

IN THE MATTER of the Gambling Act 2003

AND an appeal by **AOTEAROA GAMING TRUST APPEAL** against a decision of the Secretary for Internal Affairs regarding Class 4 venue licence conditions for **GLASINE'S CAFÉ AND BAR**

BEFORE THE GAMBLING COMMISSION

Members: L M Hansen (Chief Gambling Commissioner)
S C L Pearson
S Hughes QC
W A Acton
S T Shaw

Date of Notice: 23 December 2021

Date of Decision: 6 May 2022

Date of Notification
of Decision: 13 May 2022

AN APPEAL BY AOTEAROA GAMING TRUST AGAINST A DECISION OF THE SECRETARY FOR INTERNAL AFFAIRS REGARDING CLASS 4 VENUE LICENCE CONDITIONS FOR GLASINE'S CAFÉ AND BAR

Introduction

1. Aotearoa Gaming Trust ("**Appellant**") appealed to the Gambling Commission ("**Commission**"), under section 77(1)(b) of the Gambling Act 2003 ("**Act**") against a decision by the Secretary for Internal Affairs ("**Secretary**") to impose a special licence condition on the class 4 venue licence for the Glasine's Café and Bar in Invercargill ("**Venue**"), relating to an external entrance door to the gaming room ("**Door**").

2. The condition imposed is as follows:

Any external entrances into the gaming area must remain closed and locked at all times that the gaming machines are in operation, and may only be used to meet fire, health and safety regulations specific to the venue.

The internal entrance(s) to the gaming area must be in direct line of sight to the main bar serving area ("**Special Condition**").

3. The Secretary imposed the Special Condition, pursuant to section 70(2)(b), because he was not otherwise satisfied that the possibility of excluded gamblers and persons under 18 years of age gaining access to class 4 gambling at the Venue had been minimised.
4. The Appellant appealed to the Commission against the imposition of the Special Condition on the grounds that the Special Condition is not necessary and proposed the following replacement condition in its place:

Any external entrance to the gaming area must remain closed (but not necessarily locked) at all times that the gaming machines are in operation and may only be used for immediate entry and egress by staff and patrons, and for completing deliveries. The internal entrance(s) and external entrance(s) to the gaming machine area must be in direct line of sight to the main bar serving area ("**Alternative Condition**").

Background to Appeal¹

5. The layout of the bar and gaming area, including the Door has been unchanged for more than a decade. The Department of Internal Affairs ("**Department**") undertook compliance checks periodically over the years. An earlier special condition relating to the Door was removed in 2012, because the Secretary did not consider that it was needed.
6. The Department conducted a targeted venue inspection in July 2013, the outcome of which was that "...the venue complied with the Act in the areas tested". One of the areas tested was "...access to and supervision of the gaming area".
7. A further venue inspection was conducted in December 2018. The 2018 inspection considered whether "the opportunity for excluded gamblers and minors to enter the gaming room is minimised, and they are appropriately dealt with if they enter." The Department's assessment report, dated 11 December 2018, concluded that the Venue met expectations in that regard.
8. In October 2020, the Department was contacted by Eru Loach, of the Nga Kete Problem Gambling Service, who advised of receiving reports that excluded problem gamblers were accessing the Venue and gambling in breach of exclusion orders because "one of the entrances almost allows direct access to the machines". Mr Loach offered to assist in gathering information about breaches of exclusion orders but there is no indication that the offer was taken up by the Department.
9. On 9 February 2021, inspectors from the Department made a compliance visit to the Venue. Photos taken during the visit show the Door (which had a "Gaming entrance" sign above the doorway and a free-standing "Gaming" sign outside in the mall) open onto the sushi bar area of the mall. Gaming machines (including the jackpot) and patrons playing EGMs could be seen through the open Door. The inspectors entered the gaming room apparently unobserved and

¹ This section summarises the background events as they are outlined in the Appellant's submissions, supplemented by the Department's file and the affidavit of Kenneth Koo.

were acknowledged only when one of them approached the screen directly in front of the side bar.

