IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-270
[2024] NZHC 217

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER OF	the Gambling Act 2003
BETWEEN	FEED FAMILIES NOT POKIES AOTEAROA INCORPORATED Applicant
AND	SECRETARY FOR INTERNAL AFFAIRS First Respondent
AND	GAMBLING COMMISSION Second Respondent
AND	GAMING MACHINE ASSOCIATION OF NEW ZEALAND INCORPORATED Third Respondent

Hearing: 27 November 2023

Appearances: M J McKillop and A G Emanuel for the Applicant
S P R Conway and R M Fistonich for the First Respondent
Appearances excused for the Second Respondent
M S Smith and J W True for the Third Respondent

Judgment: 19 February 2024

JUDGMENT OF PALMER J

Barristers/Solicitors
M J McKillop, Barrister, Wellington
A G Emanuel, Barrister, Wellington
M S Smith, Barrister, Wellington
True Legal, Hamilton
Crown Law Office, Wellington

Summary

[1] In 2013, in *ILT Foundation v Secretary for Internal Affairs* (*Waikiwi*), the High Court held that a venue licenced for class 4 gambling machines did not require a new licence when there is a "minor change in location".[1] Those machines are non-casino electronic gaming machines (commonly known as "pokies"). Three months later, through the Gambling (Gambling Harm Reduction) Amendment Act 2013 (the 2013 Amendment Act), Parliament changed the law to provide territorial authorities with the power to adopt relocation policies for class 4 venues and to make relocation decisions. But, until recently, the Department of Internal Affairs (the Department) continued to apply the *Waikiwi* criteria. The applicant, Feed Families Not Pokies Aotearoa Inc (Feed Families Not Pokies) applies for a declaration that the *Waikiwi* route has not been available since the legislation was changed. The Secretary for Internal Affairs (the Secretary) now supports the application. The Gaming Machine Association of New Zealand Inc (Gaming Machine Association) opposes it.

[2] The thrust of the 2013 Amendment Act was to place the locus of decision-making about relocation of licenced venues with each territorial authority. The effect of the plain meaning of the text is that a change in the location of a venue will only apply if the territorial authority so consents in accordance with its relocation policy. That extends to, and includes, the sorts of "minor" relocations which the High Court had found a safety valve for in *Waikiwi*. There is no longer room in the Act, as amended, for a venue to be deemed to be the same "venue" at a new "place". I accept that the *Waikiwi* workaround would now undermine the purpose of the Act of placing the decision on venue relocations in the hands of territorial authorities. I make declarations accordingly. That does not affect the validity of the licences amended by the Department under the *Waikiwi* route since 2013.

What happened?

Pokies

[3] Pokies proliferated in New Zealand in the 1990s. Professor Peter Adams, of the School of Population Health and Associate Director of the Centre for Addiction

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1 *ILT Foundation v Secretary for Internal Affairs* [2013] NZHC 1330 [*Waikiwi*] at [28].

Research at the University of Auckland, gives expert evidence for Feed Families Not Pokies. His evidence is that the proliferation of pokies led to sharp rises in problem gambling and other gambling harm. Manatū Hauora | Ministry of Health statistics show that, on average over the ten years from 2012/13 to 2021/22, a little over 60 per cent of the 5,765 people treated for problem gambling each year were treated for gambling on electronic gaming machines. Over half of those people were treated for gambling on pokies. The average amount of money lost by those playing pokies each year was $859.7 million per year from 2010/11 to 2021/22. This was significantly more than other forms of gambling, such as Lotto, despite the percentage of people participating in pokies being similar to, or less than, those participating in other forms of gambling.

[4] Professor Adams' evidence is that pokies are designed so that the sounds, visual effects, and the variable reward schedule of wins and losses, stimulate the brain's "reward system", bypassing normal cognitive brain function. It can induce a "trance-like" state or "machine zone" until, after continuous play, the gambler runs out of money. The public health literature is clear that constraints on availability are the most effective way of reducing gambling harm.

The regulation of pokies

[5] In response to the harm generated by pokies, Parliament regulated the operation of pokies by passing the Gambling Act 2003. Its purpose is stated to be:

> **3 Purpose**
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> The purpose of this Act is to—
>
> (a) control the growth of gambling; and
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> (b) prevent and minimise harm from gambling, including problem gambling; and
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> (c) authorise some gambling and prohibit the rest; and
>
> (d) facilitate responsible gambling; and
>
> (e) ensure the integrity and fairness of games; and
>
> (f) limit opportunities for crime or dishonesty associated with gambling and the conduct of gambling; and

(g) ensure that money from gambling benefits the community; and

(h) facilitate community involvement in decisions about the provision of gambling.

[6] The Act's definitions of "harm" and "place" in s 2 are relevant:

harm—

(a) means harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and

(b) includes personal, social, or economic harm suffered—

(i) by the person; or

(ii) by the person's spouse, civil union partner, de facto partner, family, whanau, or wider community; or

(iii) in the workplace; or

(iv) by society at large

place includes—

(a) a building, structure, or tent, whether fully or partly constructed; and

(b) a room in a building or structure; and

(c) a court or a mall; and

(d) land; and

(e) a vehicle, vessel, or aircraft; and

(f) a caravan or a trailer or other conveyance

[7] Section 9 prohibits gambling unless it is authorised under the Act, authorised under the Racing Industry Act 2020, or is private gambling. Under the Act, territorial authorities govern the number and location of pokies by licensing class 4 gambling venues:

(a) The Act limits the number of pokies at a class 4 venue. Under a grandparenting arrangement in s 92, licences held on 17 October 2001 are permitted to have up to 18 machines in a venue. Under s 93, licences issued after 17 October 2001 are limited to a maximum of nine pokie machines, with a ministerial discretion to permit more under s 95.

