GC19/21

IN THE MATTER of the Gambling Act 2003

AND an appeal by **KIWI GAMING FOUNDATION** against a decision of the Secretary for Internal Affairs regarding Class 4 venue licence conditions for **WOODEND TAVERN, CHRISTCHURCH**

BEFORE THE GAMBLING COMMISSION

Members:	L M Hansen (Chief Gambling Commissioner) D C Matahaere-Atariki W N Harvey S C L Pearson
Date of Notice:	12 July 2021
Date of Decision:	1 October 2021
Date of Notification of Decision:	19 October 2021

AN APPEAL BY KIWI GAMING FOUNDATION AGAINST A DECISION OF THE SECRETARY FOR INTERNAL AFFAIRS REGARDING CLASS 4 VENUE LICENCE CONDITIONS FOR WOODEND TAVERN, CHRISTCHURCH

1. INTRODUCTION

1.1 Kiwi Gaming Foundation Limited ("**KGF**") currently holds a Class 4 venue licence for the Woodend Tavern which records that is authorised to operate no more than 18 gaming machines. However, the schedule attached to the venue licence lists the details of only 10 gaming machines. Following the decision in an *Appeal by Pub Charity Limited re Matata Hotel*[1] ("**Matata Hotel decision**"), KGF applied to the Secretary for Internal Affairs ("**Secretary**") to add the details of an additional 8 gaming machines to the machine detail schedule of its venue licence, with a view to preserving the right to operate a maximum of 18 machines at the venue.

1.2 The application to amend the licence by adding the details of 8 machines was filed on 20 April 2021. On 8 July 2021, counsel for the Appellant enquired about the status of the application.

[1] Decision GC03/21, 8 April 2021

On 12 July 2021, an email on behalf of the Secretary advised that the application was "null and void" and would not be accepted by the Department.

1.3 On 12 July 2021, pursuant to section 77(1)(b) of the Gambling Act 2003 (the "**Act**"), KGF lodged a notice of appeal with the Commission against what it regarded, relying on the decision of the Commission in an *Appeal by The Southern Trust and Te Wheke Holdings*[2] ("**Te Wheke decision**"), as a refusal to amend the venue licence.

1.4 The additional 8 gaming machines which KGF applied to have added to the machine detail schedule are owned by KGF and have been approved as meeting the minimum standards, but they are held in storage and KGF intends to keep them in storage and non-operational. KGF's intention to keep the additional machines unconnected to the electronic monitoring system was one of the reasons that the Secretary regarded the application to add their details as null and void.

1.5 The notice of appeal was supported by an affidavit sworn on 30 July 2021 by Sheldon Bell, the chief executive of the KGF, and written submissions dated 30 July 2021. In response, an affidavit sworn on 13 August 2021 by Susan Allen, the Deputy Director Operations within Regulatory Services of the Department of Internal Affairs ("**DIA**") and written submissions dated 13 August 2021 were filed on behalf of the Secretary. Reply submissions were filed on behalf of KGF dated 18 August 2021.

2. BACKGROUND TO APPLICATION – MATATA HOTEL DECISION

2.1 The subject application followed the Matata Hotel decision, in which Pub Charity Limited appealed against a decision of the Secretary to issue a Class 4 venue licence for the Matata Hotel with a commencement date of 14 August 2020 and a condition that a maximum of 9 gaming machines may be operated at the venue.

2.2 The previous holder of the venue licence for the Matata Hotel, The Southern Trust, had held a venue licence which expressly recorded authorisation to operate "no more than 14 gaming machines", reflecting rights preserved under section 92 of the Act. However only 5 gaming machines had previously been in operation and the details of only 5 machines appeared on the machine detail schedule in the licence. On 12 December 2019, The Southern Trust filed a notice of surrender of the venue licence with DIA, with effect from 11 December 2019.

2.3 The Secretary's decision, on Pub Charity Limited's application, to issue a licence recording that the venue was authorised to operate "no more than 9 gaming machines" assumed that the venue did not hold a class 4 gambling licence for a period of more than 6 months after 17 October 2001 (that is, between the effective date on which the prior licence was surrendered (11 December 2019)) and the commencement date of the new licence issued

[2] Decision GC17/07, 11 September 2007.

(14 August 2020)), and, accordingly, had no rights which continued to be preserved by section 92, reducing the venue's maximum entitlement to the standard 9 machines. In so deciding, the Secretary declined to backdate the issue of the licence in order to preserve the section 92 entitlement.

2.4 Pub Charity argued on appeal that the Secretary had erred in the treatment of the application. It contended both that the assumed 6 month period had been incorrectly calculated, and that the discretion should have been exercised to backdate the new venue licence to the application date to preserve rights under section 92. The appeal assumed that doing so would allow up to 14 gaming machines to be operated at the venue.

2.5 On appeal, the Commission determined the true date of expiry of the section 92 period and decided to exercise the discretion to backdate the issue of the licence. Having done so, the Commission then considered what the terms of the resulting licence should be. The appeal submissions had been focused exclusively on the time continuity dimension of section 92. The Commission questioned, however, whether the authorisation continuity requirement of section 92 had been met.