10. In a telephone discussion later that day, Mr Wilson of the Appellant was advised of the inspectors' concerns regarding the Door. While initially contending that the Door needed to remain open to allow for air flow and access to facilities, he ultimately agreed to keep the Door closed pending a decision regarding the addition of a licence condition in respect of the Door.
11. On 12 February 2021, Mr Wilson forwarded an email (of same date) from the Venue owner and operator, Matt Smellie. Mr Smellie provided a list of self-excluded persons who had been observed at the Venue and set out how the Venue had dealt with them. The steps included requiring identification (to determine their exclusion status), conducting home visits (to complete self-exclusion documentation), requiring self-excluded gamblers to leave the Venue, contacting the Appellant for advice on formally reporting individuals and, in one instance, reporting the excluded person to the Police.
12. In the same email, Mr Smellie advanced the following reasons why it was not necessary for the Door to be locked, as opposed to closed:
 - (a) The Door is in direct line of sight from the bar.
 - (b) When the Door is open, the attention of venue staff is drawn directly to it as there is a light imbalance between inside the Venue and the adjoining open mall that is at times acute.
 - (c) The Door serves as a service door for the business and is used by staff to access frozen and dry goods which are held in a storage room.
 - (d) The Door is used to access the ice machine and cleaners' cupboard.
 - (e) The Door is the closest point to the designated fire assembly area within the mall.
 - (f) The Door is the point of receipt for heavy goods delivery such as 50 litre kegs and is also used when removing empty kegs for storage.
 - (g) As the Venue has only a single toilet, the Door provides access for customers to use the mall toilet, including the disabled toilet.
13. Mr Smellie also advised the Department in the email that the Door would be kept closed at all times and that it had signage on both sides indicating that it must not be left open². In response, the Department indicated that the proposed interim measure to keep the Door shut was "acceptable given there is no licence condition", and that it would consider, taking into account

² The email did not mention the "Gaming Entrance" sign or the free-standing Gaming sign observed on 9 February 2021.

the information provided by Mr Smellie, whether to add a licence condition requiring the Door to be either locked at all times or used as a fire egress only.

14. On 12 February 2021, the Department also reviewed an email from Mr Loach (sent on 4 February 2021), advising that he had found the Door open again (but not indicating the date) and had been able to enter the Venue unnoticed. He also claimed to have received further reports of excluded problem gamblers accessing the Venue (without providing details of the relevant persons, dates, or times). The email resulted in an internal decision in February 2021 to impose the Special Condition but no steps were taken at that stage to implement it.
15. On 10 December 2021, the Department sent a letter to the Appellant advising of the decision to add the Special Condition with immediate effect to the Venue's class 4 venue licence. The letter stated that the Secretary considered the addition of the licence condition to be necessary following "numerous complaints" of excluded gamblers entering the Venue unseen via the Door. It stated, in part:

Initial conversations with the Society provided that the door would remain shut. A follow-up inspection found the door leading directly into the gaming room from the mall, open³.
16. On 16 December 2021, the Appellant emailed the Department requesting the details of the date and time of the follow-up inspection referred to in the Department's letter of 10 December (pursuant to the Official Information Act 1982). The email stated that Mr Smellie was unaware of the Door being open at any point other than for a period of approximately 15 minutes per week, while the keg delivery was carried out. The Appellant further requested details of the "excluded gamblers" who had allegedly entered the Venue in breach of an exclusion notice, as Mr Smellie was unaware of any such incidents, save for one recidivist offender who had been dealt with.
17. On 23 December 2021, the Appellant filed an appeal against the Secretary's decision to add the Special Condition to the Venue's class 4 venue licence, pursuant to section 77(1)(b) of the Act.
18. On 3 February 2022, the Department responded to the Appellant's 16 December 2021 request for information by email, advising that the Department had visited the Venue on 9 February 2021. In response to the request for details of the excluded gamblers, the Department provided only one document, a copy of Mr Smellie's email to the Department of 12 February 2021 (as described in paragraph 11 above). No information about other reports of "numerous" excluded gamblers allegedly entering the Venue unseen was provided.

³ As the Department file does not record any inspection of the Venue after 9 February 2021, the letter does not appear to be accurate – the inspection predated, not followed, the promise to keep the Door closed.

Relevant legislation and prior decisions

19. The following provisions of the Gambling Act are relevant to the issues raised by the appeal:

67(1) Grounds for granting class 4 venue licence

The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—

....

(b) the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue is minimised; and

....

(q) the proposed venue is suitable in all other respects to be a class 4 venue; and

(r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

(s) the applicant is able to comply with all other applicable regulatory requirements.

69A Continuing obligations of corporate society in relation to class 4 venue licence

A corporate society that holds a class 4 venue licence must, in relation to class 4 gambling conducted at the class 4 venue for which the licence is held, ensure that, at all times:

(a) the possibility of persons under 18 years old gaining access to class 4 gambling at the venue is minimised; and

....

(g) the risk of problem gambling is minimised.

70 Content and conditions of class 4 venue licence

(1) A class 4 venue licence must include the following information and conditions:

...

(j) any other conditions added by the Secretary.

