from the Department’s Manual confirms the Departmental view that “mainly” has its ordinary meaning of “for the most part, (ie more than 50 percent)”. The Commission concurs.
- 9.6 The Commission takes the view that, while the statutory references relied upon by Prime do not, of themselves, confer a right for Prime to apply any of its funds, the references to “mainly distribute” indicate a Parliamentary intention that partial application of funds would be at least theoretically possible under the statutory scheme, not necessarily in all cases, but at least possibly in some.

Effect of Regulation 11

- 9.7 The correct construction and consequent effect of Regulation 11 is at the heart of the appeal. It has been treated to date as creating an express obligation to distribute all available net proceeds, leaving nothing capable of application. The Commission does not agree with the approach by either party to the construction of Regulation 11. The Commission considers that the Regulation is concerned solely with the timing of distribution, as provided by s114(1)(b) of the Act, a view consistent with its heading:

Timing requirements for distribution of proceeds for authorised purposes

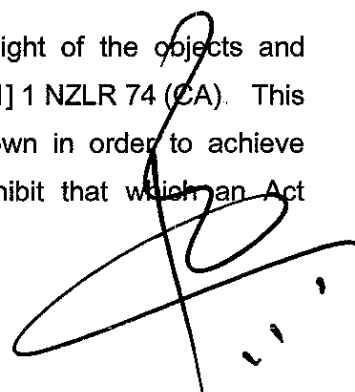
- 9.8 The language of Regulation 11 however reflects an apparent (but, in the Commission’s view, mistaken) underlying assumption of the possibility of distribution only. Such an unstated assumption should not be construed, as the Department has done, as effecting a total prohibition on any partial application of funds. Rather, the Commission considers that Regulation 11 should be construed as applying only to such proceeds as are actually distributed or as are required to be distributed (whether as a result of legislation or licence conditions). In other words, Regulation 11 imposes a timing requirement on the distribution of that portion of funds which are, or are required to be, distributed, but does not necessarily require that all available money be distributed in all cases. To interpret

Regulation 11 as requiring total distribution (thus effectively prohibiting the application of any funds) would conflict with the apparent intention behind the use of the phrase “mainly distribute” which appears in the Act and Regulations. If Regulation 11 were construed as the Secretary did, there could never be any such licence holders, as all licence holders that “mainly” distributed net proceeds would in fact be obliged to distribute all their available funds.

- 9.9 Under the Commission’s approach, Regulation 11 applies only to such of the net proceeds as the licence holder in fact distributes, or is obliged to distribute, and it does not apply to such funds (if any) as it may apply. Control of the amounts required or permitted to distributed and applied respectively will be a matter for other regulations or specific licence conditions imposed on each licence holder.
- 9.10 The standardised form of licence conditions adopted (and of apparently general application) appears inadequate for this purpose. If licence holders are to be required to apply or distribute particular amounts or proportions of their net proceeds, rather than simply meeting statutory minimums such as Regulation 10, the source of that control must be appropriate individual licence conditions.

Ultra vires

- 9.11 The Commission takes the view that the issue of *ultra vires* does not arise on its construction of Regulation 11 as the Regulation 11 does not prevent licence conditions permitting partial application of funds or exclude absolutely the possibility of entities operating “mainly to distribute” proceeds. If Regulation 11 had been construed as the Secretary did (ie so as to require the distribution of all funds), the issue of *ultra vires* would have needed to be addressed. In such an event, the Commission is of the view that its jurisdiction extends to considering questions of ultra vires which are appropriately raised in appeals properly before it.
- 9.12 While the Commission does not consider that the Act confers a right to apply partially, it indicates an intention that the possibility of an entity mainly distributing but partially applying its proceeds must exist within the statutory regime. The Commission would have been concerned if it had reached the conclusion that Regulation 11 could only be construed as requiring distribution because it would mean that there could never be an entity which merely “mainly distributed”.
- 9.13 The scope of empowering provisions must be construed in light of the objects and scheme of the legislation: *Brader v Ministry of Transport* [1981] 1 NZLR 74 (CA). This can mean that wide general words may need to be read down in order to achieve consistency with the Act. Delegated legislation cannot prohibit that which an Act