2.6 After receiving additional submissions, the Commission analysed carefully the class 4 venue licence provisions, both generally and in terms of section 92, observing that both section 92 and the general venue licence provisions required both the maximum permitted number of gaming machines to be stated **and** details of all gaming machines authorised to be operated (the latter appearing in the machine detail schedule). The Commission held that, for the purposes of the preservation of rights under section 92, a degree of consistency was expected between those elements, such that the stated maximum number of gaming machines would be reflected in a schedule containing the details of *at least* that number of gaming machines. The Commission held that, if an operator were permitted to operate only machines for which details were set out in the licence schedule (which is what the licence expressly provided), there would be no sense in which it would be authorised to operate more machines than those for which details appeared in the licence schedule.[3] As section 70(1)(h) required "details of the gambling equipment that **may** be operated at the venue" (not the equipment **currently** operated in fact, as had been assumed by the parties), no licence authorised the operation of a greater number of machines than those listed in the schedule.[4]

2.7 In reaching those conclusions, the Commission expressly acknowledged that there was no statutory obligation for a society to operate all of the machines that it is permitted to operate at a particular venue. The minimum operational requirement was set out in section 71(1)(g), namely the conduct of some form of class 4 gambling at the venue within a 4 week period, with no reference to the number of machines operated.[5]

[3] Decision GC03/21, at [10.18].
[4] At [10.22].
[5] At [10.19].

2.8 The Commission also observed the lack of any statutory requirement to remove from the schedule the details of any machines not presently in operation. The statutory provisions did not preclude the inclusion in the schedule of the details of machines not located at the venue; the details of machines could be listed so long as the machines met the applicable regulatory standard and were owned by the licence holder. The Act did not even preclude the schedule listing the details of a greater number of owned and compliant machines than permitted by the maximum machine provision. Doing so would allow the licence holder to change the machines in operation, up to the maximum permitted number, without the need to amend the licence.[6]

2.9 The Commission expressed concern that the administration of the Act had rested on assumptions and practices adopted or endorsed by the Secretary which, on close examination, were not well-grounded in the Act's provisions. In those circumstances, its preferred solution was to refer the matter back to the Secretary, pursuant to section 77(4)(b), with directions to provide a sufficient opportunity to the applicant to recover the venue's position in light of the guidance provided by the decision. The direction was to issue a new licence, backdated to 11 June 2020, for a maximum of 14 machines with the inclusion in the schedule of the details of at least 14 permitted machines (thus requiring the applicant to provide the Secretary with details of an additional 2 machines than had been provided up to that point). If such a licence were issued, the venue's position under section 92 would be recovered and preserved. The Commission considered that section 92 rights could be maintained in the future, provided that the venue held a licence which included the details of 14 machines (and any associated costs were met).[7]

2.10 The Commission suggested to the Secretary that other operators in a similar position be given an opportunity to recover the position in a similar fashion, through the addition to the schedule of sufficient machine details to bring the permitted machine detail condition into alignment with the maximum permitted number condition. Ideally the opportunity would be available to operators to make the necessary changes in the course of the next licence renewal. Having received notice of the need to align the two conditions by the decision, if a Class 4 venue licence holder elected not to do so, the Commission saw no unfairness in a strict application of sections 92 and 98 in the future.[8]

3. RELEVANT LEGISLATION

3.1 The sections below apply to the issues raised by the appeal.

3.2 The applicable content requirements of a class 4 venue licence are set out in section 70 of the Act as follows:

[6] At [10.20] and [10.22].
[7] At [10.28].
[8] At [10.30].

70 Content and conditions of class 4 venue licence

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

(a) the name of the corporate society that holds the licence; and

(b) the commencement date and expiry date of the licence; and

(c) the authorised purpose of the corporate society; and

(ca) the name of the class 4 venue; and

(d) the name of the venue operator; and

(e) the name of the venue manager; and

(f) a description of the class 4 venue and its location; and

(g) conditions about the class 4 gambling that may be conducted at the venue, including the number of gaming machines that may be operated; and

(h) details of the gambling equipment that may be operated at the venue; and

(i) conditions to prevent class 4 gambling being conducted at the venue unless the primary activity of the venue is offered and available at that time; and

(j) any other conditions added by the Secretary.

3.3 Amendment of class 4 venue licences and the procedure to be followed on applications, including appeals, are covered by sections 73, 75 and 77 of the Act, as follows:

73 Amending class 4 venue licence

(1) A corporate society must apply to the Secretary to amend its class 4 venue licence if the corporate society proposes to—

(a) change any gambling equipment at the venue; or

(b) increase the number of gaming machines that it may operate at the venue; or

(c) change any condition of the licence or any procedure that is a condition of the licence.

(2) An application must be on the relevant standard form and be accompanied by any items listed in section 65 that the Secretary requests in order to consider the application and effect the amendment.

(3) The Secretary may return an incomplete application, and the accompanying documents and any fee, to an applicant.

(4) Sections 66 and 67 apply to an application for amendment as if it were an application for a class 4 venue licence.

(5) The Secretary must refuse to amend a class 4 venue licence if—

(a) the applicant does not hold the associated operator's licence; or

(b) any investigations carried out by the Secretary cause the Secretary not to be satisfied about any of the matters specified in section 67; or

(c) the Secretary is not satisfied that the applicant complies with section 69A; or

(d) the Secretary is not satisfied that the applicant will comply with all relevant requirements of this Act, including the obligations set out in section 69A, minimum standards, game rules, Gazette notices, and licence conditions.

75 Procedure for suspending, cancelling, or refusing to amend or renew class 4 venue licence

(1) If the Secretary proposes to suspend, cancel, or refuse to amend or renew a class 4 venue licence, the Secretary must notify the corporate society or, if there is a venue agreement, the parties to the agreement, and the venue manager of—

(a) the proposal to suspend, cancel, or refuse to amend or renew the licence; and

(b) the reason for the proposed suspension, cancellation, or refusal; and

(c) their rights, and the procedure to be followed—

(i) before the suspension or cancellation takes effect; or

(ii) as a result of the refusal to amend or renew the licence.

(2) The corporate society or the parties to the venue agreement, and the venue manager may make written submissions to the Secretary concerning the proposed suspension, cancellation, or refusal to amend or renew within—

(a) 20 working days after the date of the notice under subsection (1); or

(b) any longer period that the Secretary allows if an application for an extension is made within the time period specified in paragraph (a).