(2) The conditions that the Secretary may add to a class 4 venue licence include—

(a) conditions to ensure that both the venue operator and the venue manager can supervise effectively—

(i) the class 4 gambling at the venue; and

(ii) the venue personnel:

(b) conditions to minimise the possibility of persons under 18 years old gaining access to class 4 gambling at the class 4 venue:

....

(fa) conditions to minimise the possibility of problem gambling at the venue:

(g) conditions encouraging responsible gambling at the venue:

....

(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.

(4) If the Secretary decides to amend or revoke a condition or add a new condition to a class 4 venue licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager, of—

(a) the right to appeal the decision; and

(b) the process to be followed for an appeal under section 77.

77 Appeal to Gambling Commission regarding class 4 venue licence

(1) A corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager may appeal to the Gambling Commission against a decision of the Secretary to—

...

(b) amend or revoke a condition of the licence, or add a new condition to it; or

...

(3) The Gambling Commission—

(a) may request any information from the corporate society or the parties to the agreement or the venue manager or the Secretary; and

(b) is not bound to follow any formal procedure; and

(c) does not need to hold a hearing; and

(d) must consider any information provided by the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary.

(4) The Gambling Commission may—

(a) confirm, vary, or reverse the decision of the Secretary; or

(b) refer the matter back to the Secretary with directions to reconsider the decision.

20. Although section 70(2)(b) refers directly to access by persons under 18 years, exclusion of problem gamblers is an established gambling harm minimisation tool and preventing access by excluded persons is sufficiently concerned with minimisation of the possibility of problem gambling at the Venue to come within section 70(2)(fa). Although many of the specific concerns addressed below are about excluded persons rather than those under 18 years, there appears to be no logical reason to think that the risk of undesirable access posed by the Door is different for the two groups.

21. It can be seen from the relationship between the provisions of sections 67, 69A and 71, especially in respect of such things as access by persons under 18 years old, that the imposition of conditions is an option available to the Secretary to address concerns in place of refusal to grant or renew⁴, or to cancel⁵, a class 4 venue licence.
22. The Commission has previously considered how it should approach appeals against the addition of conditions aimed at addressing undesirable access concerns in a series of earlier appeal decisions, including *The Lion Foundation* (GC16/06), *Unison Trust* (GC37/06), *Perry Foundation* (GC22/08), *Eureka Trust* (GC29/08), *The Sail and Anchor* (GC10/12) and *The Riversdale Hotel* (GC05/15). In each decision, the Commission considered whether to require the closure of a secondary entrance into a class 4 gaming area.
23. Decision GC16/06 (which considered similar conditions at 11 different venues) was the first to set out the approach which the Commission would take in reaching its determination (which approach was adopted in all subsequent decisions). It also set out the Commission's views on passive and active measures (the latter being ineffective without alert and attentive staff) and the meaning of "minimal" and "minimise" under the Act. It also recorded that the focus of the provisions was on risk and possibility, and not limited to proven past instances of actual access.
24. In their submissions, both parties cited and relied upon the stated approach set out in decisions GC37/06 and GC29/08. No alternative approach was advanced by either party. Accordingly, it was common ground that the following approach should be used in the current appeal:
- (a) In the absence of the condition, are the measures in place sufficient to satisfy the Commission that the possibility of minors gaining access to class 4 gambling at the venue is minimal?
 - (b) Will the imposition of the condition minimise the risk of access?
 - (c) Is the condition reasonable in all of the circumstances of the venue?
 - (d) Is the condition appropriately imposed for reasons other than risk by minors, such as problem gambling and harm minimisation?

Appellant's submissions

25. The Appellant complained that the Department's decision-making process, including the delay in reaching the decision to impose the Special Condition and the failure to give advance notice before imposing the Special Condition, had been poor.
26. The operative part of the Special Condition is a requirement to lock the Door while the gaming machines are in operation. The Appellant argued that it would be sufficient for the Door to be

⁴ Under section 72(4), sections 66 and 67 apply to renewal applications as if it was an application for the grant of a class 4 venue licence.

⁵ Under section 74(1)(a), a ground for suspension or cancellation of a class 4 venue licence is any of the grounds in section 67 no longer being met.

kept closed, but not locked. The Door is visible from the main bar service area, and the layout of the Venue, including the gaming machine area and the Door, has remained the same for over a decade.