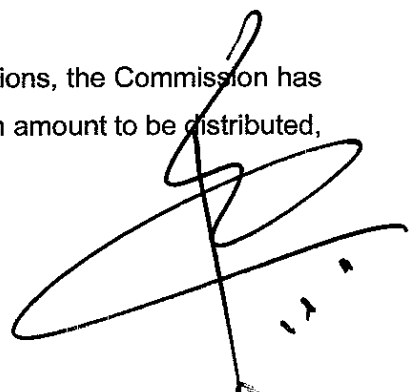


expressly allows: *Powell v May* [1946] 1 KB 330, 335. Since the Act by express words impliedly contemplates that there will be some who mainly distribute but partially apply, the Commission is of the view that the apparently wide general words of s114(1)(a) must be read down to exclude the power to make regulations which remove absolutely the possibility that an entity can mainly distribute but partially apply.

- 9.14 While s114(1)(a) does not contain words of express limitation, the Commission considers that they are subject to an implied limitation to achieve effects consistent with the words of the primary statutory instrument, the Act. Section 114(1)(a) does not confer a power to make a regulation which would have the effect of eliminating any possibility of an entity which mainly, but not solely, distributed its net proceeds.
- 9.15 Although the Secretary submitted that the Commission may not consider the validity of a regulation in the course of dealing with an appeal, the Commission does not agree. The Commission does not have a primary jurisdiction to consider the validity of regulations by way of declaration – that is a matter for the High Court. That is not how the issue came before it in this case however.
- 9.16 The issue of invalidity of delegated legislation may be raised in any proceedings where it is relevant: *Boddington v British Transport Police* [1999] 2 AC 143 (HL). The position of the Commission is analogous to that of the District Court which has jurisdiction to consider the validity of subordinate legislation on a collateral basis (eg if a person charged with an offence challenges the validity of the bylaw or regulation under which they are charged). Here, the *vires* issue arose collaterally on an appeal brought within the primary jurisdiction of the Commission. The Commission considers that, if necessary, it has the jurisdiction to determine the *vires* of relevant regulations in the course of an appeal.

10. DECISION ON APPEAL

- 10.1 The Secretary refused Prime's application on the basis that the amendment sought was prohibited by Regulation 11. The Commission has held that the Regulation does not have the effect assumed by the Secretary and the Secretary was in error for refusing the application on that basis. The Commission accordingly allows Prime's appeal and, for the reasons set out in paragraph 10.6 below, refers the matter back to the Secretary for reconsideration.
- 10.2 Although it was not addressed as part of the appeal or submissions, the Commission has considered whether Regulation 10, which specifies the minimum amount to be distributed,



would prevent the Secretary from necessarily considering Prime's application on its merits. Regulation 10 provides as follows:

10 Minimum amount of net proceeds to be distributed for authorised purposes

- (1) The minimum amount of net proceeds that a licence holder must distribute for authorised purposes is the proportion equivalent to 37.12% of its GST exclusive gross proceeds for each of its financial years.
- (2) The first financial year in relation to which a licence holder must comply with subclause (1) is the financial year that commences after the commencement of this regulation.
- (3) This regulation is subject to regulation 11.