(3) The Secretary must consider any submissions made by the corporate society or the parties to the venue agreement, or the venue manager.

(4) If the Secretary decides to suspend a licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager of—

(a) the date that the suspension takes effect; and

(b) the suspension period (up to 6 months); and

(c) the reason for the suspension.

(4A) Where the licence is suspended because of a continuing breach, the Secretary must notify the society of—

(a) the matters to be dealt with in order for the Secretary to consider withdrawing the suspension before the end of the suspension period; and

(b) the consequences of not dealing with the matters identified.

(5) If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the corporate society or the parties to the venue agreement, and the venue manager of,—

(a) for a cancellation, the date on which the cancellation takes effect and the reason for the cancellation; or

(b) for a refusal to amend or renew, the reason for the refusal.

(6) If subsection (4) or subsection (5) applies, the Secretary must also 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—

(a) refuse to grant a class 4 venue licence to the corporate society; or

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

(c) refuse an application by the corporate society for the renewal of a class 4 venue licence; or

(d) refuse to amend a class 4 venue licence held by the corporate society; or

(e) suspend or cancel a class 4 venue licence held by the corporate society.

(1A) To avoid doubt, the specification of an expiry date under section 70(1A) is not a decision that may be appealed to the Gambling Commission.

(2) An appeal must be in writing and must be made within—

(a) 15 working days after the date of the notice of the Secretary's decision; or

(b) any longer period that the Gambling Commission allows if an application for an extension is made within the time period specified in paragraph (a).

(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.

(5) The Gambling Commission must give notice of—

(a) its decision, with reasons, to the corporate society, or the parties to the venue agreement, and the venue manager and the Secretary; and

(b) the date on which its decision takes effect (which may be a date that is later than the date on which it makes the decision).

3.4 The statutory requirements for connection to the EMS are set out in section 86 of the Act, as follows:

86 Holder of class 4 operator's licence must connect to electronic monitoring system

(1) The holder of a class 4 operator's licence must connect the following gambling equipment to an electronic monitoring system specified by the Secretary in a notice to the holder:

(a) all gaming machines under the holder's control; and

(b) any other gambling equipment, or classes of gambling equipment, specified by the Secretary by notice in the Gazette.

(2) The holder of a class 4 operator's licence—

(a) must bear the cost of replacing or upgrading gambling equipment in order to enable the connection of gaming machines to an electronic monitoring system; and

(b) may be required by the Secretary to bear the cost of equipping or upgrading a class 4 venue for which it holds a licence in order to enable the connection of gaming machines to an electronic monitoring system.

(3) The holder of a class 4 operator's licence must comply with subsection (1) by the date or dates notified to that holder by the Secretary, and the Secretary may notify particular dates that apply—

(a) to particular corporate societies or classes of corporate society:

(b) to particular class 4 venues or classes of class 4 venues.

(4) [Repealed]

(5) The holder of a class 4 operator's licence must not operate gaming machines after the date or dates notified to the holder by the Secretary unless the machines are connected to an electronic monitoring system specified by the Secretary.

(6) A notice under subsection (1)(b) is a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

3.5 Section 86 refers to gaming machines and gaming equipment which are defined in section 4 of the Act as follows:

gambling equipment –

(a) means a machine, device, or thing used remotely or directly to conduct or monitor gambling; and

(b) includes equipment and things associated with the items specified in paragraph (a); and

(c) includes a gaming machine; and

(d) includes a machine, device, or thing declared to be gambling equipment by regulations made under section 368; but

(e) does not include a machine, device, or thing declared not to be gambling equipment by regulations made under section 368

gaming machine—

(a) means a device, whether totally or partly mechanically or electronically operated, that—

(i) is adapted or designed and constructed for gambling; and

(ii) is played or confers a right to participate, whether totally or partly, by the insertion of money into it or by the direct or indirect payment of money by any other means; and

(b) includes a device for gambling that is conducted partly by a machine and partly by other means; and

(c) includes a device, or type of device, that is declared to be a gaming machine by regulations made under section 368; but

(d) does not include—

(i) a device used only to draw a lottery; or

(ii) a random selection device used in a game of housie; or

(iii) a device used only to dispense tickets that is not capable of being used to decide the outcome of gambling; or

(iiia) a jackpot device that links a series of gaming machines and thatcan only be played through those gaming machines; or

(iv) a communication device that is used both to dispense tickets in and draw a lottery that is a sales promotion scheme; and

(e) does not include a device, or type of device, that is declared not to be a gaming machine by regulations made under section 368; and

(f) does not include a device operated by the Lotteries Commission.

4. APPELLANT'S SUBMISSIONS

4.1 The KGF submissions referred to the Matata Hotel decision in detail. It submitted that the DIA response, which amounted to a refusal to add the additional machines, derived from an email from the Deputy Director, Gambling Regulation to gambling operations staff dated 21 May 2021, which advised that the Matata Hotel decision was "not a formal decision from the Commission" and that the observations by the Commission concerning the addition of non-operational machines to a licence were merely a "suggestion" or "recommendation". It advised that, until a subsequent operational decision was made by the Department in light of the Commission's observations, the Department's current practice "remains unchanged".

4.2 KGF argued that the Matata Hotel decision constituted a decision by the Commission concerning the need to add machines to a venue licence schedule in order to preserve a section 92 right, even if there were no intention to install or operate them at the venue. The decision had been a comprehensive, well-reasoned one, issued after the parties had been alerted to the "permitted number" issue and had made detailed submissions on the point, including submissions in reply.

4.3 KGF accepted that the passages in the decision regarding possible future amendments to the fee structure and the desirability of allowing an opportunity to other licence holders to recover the venue's section 92 position were recommendations or suggestions. However, the statements regarding the requirement, and the right, to address disparity between the permitted machine schedule and maximum number of machines provision were live issues on the appeal and constituted binding legal precedent.