27. The Department had undertaken periodic compliance checks over the previous 10 years and raised no issues about the Door until 2021. The December 2018 Venue inspection specifically considered whether the opportunity for excluded gamblers and minors to enter the gaming room was minimised, and whether they were appropriately dealt with upon entrance. The assessment concluded that this aspect had met the Department's expectations.
28. The Special Condition appears to have been added following a complaint, but neither Mr Smellie nor the Appellant were given sufficient information about the complaint to assess its credibility.
29. There was a significant and unjustified delay by the Department in respect of its decision to impose the Special Condition. The complaint was made in February 2021, but the Department issued its decision to add the Special Condition more than nine months later (December 2021). Even accounting for Covid restrictions, that delay should be regarded as unacceptable, according to the Appellant, who suggested that a venue operator should be able to consider the matter closed after an appropriate period or, at a minimum, be offered the opportunity to mitigate an adverse outcome.
30. The Appellant suggested that, as "justice is fairness", a venue operator should be entitled to be aware of, and to rely on, the established application of rules and the outcome of compliance checks and to maintain longstanding harm minimisation strategies.
31. The Appellant relied upon the reasons given by Mr Smellie in his email to the Department for not requiring the Door to be locked (see paragraph 12 above) to submit that the Special Condition is unreasonable, and the requirements of section 67(1)(b) can be satisfied by the Alternative Condition.
32. Applying the test (as set out at paragraph 24 above), the Appellant submitted as follows:

In the absence of the condition, are the measures in place sufficient to satisfy the Commission that the possibility of minors gaining access to class 4 gambling at the venue is minimal?

- (a) Numerous factors support the possibility of access by minors and excluded persons to class 4 gambling being minimal: the Door does not need to be locked but should be kept closed, the existing layout of the gaming room and bar has remained the same for over 10 years, minors in any area of the hotel would be immediately noticed and the current measures and compliance checks indicate that the risks were already minimal. In addition, there is no greater risk of a minor or excluded person entering the gaming area via the Door in the absence of staff at the main bar than the main entrance to that area. If anything, a person who has already entered the venue and wishes to access the gaming area via the internal door has a better sense of when

best to enter the area unnoticed. Finally, Venue staff actively monitor gaming at the Venue and could provide a list of people who were seen breaching their exclusion. The Department has not attempted to ascertain whether such persons were the same as those reported as gaining access to the area via the Door.

Will the imposition of the condition minimise the risk of access?

- (b) Requiring the Door to be locked would eliminate any risk but it is sufficient to require the Door to be closed, which would minimise the risk of access.

Is the condition reasonable in all of the circumstances of the venue?

- (c) The Special Condition is unreasonable in the circumstances of the Venue. The Door is as visible as the internal entrance, and it has not been considered necessary previously for the Door to be locked within an identical Venue layout.

Is the condition appropriately imposed for reasons other than risk by minors, such as problem gambling and harm minimisation?

- (d) The Venue is proactive in its surveillance and apprehension of excluded persons and has successfully identified and notified the Department about the presence of such individuals in the past.

33. It was submitted that the Alternative Condition would achieve a balance between harm minimisation, the existing use of the Door and the Department's past pattern of allowing operation with a closed but unlocked Door.

Secretary's submissions

34. In the Secretary's submission, the Alternative Condition is not sufficient to minimise the possibility of problem gambling and access by minors to the gaming room.
35. In *The Lion Foundation* decision GC31/10, the Commission held that it must be satisfied that the Secretary's proposed condition is necessary for minimising the risk of problem gambling to the extent practicable under the Act. The Secretary submitted that the Special Condition is necessary, proportionate, fair and reasonable to mitigate the risk of problem gambling, for the following reasons:
- (a) As outlined in the affidavit of Kenneth Koo, excluded persons have admitted their calculated decision to visit the Venue is because the Door allows them to enter the gaming room unseen⁶.

⁶ The submission does not, in fact, reflect the content of the affidavit which contains no evidence of admissions, only a belief on the part of the deponent that there had been numerous complaints and without indicating what details he had about the complaints.