10.3 The Commission recognises that, depending on actual circumstances, from a practical perspective, the application of Regulation 10 (and condition 1 of Prime's Licence) may mean that there is little or nothing to apply from net proceeds. Condition 1 states:

Minimum return to authorised purpose:

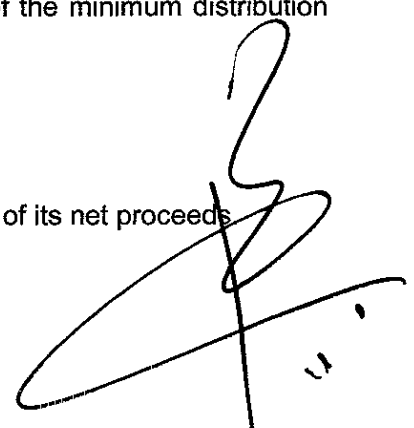
- (1) The holder of a class 4 operator's licence must apply or distribute to or for the authorised purpose(s) specified in the licence the maximum available funds, which must be at least 33% of the licence holder's GST inclusive (or 37.12% of its GST exclusive) gross proceeds in each of its financial years.
- (2) For the purposes of this condition, 'gross proceeds', in relation to class 4 gambling, means the turnover of the gambling, plus interest or other investment return on that turnover, plus proceeds from the sale of fittings, chattels and gambling equipment purchased from that turnover or investment return, less prizes.

With reference to Mr Scobie's comments recorded in paragraph 4.5 above, Prime's attention is drawn to the fact that Condition 1 requires it to apply or distribute "the maximum available funds", not the specified minimum.

10.4 Regulation 10 requires an affected licence holder to **distribute** at a minimum the proportion equivalent to 37.12% of its GST exclusive gross proceeds for each of its financial years. Depending on the terms under which the licence holder operates, the amount available for distribution or application by a licence holder that mainly distributes may be no more than the minimum distribution required by Regulation 10. In the Commission's view, the Secretary could not, in such a case, amend licence conditions to produce an outcome not in compliance with the requirements of Regulation 10 but the possibility in some cases of there being a surplus in excess of the minimum distribution proportion appears to exist.

10.5 In summary, the Commission holds as follows:

- (a) The Act does not confer on Prime a right to apply some of its net proceeds



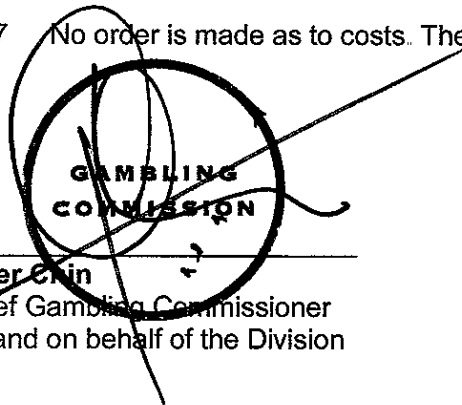
- (b) Regulation 11 places a timing requirement on the distribution of such proceeds as are actually distributed or required to be distributed. It does not effect a requirement to distribute all available proceeds, leaving none for application.
- (c) Condition 1 of its licence requires Prime to **apply or distribute** the **maximum available funds** which cannot be less than 33% of its GST inclusive (or 37.12% of its GST exclusive) gross proceeds.
- (d) Regulation 10 requires Prime, as an entity which mainly **distributes**, to **distribute** at least 37.12% of its GST exclusive gross proceeds.
- (e) Regulation 10 will apply to Prime if it mainly distributes. Whether it may mainly apply its proceeds within the regime created by the Act and Regulations depends on its licence conditions.

Relief sought

- 10.6 This appeal has not raised the merits of the proposed amendment to Prime's authorised purposes because the Secretary refused the application on grounds which did not include a consideration of the merits. The appeal has been concerned solely with the issue whether the Secretary could in law consider such an amendment. As the Secretary did not address the merits of the application and Prime has asked for the matter to be referred back if the Commission were not prepared to grant its primary relief, the Commission refers the matter back to the Secretary for him to consider the proposed amendment on its merits, whether or not Prime wishes to remain an organisation that mainly distributes net proceeds. In future, to avoid the need to refer matters back unnecessarily, it would be preferable in similar cases for the Secretary to express a view on the merits.

Costs

- 10.7 No order is made as to costs. The parties will each bear their own costs.

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**GAMBLING
COMMISSION**

Peter Chin
Chief Gambling Commissioner
for and on behalf of the Division

23 March 2005