4.4 Although it was clear to the Commission that no more than 12 machines would be operated and installed at the Matata Hotel, it directed the Secretary to issue a licence with 14 machines listed in the schedule (so long as further details were provided) and that had happened. In addition, as the Commission had criticised the previous administration of the Act by the Secretary in this particular respect, KGF submitted that it was inappropriate for the Secretary to decline to change past DIA practice.

Costs

4.5 In its initial submissions, KGF also sought an award of costs, citing the following passage in the costs decision in an *Appeal by The Lion Foundation*[9]:

> The Commission agrees with the Appellant that an award of costs may be appropriate to **deter parties from ignoring the Commission's prior decisions and treating them as ineffective [emphasis added]**. While costs should remain exceptional and will generally involve bad faith or procedural misconduct, the Commission will not restrict itself to considering only conduct during an appeal and, in awarding costs, may take into account conduct which brought about an appeal.

4.6 The Secretary's conduct in the present application was said to be a "classic example" of ignoring the Commission's prior decision and treating the decision as ineffective. KGF also argued that the procedure adopted, refusing to process the application and treating it as null and void, was wrong. Section 73(3) of the Act does not give the Secretary the power to return or refuse to process an application if the application contains the information required by section 73(2).

4.7 Failing to process and formally decline an application, as occurred in the present appeal, deprives an applicant of:

(a) clarity as to the status of its application (with processing delays being commonplace, periods of silence are not necessarily a sign that there is an issue with an application, or that an application has been refused);

(b) receipt of a proposal to refuse to amend the class 4 venue licence and therefore the opportunity for an applicant to make submissions on the proposal (depriving an applicant of the due process laid out in section 75 of the Act); and

(c) receipt of notice following a formal refusal giving reasons for the decision and notification of the right to appeal to the Commission.

5. THE SECRETARY'S EVIDENCE AND SUBMISSIONS

5.1 Both the submissions and the evidence for the Secretary made clear that the reason for the problems with processing the subject application were of a technical and business nature, not a refusal to accept as correct the Matata Hotel decision.

5.2 In her affidavit evidence, Ms Allen explained that use of a new DIA system, known as Kotare, had commenced in November 2020. Kotare had been designed to operate alongside a longstanding electronic monitoring system known as EMS. EMS, Kotare and its predecessor IGP system had all been designed on the basis of a set of assumptions, some of which were contrary to what the Commission had subsequently held in the Matata Hotel decision. The

[9] Decision GC16/11, 8 June 2011.

design assumptions included an assumption that only the details of installed and operating machines would be included in venue licences and that no machine could be listed in more than one licence at a time. EMS had accordingly been designed not to accept duplicate machine details and, if listed in one licence, the same details would automatically be rejected by EMS for any other licence.

5.3 The Gambling (Fees) Regulations 2015 ("**Regulations**") had also been developed on the assumption that the number of machines in the maximum number condition could exceed the number of machines for which details were listed in the machine detail schedule and that the latter number could be amended, within the parameters of the former, without seeking territorial authority consent.

5.4 Building the foregoing assumptions into its systems had resulted in previously unforeseen operational difficulties in immediately implementing the Commission's interpretation of the Act. The timing was also particularly unfortunate because about half the venue licences are renewed each June. Forty-eight applications had been received to add non-operational or "ghost" machines that would not be connected to EMS and for which applicants appeared to have assumed no fees would be payable. Fifteen of those applications had sought the addition of the details of machines listed in more than one venue licence. DIA staff had concluded that the applications sought things that could not be granted, namely the addition of "non-operational machines" which were not connected to EMS and fee waivers.

5.5 The Secretary conceded that the proper procedure in such a case would have been for the application to have been refused on those grounds, not returned to the applicant as null and void. While, under section 73(3) of the Act, incomplete applications may be returned (and such returns do not attract an appeal right under section 77), the Secretary accepted that the subject application was not incomplete and should not have been returned. Because the Secretary had not been satisfied with the application, the decision to return should now be treated by the Commission as an appealable refusal to amend the licence, consistent with the Te Wheke decision.

5.6 The evidence also outlined and produced a sector-wide communication which DIA had issued in May 2021 informing the sector of the operational difficulties that it was experiencing, advising that a solution was being developed and giving an assurance that existing entitlements would not be affected by the resulting delay in the meantime.

5.7 In applying the approach proposed by the Commission in the Matata Hotel decision, Ms Allen acknowledged In her evidence that the licence in the subject application could be issued if KGF accepted that the proposed licence would not distinguish between operational and non-operational machines (which, the submissions clarified, would require their connection to EMS), that the annual fee would be paid in respect of all listed machines (whether or not they were operated) and that only machines not already listed elsewhere were added (which, in fact, was the case in the particular application).

5.8 The Secretary's submissions noted that the Matata Hotel decision had recognised that the result and reasoning was contrary to the Secretary's previous practice and the understanding of the wider Class 4 sector. The Commission's suggestion that, for a period, corporate societies be allowed to increase the machine details listed on their licences without territorial authority consent, required the Secretary to consider how best to implement the suggested approach operationally against the operational background set out in the evidence.

5.9 The Secretary submitted that, if the conditions stipulated by Ms Allen were not accepted by KGF, its application was properly refused for the following reasons:

(a) The Secretary had no statutory obligation to contact applicants to suggest amendment to applications which seek something which cannot be granted; it is for an applicant to satisfy the Secretary that the application, as submitted, can and should be approved.

(b) A difficulty with the subject application arose from the covering email from the chief executive of KGF, which attached the completed Class 4 Venue Licence Amendment and Non-Key Person Notification form ("**GC4A**"). The email advised that all additional machines would not be connected to EMS and sought an exemption from the fees for the unconnected machines.