- (b) The Door is adjacent to a public area of a mall where excluded persons or minors may be shopping.
 - (c) Minimising the risk of excluded persons or minors accessing the gaming machines outweighs the detriment to the Venue staff or patrons of having to walk a marginal distance further to access the mall toilets or other facilities.
 - (d) The decision to add the Special Condition resulted from a reasonable process, including an opportunity afforded to the Venue to mitigate the risk themselves by requiring the Door to be kept securely closed. The Secretary imposed the Special Condition after finding the door open in the course of a premises inspection.
36. In previous decisions concerning external entrance licence conditions, including *The Lion Foundation* decision⁷, *Unison Trust* decision GC37/06 and *Eureka Trust* decision GC29/08, the Commission upheld conditions which required external entrances outside the direct line of sight of the venue's main area to remain locked.
37. Although a closed door would likely reduce the chance of persons accessing the gaming rooms (compared to an open one), it will not deter those who are familiar with the Door's operation or who observe other patrons using the Door as an entrance. In addition, regular use of the Door to access the mall toilets may result in staff becoming accustomed to the Door being used and reducing attention paid to its use. In contrast, requiring the Door to remain locked greatly reduces the risk of excluded persons or minors accessing the gaming room.
38. The Appellant had outlined what it considered to be the detriments of the Special Condition, which may be broadly categorised in two ways; detriments to the Venue and detriments to patrons.
- (a) Detriments to the Venue involve difficulties accessing facilities (freezer, ice machine, cleaning facilities, storage, keg and heavy goods deliveries, designated mall fire assembly and mall toilets, including the disabled toilet). However, the Special Condition allows the Door to be used as a fire escape and, despite the aforementioned difficulties, the size of the Venue means the additional distance involved in not using the Door is minimal. As use of the Door is also permitted while gaming machines are not in use, if necessary, deliveries could be scheduled within those times.
 - (b) The alleged detriments to patrons from the Special Condition are minimal in comparison to the harm resulting from problem gambling. One purpose of the Act is to minimise and prevent harm from gambling, which can have serious effects. The Act's exclusion regime, which provides for the identification and removal of problem

⁷ Presumably Decision 16/06 as that dealt most directly with external access.

gamblers from gambling venues, is its key harm minimisation tool for class 4 gambling. The Act imposes strict requirements on class 4 venue managers to minimise harm, including consequences of allowing an excluded person to access gambling areas.

39. The implementation of the Alternative Condition in lieu of the Special Condition would not minimise the chance of excluded persons entering the gaming area, according to the Secretary's submissions. Excluded persons are well aware of the Door, a number having admitted use of it⁸. As the Door leads directly into the gaming area, Venue employees would be unable to prevent the entry of excluded persons, in breach of the statutory duty to do so.
40. Although reports which the Department has received about the use of the Door are limited to the use by excluded persons, minors could also use the Door to access the gaming area. The Door opens out to an area of the mall with a sushi bar and retail shops, both which are used by minors.
41. Under section 67, the Secretary may only grant a class 4 licence where satisfied that the possibility of minors accessing class 4 gambling is minimised. The Appellant has an ongoing obligation to ensure such risk (and also in respect of excluded persons) is minimised at all times.
42. Though the Appellant argues that a minor would be quickly noticed and removed, a person's age is sometimes not clearly apparent, particularly when employees are limited to a fleeting glance when persons enter via the Door. Unless staff are constantly checking for new patrons, minors may be able to use gaming machines undetected. Allowing the Door to remain unlocked while class 4 gambling is in operation would be inconsistent with the ongoing obligations of both the Secretary and the Appellant.

Appellant's submissions in reply

43. In reply, the Appellant submitted, in summary, as follows:
 - (a) The expressed concerns about access to the Venue and the knowledge of excluded gamblers are almost exclusively based on hearsay evidence.
 - (b) The material provided by the Secretary indicates that the allegations relating to access by excluded patrons came from a person who is an anti-gambling advocate who is strongly opposed to class 4 gambling and who complained in general terms about the ills of class 4 gambling without providing any details of the allegations of access by excluded persons to enable their verification.

⁸ See footnote 6.

- (c) The complainant provided neither direct evidence of admissions by excluded persons nor even any detail of the alleged access events.
- (d) Although it may not be the complainant's responsibility to provide adequate factual detail, in its absence, at the very least, the Secretary should have made independent enquiries to verify the allegations and provided the Appellant with a fair opportunity to respond.
- (e) The Alternative Condition addresses the risks outlined in the Secretary's original decision regarding the Special Condition adequately.

Initial consideration and further submissions

44. Following consideration of the original written submissions from the parties, Commissioners noted that the parties had adopted a binary approach to the issues before the Commission, assuming that the Commission would decide either to approve the Special Condition (imposed by the Secretary) or to replace it with the Alternative Condition (proposed by the Appellant). The submissions gave no consideration to any other possibilities, including conditions which could be seen as effecting a compromise between the Special Condition and the Alternative Condition.
45. On 13 April 2022, the Commission requested further submissions from the parties on other options and, to assist the parties with their responses, asked them to address specifically two potential alternative licence condition options as follows:
- (a) The external entrance into the gaming room must remain closed and locked when the gaming machines are in operation but may be fitted with a mechanism which permits egress from inside with automatic locking such that the external entrance cannot be used for ingress by patrons into the gaming room. Signage in the vicinity of the door indicating the presence of gaming and access to it is prohibited. **(First Option)**
 - (b) The external entrance into the gaming room must remain closed and locked when the gaming machines are in operation but may be fitted with a mechanism which permits egress from inside with automatic locking. In addition, the mall-side of the external entrance may be fitted with a keypad lock (or similar) which permits controlled ingress by venue staff into the venue, for deliveries and for necessary wheelchair access, but no general ingress by patrons. Signage in the vicinity of the door indicating the presence of gaming and access to it is prohibited. **(Second Option)**
46. Whereas the Special Condition required the Door to be kept permanently locked and the Alternative Condition would require the Door to be kept closed but not locked (so that anyone

could use it for entry while the premises were open), the First and Second Options comprised different compromises between the Special Condition and the Alternative Condition. Both Options would require the Door to be locked to prevent the Door from being used for general entry but would provide for a form of unrestricted exit in each case and, in the case of the Second Option would additionally allow entry by a limited group of people who had the necessary digital access. Both Options also included a prohibition on signage indicating that the Door provided access to gaming (as the Door currently has signage to that effect).

47. The Appellant and the Secretary filed additional submissions, including reply submissions.

Secretary's additional submissions

48. The Secretary's submissions were received first. The Secretary was conditionally supportive of either of the proposed Options, subject to additional controls to ensure that the underlying purpose was preserved in each case.
49. With the First Option (the one-way door), the Secretary's concern was the possibility of patrons inside the premises opening the door for excluded or underage gamblers. As a solution for the concern, the fitting of an audible alarm to alert venue staff to the use of the door was proposed as an additional element.
50. With the Second Option (limited digitally controlled entrance), the concern was with the sharing of access codes among patrons without the knowledge of staff. The suggested solution included an additional requirement to fit an audible alarm (as above), combined with control of access being limited to physical means, such as keys or access cards (rather than a keypad) or, if a keypad were used, an express requirement for periodic changes of code.
51. No other alternatives were advanced by the Secretary.

Appellant's additional submissions

52. The Appellant initially indicated that it was generally amenable to the options suggested but, on closer examination, the Appellant's submissions would involve very significant departures from the proposed options, as follows:
- (a) The Appellant opposed any requirement to keep the Door locked, preventing its use as an entrance by those "lawfully permitted to be on the premises" and thereby inconveniencing them because the Door gave the most "direct path to the mall carpark".
 - (b) The Appellant argued that a requirement for the Door to be locked would be disproportionate, in part because harm minimisation was merely one aspect of the Act and did not justify receiving any predominance. The Alternative Condition (Door

kept closed, but not locked) was an appropriately proportionate response to the limited importance of harm minimisation.

- (c) Underage gambling was a merely theoretical concern, not based in evidence concerning the Venue. In contrast, access by excluded problem gamblers has been established as a real concern nationally. A 2010 study indicated that 29% of all patrons excluded from class 4 venues breached the exclusion notice.
 - (d) Restrictive access conditions should be limited to harm minimisation for excluded problem gamblers, not directed at underage gamblers (because the latter are not, in fact, a problem). An appropriate solution would be limited therefore to the use of facial recognition technology in the gaming room itself.
 - (e) The Appellant opposed, apparently as a matter of principle, any aspect of a proposal which had not been included in the original Special Condition. The addition of a gaming entry signage prohibition, which had not been part of the Special Condition, was such an aspect. While the rationale for its inclusion was said to be unclear, prohibiting references to "entrance" on signage at the Door would be acceptable.
53. Consistent with the foregoing, the Appellant advanced a Second Alternative Condition, which added to the Alternative Condition, a requirement for "a functioning facial recognition system" for monitoring the rear entrance when the gaming machines were in operation.

Replies

54. In reply, it was submitted for the Secretary:
- (a) The Second Alternative Condition would not sufficiently minimise the risk of gambling by underage patrons or excluded problem gamblers.
 - (b) Harm minimisation is one of the limited express purposes of the Act, not a minor consideration. In addition, minimisation of the risk of harm or underage gambling is an express feature of many individual sections, including the power to impose conditions.
 - (c) While it is a potentially useful tool in identifying problem gamblers, the obligations under the penal provisions of the Act aimed at preventing access by problem gamblers⁹ and underage gamblers¹⁰ would not be met by facial recognition technology. There are weaknesses in the technology, and it could not be used to detect underage gamblers.

⁹ Section 312(3)(a)

¹⁰ Section 302(3)

- (d) The inconvenience of patrons not being allowed to use the Door for access and having to walk a short further distance was not disproportionate to the risk reduction benefit of locking the Door.
- (e) As the Act is concerned with risk of underage gambling and harm, the Secretary is not required to establish the prior occurrence of either in order to impose a condition to minimise those risks.