(c) Although there is nothing objectionable in principle about adding to a licence the details of machines which will not be operated, the disclosed intention on the part of KGF to connect only 10 machines to EMS created a difficulty. EMS is a crucial component in ensuring the integrity of Class 4 gambling as indicated by the requirement in section 86 of the Act that all gaming machines under the holder's control be connected to the EMS system.

(d) The Secretary submitted that, unless a machine were connected to EMS, it could not be lawfully used. Under section 70(1)(h) of the Act, the Secretary must include the details of the gambling equipment that may be operated at the venue. It followed that the details of machines which may **not** be lawfully operated at the venue (because they are not connected to EMS) should not be listed in the licence schedule.

Fees

5.10 A further ground for refusing the application was KGF's request for waiver of licensing fees in the covering email. The fees charged under the Regulations are set by the Governor-General by Order in Council under section 370 of the Act. In the covering email, the Appellant sought to waive the "licensing fees" but all fees imposed under the Regulations are deemed to be licensing fees. The Regulations include the following licence fees:

(a) The venue licence non-key person application fee was payable on making the application. As the application had been returned, without being entered into the DIA system, the usual invoice was not issued, and the application fee was still to be charged and paid.

(b) The Class 4 annual fee is calculated, under regulation 9, as the number of whole months in the year for which the licence is valid, multiplied by the number of gaming machines specified in the machine detail schedule to the licence. The Regulation calculation does not distinguish between operational and non-operational machines. It is assumed that this is the fee which the Appellant wished to have waived.

(c) The daily monitoring and licencing systems fee is calculated under Regulation 19 as the number of days per month that a machine is operated. The fee is charged on a per machine but only if EMS records gaming turnover on the particular machine.

5.11 The annual fee is payable for all machines listed on the licence and the Regulations make no provision for the fee to be waived. The daily monitoring and licencing systems fee is only charged on machines which EMS records as having been operated. Refunds are only provided for in limited specified circumstances which do not apply in this case. There is no discretion for DIA staff to waive or reduce the annual fee imposed by the Regulations.

5.12 The Secretary would not wish to see societies adding additional machines to their licences unnecessarily as doing so would result in additional fees which would reduce net proceeds. The Commission took the submission to imply that, although maintaining section 92 rights would be a good reason to list machine which were not operated in fact, the Secretary would not wish to see societies listing more than the minimum required for that purpose.

5.13 If KGF advised that it wished to proceed with the application despite the requirement to pay the Class 4 annual fee, fees would be no barrier to granting the licence.

Costs

5.14 The Secretary opposed the award of costs sought by KGF. As Ms Allen's affidavit established, the conduct of DIA amounted to neither bad faith nor procedural misconduct and did not constitute exceptional circumstances justifying an award of costs. Rather than ignoring the Matata Hotel decision, the Secretary has been endeavouring to address technical and operational difficulties in implementing the decision. Steps are currently being undertaken to ensure that the consequences of adopting the earlier, incorrect, interpretation of the Act are corrected. Because of various complexities within the systems, the process has taken some time.

5.15 The Secretary accepted that there were flaws in the process followed and that the process in section 77 of the Act to refuse to amend a licence should have been followed. However, it

would likely have issued the licence in the form sought if an ordinary GC4A had been filed with no covering request to add non-operational machines and no request for fees to be waived.

6. REPLY SUBMISSIONS

6.1 In reply, KGF initially accepted that the additional 8 machines should not be distinguished as "non-operational machines" and would need to be listed in the ordinary way in the licence schedule, and that the Class 4 annual fee would need to be calculated and paid with reference to the total number of machines specified on in the licence schedule. However, it argued that the additional 8 machines, the details of which it sought to have added to the licence, did not need to be connected to the EMS. The reason advanced, by implication, is that they would be held in storage and not operated. KGF accepted, however, that the serial numbers for the stored machines should be recorded in the EMS.

6.2 While accepting that the licence itself would draw no distinction between operational and non-operational machines, KGF submitted that such distinction should in fact be made in operational practice, including on the face of the licence. It did so by reference to the form of a class 4 venue licence, rather than by reference to the provisions of the Act, suggesting that the first section of every venue licence schedule, headed "Gaming Machines", could be limited to the machines which the society **wished to operate**, and the remaining gaming machines could be listed in the second section is headed "Additional Equipment and/or Systems", which lists items such as jackpot controllers, cash redemption terminals and cash in, ticket out systems which are not connected to EMS. The suggestion to omit machines not in operation from the gaming machine detail schedule sat oddly with the conclusions reached in the Matata Hotel decision and the KGF's initial acceptance that the licence should draw no distinction between operational and non-operational machines.

6.3 Although the Secretary's submissions had focused, not on location, but on connection to EMS, the submissions were criticised on the basis that they had suggested that machines which were not installed at the venue could not be listed. While KGF's submissions impliedly assumed that connection could only occur at the venue, they provided no supporting factual basis for the assumption and the Secretary's submissions did not clearly rest on a similar assumption.

6.4 The reply submissions addressed the issue of compliance with section 86(1) – the obligation that all gaming machines under a society's control must be connected to the EMS – by suggesting that the words of the section should not be applied as they appear, because of the established practice of societies holding unused machines in storage. Such machines were not connected to EMS when in storage or in transit. For that reason, it was submitted that the section should be construed as if it included the additional words "located at class 4 venues". If that approach were taken, it was suggested that no issue would arise with compliance with section 86 (although that might possibly be true only of section 86(1)). The reply submissions

did not address directly the Secretary's submission that a machine which was not connected to EMS was not permitted to be used anywhere. In fact, the reply submissions conceded that to be the case.

6.5 The reply submissions advanced pragmatic solutions for the unexpected difficulties which the design of the Kotare and EMS systems had created in the light of the Matata Hotel decision, including the manual addition of non-operational machines, pointing out that paragraph 14 of the Secretary's submissions acknowledged that "the decision to approve the licence could be recorded in a manual way…". However, those suggestions did not address the legal objection raised by the Secretary, namely the Act's requirements that all machines under the control of a society, and all machines that may be used at a venue, be connected to EMS.

6.6 The reply submissions argued that the Secretary appeared to have conceded that an amended licence, incorporating the listed details of 18 machines, could, and should, now be issued. However, the argument did not address the EMS connection issue raised by the Secretary in circumstances where KGF's submissions made clear that 8 of the machines would not be connected to the EMS.

Fees

6.7 In reply, KGF submitted that at no stage did it state that it would not pay the standard licensing fees; it merely asked whether the fees in respect of the extra 8 machines could be removed in the circumstances and received no reply. A mere inquiry whether a fee waiver were possible when there was no other suggestion of a refusal to pay licensing fees was said to be insufficient grounds to refuse to amend a licence.

Costs

6.8 The reply submissions raised other grounds for a costs award in favour of KGF. It was submitted that the Secretary's evidence was misleading, in referring to concerns about the requested fee waiver, arguing that such a concern was not apparent from the contemporaneous internal records. Rather, an email dated 8 July 2021 indicated that the main concern was that it was an application to add "ghost machines", as Mr Bell had described them. While KGF appears to be correct that the application was not processed primarily because it sought the addition of non-operational or "ghost" machines and that fee waivers were not mentioned in internal guidance documents, it is another matter whether the evidence can fairly be described as "misleading" and whether the result should be an adverse costs award.

6.9 Although Ms Allen acknowledged that it was wrong to treat what seems to have been 48 applications as null and void and that refusal decisions should have been issued instead, the reply submissions complained that no retraction had been made of statements regarding aspects of the Matata Hotel decision being recommendations and suggested that there was no indication that the correct process for refusing applications would be followed in the future.

7. ANALYSIS

Procedural matters

7.1 The Commission starts by confirming what emerged as common ground between the parties, namely that, in the circumstances, the Secretary was not entitled to regard the application as null and void and to return the application to KGF. Section 73(3) of the Act provides that the Secretary may return an incomplete application. The application was not incomplete and should not have been returned. The Secretary's actions in doing so deprived the applicant of the procedural rights set out in section 75.

7.2 It is important that the Secretary follows the process set out in section 75; it provides an opportunity for the parties to engage with the issues in advance of an appeal, provides useful background to the appeal process and clarifies the statutory right of appeal. However, in this case, while it may have reduced the number of issues (for example, by removing the fee issue) it is unlikely that following the process would have removed the need for the appeal entirely.

7.3 The procedural error was acknowledged in submissions for the Secretary. The Secretary adopted the position that the application should have been refused (not returned) and that the Commission should deal with the appeal as a refusal of the application in accordance with the Te Wheke decision, as the appellant had sought. The Commission concurs. In the circumstances, the Commission can see no basis for the suggestion by counsel for KGF that the Secretary is likely to repeat the procedural error in the future.

Fees

7.4 The Secretary's evidence and the submissions of the parties have clarified the position adequately. The fees attaching to Class 4 venue licences are imposed by way of regulations made under section 370, not as a matter of discretion on the part of the Secretary. The Secretary is given only such discretion as the Regulations expressly provide. The Regulations provide for the annual fee to be paid on the basis of all gaming machines listed in the licence, whether or not the licence holder chooses to operate them. For so long as regulations made under section 370 so provide, the addition of details for more gaming machines than the licence holder wishes to operate, in order to preserve rights under section 92, will come at an additional cost to the licence holder.

7.5 The appeal process has resulted in clarity in the positions of the parties. KGF accepts that, if it adds 8 more gaming machines than it intends to operate to the class 4 licence, it will be required to pay more fees than if the licence listed only the machines that it intends to operate. The Secretary accepts that merely inquiring whether a fee waiver is available does not amount to a refusal to pay the fees required. Nothing more need be said on this particular appeal on the matter.

The Commission's earlier suggestion and related operational matters

7.6 The effect of the provisions of sections 92(3) and 70(1)(g) and (h) – namely that, as they contained references both to the maximum number and to the details of the gambling machines "that may be operated at the venue", the references needed to be reconciled and that it was not possible to do so by assuming that one referred to authorisation and the other to actual operation – arose only peripherally in the Matata Hotel decision and required additional submissions from both the appellant and the Secretary.

7.7 The Matata Hotel decision recognised the potentially disruptive effect of the Commission's ruling which was contrary to longstanding sector-wide assumptions which had not previously come before the Commission. While the Commission considered that its role required it to clarify the true effect of the statutory provisions, it was concerned to see that the consequences would be managed fairly. For that reason, it disposed of the appeal in a manner which was intended to provide an opportunity to the appellant to regain a position, which otherwise would have been lost owing to an understandable misapprehension which was widely shared, and which ultimately put the means of effecting that outcome in the hands of the Secretary, who would be in a position to decide how best to effect the intended outcome within the operational constraints of which the Commission lacked first-hand knowledge.

7.8 In paragraph 10.30 of the Matata Hotel decision, the Commission made suggestions for how the Secretary might address the position of other societies in a similar position. It should have been apparent from the words used ("suggests") that those matters were mere suggestions. The Commission did not have before it detailed operational information and none of the submissions which it received had addressed the wider operational implications of the legal analysis which it adopted. It expected those matters to be addressed by the Secretary in the course of subsequent applications. If aspects of the Secretary's chosen path for implementation became contentious, it expected to deal with those aspects in subsequent appeals if required.