55. In its reply, the Appellant took issue with a suggestion, in the Secretary's reply submissions, that the Appellant did not appreciate the importance of its role in minimising harm, pointing out that there was no evidence of underage gambling at the Venue and that the suggestion was in response to the Appellant questioning the reliability of the unparticularised and hearsay evidence that excluded gamblers were using the Door to gain entry. The Appellant's observations of the absence of underaged gamblers and its established practice in detecting excluded gamblers were appropriately made in its submissions and did not indicate a lack of appreciation of the importance of its role.

The issues

56. As it has indicated in its previous decisions, the appeal requires the Commission to make its own assessment and to apply the established approach to the particular circumstances of the Venue. As has been the case in previous appeals of this nature, Commissioners visited the Venue in early April 2022. The purpose of the visit was to gain firsthand impressions of the Venue's layout and operation in order to understand better the written information before the Commission. The visit was an informal one, as ordinary members of the public, unaccompanied by representatives of either party.
57. As the condition was imposed because of concerns with the possibility of entry by both excluded problem gamblers and underage persons, the Commission considered that its approach could be further summarised to a three-step issue analysis:
- (a) Whether the risks of access by underaged persons or by excluded persons are already minimised, without the imposition of a condition regarding the Door;
 - (b) If not, would the imposition of the Special Condition minimise access by underaged persons or excluded persons; and
 - (c) If so, would its imposition be reasonable in all the circumstances, including whether another condition, such as the Alternative Condition, the First Option or the Second Option, would be an acceptable alternative to the Special Condition to minimise those risks, having regard to the balance of benefits (specifically the extent of the reduction in those risks) and the detriments (the extent of the consequent detriments suffered by the Venue and its patrons).

Analysis

General observations on peripheral matters

58. Before addressing the issues set out above, the Commission addressed a number of the more peripheral issues raised in the Submissions.
59. The Commission does not regard the procedural complaints made by the Appellant, including delay in imposing the Special Condition and the fact of a different assessment outcome in 2021 than in the past, as independently material to its assessment. In the Commission's view, the Department may re-assess the risks imposed by a particular venue's operation from time to time, form a different view from a past view and, as a result, impose new obligations in the form of conditions. That is not to say that the results of past inspections and assessments are never relevant to the current assessment. However, an expectation of the status quo remaining unchanged is not a legitimate one and does not justify departure from observance of the requirements of the Act by the licence holder, the Secretary or the Commission.
60. This is particularly the case when the minimisation of a particular risk is one which requires a positive assessment by the Secretary both to grant and to renew a class 4 venue licence and when a negative assessment by the Secretary would provide a basis for cancellation of the venue licence. The imposition of suitable conditions is a means by which the Secretary may achieve the statutorily required level of satisfaction required by section 67(1).
61. Neither is the failure to give advance notice nor to allow the Appellant an opportunity to address the risk without imposition of the Special Condition material when imposing or amending conditions (in contrast to the provisions relating to suspension, cancellation, or non-renewal decisions¹¹). In any event, in this particular case, the Venue and Appellant in fact had notice of the Department's concerns and advanced arguments that the step which the Secretary was contemplating was unnecessary.
62. In the present case, the Secretary's change of view appears to have arisen from unparticularised, unverified, and second-hand allegations of access by excluded persons prior to the imposition of the Special Condition. The Appellant questioned the credibility of the accusations by reference to the known opposition by the person reporting them, and to the lack of supporting independent information, or even details of the alleged access, to enable the Appellant to controvert the complaint allegations other than in general terms. While the Appellant's criticisms of the credibility of the complaints have real force, the Commission sees the doubts raised about their credibility as largely neutralising their effect, rather than leading logically to a conclusion that there is no risk.

¹¹ Section 75(1) to (3)

63. The suggestion that entry by underage gamblers is a mere theoretical concern, which can be safely ignored on that basis, is not sustainable when reference is had to the provisions of the Act. Minimisation of the risk of access by those under 18 years of age is an essential ground for the grant or renewal of a class 4 venue licence¹², is a continuing obligation of the licence holder¹³ and expressly approved as a potential licence condition¹⁴. The Act is expressly concerned about minimisation of that risk, not merely ameliorating a proven prior state of affairs. Evidence of prior undesirable access affects the assessment of the extent, not the existence, of risk. In this case, the 2010 study provides a sound empirical basis for ongoing concern about access by excluded problem gamblers generally in class 4 venues and the evidence is that access by excluded problem gamblers has occurred, but been detected, in the past.
64. The Commission also saw nothing of substance in the objection in principle raised to the addition of the proposed signage restriction in the First Option and the Second Option. The presence of signage would be of little concern under the Special Condition because the Special Condition required the door to be kept permanently locked. As the First and Second Options would allow only very restricted use of the Door as an entrance, signage inviting its use as a general entrance would undermine the primary intent of excluding its use as an entrance except in limited circumstances. Ultimately, the Appellant accepted that such a restriction would be reasonable in those circumstances.