7.9 The Commission records the foregoing for several reasons:

(a) Contrary to the position advance for KGF, it seems clear, from the submissions, that the Secretary accepted the correctness of the legal determinations in the Matata Hotel decision. The submissions also indicated that the Secretary correctly appreciated how far the decision went and what matters were mere suggestions to be considered in the light of operational considerations not necessarily known to the Commission.

(b) The evidence from DIA was helpful in explaining some of the operational implications of which the Commission was previously unaware, including the characteristics of the operating systems in use. While operational limitations do not change the meaning of statutory provisions, the Commission considers that they may well have

an important effect on the nature and speed of possible solutions to the difficulties which have arisen.

(c) Of relevance to this appeal are the provisions of section 86, relating to the connection of gambling machines to the EMS. No party raised those provisions in submissions prior to the Matata Hotel decision and there is no reference to them in the Commission's decision.

(d) General statements made by the Commission in the Matata Hotel decision may accordingly require reconsideration and revision in the light of matters not considered in that appeal. One such statement appeared in paragraph 10.20 ("The provisions do not preclude the schedule containing the details of machines which are not located at the venue (so long as they are all owned by the society)"). The statement is true of the provisions that were there addressed (sections 92 and 70) but it was made without reference to section 86, raised for the first time in this appeal.

Section 86

7.10 The Matata Hotel decision construed section 92, in combination with section 70, as requiring the licence to include the details of a sufficient number of machines to match the maximum number of machines provision in the licence. Nothing in section 70 suggested that the licence should not include the details of machines which the society would be permitted to operate but which were not in fact operating at the time of inclusion and which the society may never decide to operate. The Commission's decision was made without reference to section 86.

7.11 The provisions of section 86 give rise to potential issues arising from the scope of the statutory obligations of societies regarding the connection of gaming machines that they control to EMS and the effect of non-connection on authorisation for use. As was the case in the Matata Hotel decision, the final resolution of some of the issues raised may be affected by operational information which is outside the knowledge of the Commission. It may also be affected by the exercise of powers given to the Secretary under section 86. For that reason, the Commission makes only limited observations about the section as a whole and the scope of its decision is restricted to the limited issue which arises for determination on the appeal.

7.12 The Commission makes the following general observations about section 86:

(a) Section 86(1) creates a statutory obligation on the part of the holder of a class 4 operator's licence to connect certain gaming machines to an electronic monitoring system which is to be specified by the Secretary. The subject machines are expressly described in very broad terms ("all gaming machines under the holder's control") but the section itself does not explicitly require connection to the current EMS system. The statutory obligation depends in part on the Secretary specifying

a system. Operationally, the obligation is ultimately under the Secretary's control and does not affect licensing directly.

(b) Separate provision is made in section 86(1) for "all gaming machines under the holder's control" and for any other gambling equipment, specified by the Secretary by Gazette notice. That distinction is consistent with the statutory definitions of "gambling machines" as a separate sub-category of a broader category of "gambling equipment" and is not consistent with the submission for KGF that non-operational gaming machines would be appropriately listed in the "other equipment" schedule.

(c) Section 86(3) and (5) between them confer a further power on the Secretary to notify class 4 operator's licence holders of particular dates for compliance with section 86(1) by reference to particular societies and venues (or classes thereof) and set out the statutory consequence of a failure to connect machines to the specified system as notified (specifically, the unconnected machines may not be operated).

(d) As section 86(3) makes clear that the resulting costs of compliance with the obligations imposed under section 86 fall on the licence holder, it appears that the Secretary may be able to exercise a degree of control over the section 86 obligations which might be used to avoid class 4 net proceeds being adversely affected by incurring costs for other than good reason.

7.13 Much of the submissions for KGF addressed the issue of compliance with section 86(1), specifically whether section 86(1) creates compliance difficulties with the practice of societies holding spare gaming machines in storage, unconnected to EMS. However, the Commission doubts that the issue requires determination on the appeal for the following reasons:

(a) The Secretary's submissions did not raise directly any licensing issue with the practice of storing spare gaming machines and did not suggest that the practice of keeping spare machines in storage was necessarily rendered unlawful by section 86(1).

(b) As indicated above, the Secretary appears to have power under section 86 to specify obligations in such a way as to avoid placing unnecessary obligations on societies, the effect of which would be to increase their operating costs and diminish net proceeds.

(c) The Commission would be reluctant to endorse an interpretation of section 86(1) which departed as significantly from the statutory language as KGF suggested but sees no requirement for it to apply section 86(1) in order to dispose of the appeal.

7.14 The issue for determination on the appeal arises from the Secretary's submission that the gaming machines **for which details are provided in the venue licence** do not merely need to be of an approved type and owned by the society but must also be connected at all times to EMS. The argument for the Secretary is that the machines for which details may be listed in the licence is not determined simply by reference to section 70 but also to section 86(5). In essence, the Secretary suggested that section 86(5) creates a similar problem for the maximum machine number provision which the Matata Hotel decision held that omitting details from the machine detail schedule in a licence would create, namely that unlisted machines would not be authorised to be used at the venue and could not form part of the stated maximum number. Because section 86(5) provides that the operator's licence holder may not operate machines after the date notified unless they are connected to EMS, the licence may not list the details of any such unconnected machines, it is argued.

7.15 While the Commission appreciates the basis for the Secretary's contention, it is not persuaded that it is correct. In the Matata Hotel decision, the Commission addressed the content requirements of venue licences (especially section 70(1(g) and (h)) in the context of their relationship to section 92. While it did not consider section 86, because no party raised it as material at the time, it sees a fundamental distinction between the required identification of machines which are authorised for use at a venue (on account of type approval and ownership) and other obligations or qualifications relating to their lawful use.

7.16 Merely listing machine details does not authorise their use without reference to other restrictions that may arise under the Act or the licence conditions. Class 4 venue licences, for example, may (and frequently do) contain restrictions on the placement of authorised gaming machines within the premises[10], typically by a detailed approved premises layout, the effect of which may make the operation of all listed machines impracticable without some premises modification for which later approval might be required.

7.17 The interpretation of sections 92(3) and 70(1)(h) advanced by the Secretary is a very restrictive one, namely that machine details may only be included for gaming machines which may be used at the venue, **at the moment of their inclusion, in all respects and without qualification**. The effect of doing so would come close to reverting, in practice, to the position which had been earlier assumed by the sector but which the Matata Hotel decision rejected. The effect of the Secretary's argument would be that all machines for which details are listed must always be capable of immediate lawful operation, even if not operated in fact. It would therefore exclude approved gaming machines owned by the society which were kept in storage (unless connection in storage were possible).

[10] Section 70(2)(h). Conditions may also be imposed to minimize the possibility of underaged or problem gambling which may affect the use of a listed machine.

7.18 The Commission sees nothing in the language of the Act which would support such a restrictive application. Sections 92 and 70 impose requirements related to identification details of a sufficient number of gaming machines to provide substance to, and not conflict with, the maximum gaming machine number condition. The requirement for congruence can be met if the applicable schedule contains the identification details of machines which could be used by the licence holder, in the sense that they meet minimum standards and are owned by the society. The Commission sees no justification for importing immediate and unqualified lawful use as an additional criterion for inclusion of machine details under section 70(1)(h). One undesirable consequence of doing so would be to require licence holders to incur expenditure (of making and maintaining EMS connection) greater than they would otherwise elect to do, at the expense of net proceeds.

7.19 The Act expressly contemplates the operation of electronic monitoring systems under the control of the Secretary. While it is clearly desirable, from an administrative and regulatory point of view, that no gaming machine may be operated lawfully without being connected to EMS, it is not obvious, from a regulatory perspective on the basis of the material before the Commission, why it would be desirable that all authorised machines be connected at all times to an electronic monitoring system, even those which are not presently intended to be operated (and which might not even be at the venue). Control of lawful use is not entirely dependent on the content of the machine detail list, without regard to other obligations. Section 86(5) makes clear the adverse effect of non-connection of gaming machines, after receiving a notice under section 85(3), on the lawful use of listed gaming machines.

7.20 However, as was the case with the Matata Hotel appeal, a lack of operational information before the Commission creates some potential difficulties in setting out specific solutions to the issue raised. The submissions before the Commission do not reveal, for example, whether all listed gaming machines were connected to EMS at Matata Hotel or even whether the issued Matata Hotel licence included an approved premises layout that would have allowed all 14 listed machines to be connected and used at the same time. The Commission has also not been provided with information about the notices that section 86 provides for the Secretary to give.

7.21 Neither the evidence nor the submissions addressed whether it is even possible to connect machines to EMS other than at a particular venue. KGF's submissions apparently assume that to be the case but the assumption was not supported with evidence or reasoning. The Secretary does not address the matter at all. As the Secretary's argument focuses on connection, not location, it might be a reasonable implication of the argument that EMS connection in storage would be possible but that is not something which the Commission could responsibly assume. If it is not, the Secretary would effectively be arguing that all listed machines must be at the venue, contrary to the Matata Hotel decision, by reason of section 86.

7.22 On the information before it, the Commission addresses only the central legal issue on the appeal, namely the effect of section 86(5) on the machine detail requirements of section 92(3) and 70(1)(h). It holds that sections 92(3) and 70(1)(h) are concerned with identifying details of gaming machines which the licence holder would be lawfully able to operate at the venue, even if actual lawful operation required compliance with other obligations outside the provision of identifying details. The requirements for listing in the licence schedule include the listed machines meeting minimum standards regarding model approval and ownership by the licence holder but, on the information before the Commission, do not extend to connection to EMS or other specified system at the time of listing. Whether particular listed machines may be operated at any given time will depend on all applicable constraints on lawful use, including section 86(5) and other licence conditions.

7.23 As the circumstances of the appeal did not raise the issue of whether machine details can be duplicated across several licences and the Commission received no argument on the matter, it has not been addressed.

7.24 In the absence of sufficient operational information, including that concerning the past or potential exercise of the Secretary's powers under section 86, the Commission considers that the prudent course is to refer the matter back to the Secretary for reconsideration in the light of the foregoing.

7.25 As the Secretary gave written assurances to the class 4 sector that any operational delay arising from the need to resolve practical issues arising from the implementation of the Matata Hotel decision would not be used to deprive licence holders of the opportunity to preserve the rights which the Commission intended that they be given the opportunity to secure, the sector can be assured that it will not suffer unfair consequences of the resulting delay. The Commission has appeal powers which would be available, if necessary, to ensure that that is the case.

Costs

7.26 The Commission is satisfied that there is no basis to award costs against the Secretary. The Secretary appears to have acted responsibly and in good faith in addressing operational issues not anticipated by the Commission in the Matata Hotel decision. Despite the assurance given to the sector in May 2021, KGF elected to press on with its application, as it was entitled to do. Its insistence on doing so uncovered a statutory consideration which had not previously been drawn to the Commission's attention and which might have limited the extent to which the Commission assumed that rights which were previously assumed to be protected could be preserved. It was appropriate for the Secretary to raise issues under section 86(5) in the context of the application.

8. DECISION

8.1 For the foregoing reasons, pursuant to section 77(4)(b), the Commission refers the application back to the Secretary with directions to reconsider the application in the light of the guidance provided above as to the effect of section 86(5).

8.2 The Commission declines to award costs to either party.

Lisa Hansen
Chief Gambling Commissioner

for and behalf of the
Gambling Commission

19 October 2021