Are the risks of undesirable access already minimised without a Door condition?

65. In the Commission's assessment, following its own observations, unrestricted use of the Door would materially increase the risk of unobserved entry by excluded or underage gamblers. Unlocked, the Door would allow direct access into the gambling area, from which point anyone entering the area would be largely out of sight of the Venue staff. Although the Appellant submitted that the Door is visible from the main bar service area, this is only true if a staff member is positioned on the side of the bar that faces the side-external-entrance into the mall and is looking left into the gaming room. During the Commission's visit, the entire bar service area was unoccupied for much of the time (because staff were very busy preparing food in the kitchen) and, when they were at the bar, staff served customers from the bar area facing the front-external-entrance, rather than the side-external-entrance, a position from which they had no view into the gambling area.
66. While the Appellant has raised genuine doubts whether excluded or, more particularly, underage gamblers have used the Door in the past, the risk of such access is a real one. Exterior doors which allow direct access to the gambling areas and which are not easily

¹² Section 67(1)(b)

¹³ Section 69A (a)

¹⁴ Section 70(2)(b)

observed are generally a matter of concern for the Commission. The answer to the first question is "No".

Would the Special Condition minimise access by excluded or underage gamblers?

67. It follows from the above assessment that a condition requiring the Door generally to be kept locked would materially reduce the risk of access by excluded or underage gamblers. The Door's proximity to the gaming area and the Door and the gaming area's remoteness from easy staff observation add materially to that risk. As a result, permanent physical constraint to use of the Door for general access would materially reduce the risk. The answer to the second question is "Yes".

Is imposition of the Special Condition reasonable in all the circumstances (including the availability of effective alternatives)?

68. The Alternative Condition and the Second Alternative Condition advanced by the Appellant clearly contemplated continued use of the Door as an available means of access. They would require the Door to remain closed (but not locked) when not in actual use, ultimately accepting the point of removing signage inviting its use for access, in such circumstances. The Secretary's position was that minimisation of the risk required that the Door should remain locked generally, with limited and conditional support for options which would permit its exceptional use as a one-way exit or for restricted access, while pointing out the concerns which each such option raised.
69. In the Commission's assessment, the Special Condition is reasonable in all the circumstances for the following reasons:
- (a) A requirement to keep the Door closed but not locked would likely be ineffective in practice, having regard to the realities of policing such an obligation, and doubts about the likely effectiveness of some form of facial recognition system which is not currently installed.
 - (b) Less restrictive limitations, such as those which would be imposed by the First Option and the Second Option, brought with them real concerns about reduced effectiveness which the Secretary had raised appropriately. Those concerns were of sufficient substance that the options would only be justified to mitigate real detriment to the Venue and its patrons resulting from the Door being locked.
 - (c) In the Commission's assessment, the extent of any detriment of a general requirement to keep the Door locked is minor, having regard to the size and location of the premises and the availability of two other entrances which would remain unlocked and available. The extra distances and ease of access involved in using one of the other two doors, rather than the Door, involve no real burden. While

Commissioners were visiting the Venue, it took a beer keg delivery through the side door without difficulty.

- (d) The degree of detriment arising from locking the Door does not approach that found in *The Southern Trust – The Riversdale Hotel* decision (GC05/15) as a result of which the Commission varied the imposed condition to remove a requirement that a rear door be kept locked, replacing it with an audible alarm (which, unlike the present case, was highly likely to be monitored as it alerted staff to patrons entering the bottle store) and video surveillance.
- (e) In the Commission's assessment, the location of the Door and its location in the mall creates a real risk of unobserved entry by excluded problem gamblers and underaged persons wishing to gamble. The risk is enhanced by signage above and outside the Door.
70. Having considered the options and the further submissions, the Commission considers that reducing the restrictions from those set out in the Special Condition would not deal appropriately with the risk and the benefit of reducing the risk outweighs the detriments arising from the restrictions. The answer to the third question is "Yes".

Decision

71. For the reasons outlined above, the Commission confirms the decision of the Secretary to impose the Special condition.



Lisa Hansen
Chief Gambling Commissioner

for and on behalf of the
Gambling Commission

13 May 2022