Section 91 provides that no compensation is payable by the Crown in relation to these provisions.

(b) Under s 101, all territorial authorities are required to adopt a class 4 gambling policy which may cover whether any new venue is permitted in the area or not, where they would be permitted, and the number of pokies permitted in the area. In formulating a class 4 gambling policy, the territorial authority is required to have regard to the social impact of gambling in the area and to other matters, such as the cumulative effects of gambling opportunities in the area. Section 102 provides that a class 4 gambling policy must be formulated in accordance with the special consultative procedure provided in the Local Government Act 2002.

(c) Section 98 requires territorial authority consent to certain changes in relation to a licence, including any proposal to increase the number of pokies, or for a new venue licence.

(d) Section 314 enables the maximum number of pokies in New Zealand, or a particular part of New Zealand, to be regulated. But that power has not yet been exercised.

[8] Sections 30 and 31 require that class 4 gambling may only be conducted by a not-for-profit corporate society that holds both a class 4 operator's licence and a class 4 venue licence. These licences are issued by the Secretary:

(a) The Secretary grants operator licences if satisfied of specified matters under s 52 of the Act. Section 53A imposes continuing obligations on a class 4 operator.

(b) Section 65 provides for applications for a venue licence which must be accompanied, under subs (2)(a), by "a description of a venue and its location" and, under subs (2)(k), by "evidence that the class 4 venue is not to be part of a place at which another class 4 venue … is located".

(c) Section 67 requires the Secretary to refuse to grant a class 4 venue licence unless satisfied of specified matters, including, at subs (1)(l) "the class 4 venue is not to be part of a place at which another class 4 venue … is located".

(d) Section 70(1)(f) requires a venue licence to include specified "information and conditions" including "a description of the class 4 venue and its location".

(e) Section 71 requires certain significant changes in relation to a venue licence (which do not include venue movement) to be notified to the Secretary. It empowers the Secretary to add, amend, or revoke conditions.

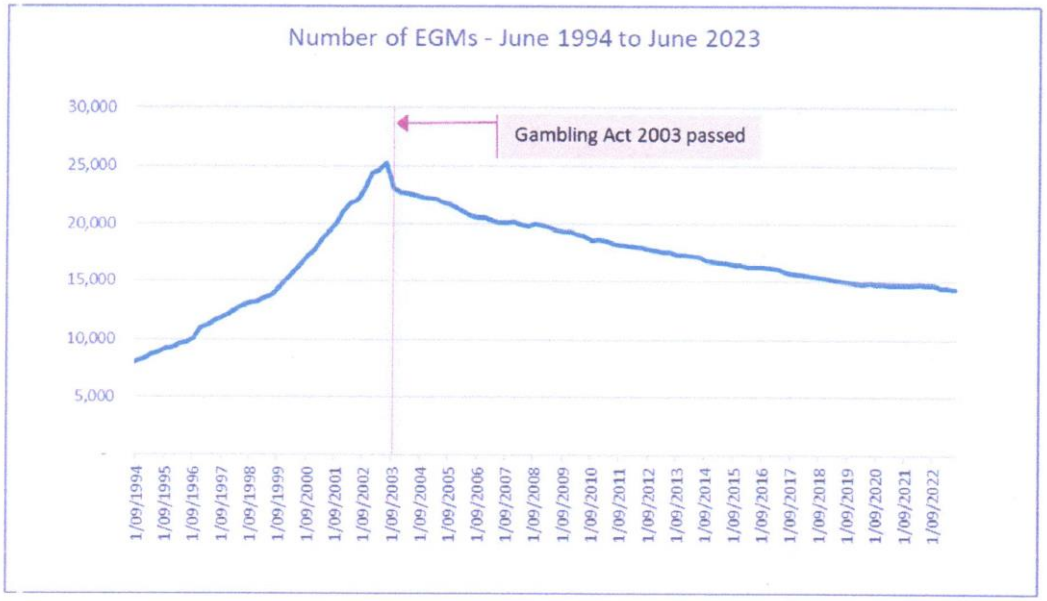
(f) Under s 73(1)(a) to (c), a corporate society is required to apply to the Secretary to amend a class 4 venue licence to change gambling equipment, increase the number of pokies, and "change any condition of the licence or any procedure that is a condition of the licence".

(g) Section 80 provides that a class 4 venue licence is not transferable.

[9] The Gambling (Venue Payments) Regulations 2016 regulate the profitability of pokies. The Department's evidence is that, of every $100 (including GST) lost on a gaming machine, $13.04 is GST, $20.00 is gaming duty, $1.08 is a problem gambling levy, a minimum of $34.78 is distributed in grants, a maximum of $13.91 may be paid to the venue operator, and approximately $17.19 goes to operating costs.

[10] The Act's prohibition of gambling unless authorised, limits on the number of pokies, grandfathering of the number of pokies allowed per licence, and territorial authorities' adoption of "sinking lids" of numbers of pokies in their areas, led to a decrease in the number of venues with pokies. However, numbers of pokies have remained relatively stable in recent years, as illustrated in Professor Adams' graph:

Class 4 Gaming Machine Numbers from June 1994 to June 2023 by quarter



[11] Prior to 2013, the Act appeared to contain no regime enabling a venue operator to retain a venue licence while relocating the venue.

Waikiwi Tavern decision

[12] In June 2013, the Invercargill Licensing Trust Foundation held a class 4 venue licence since October 2001, allowing it to operate 18 pokies at the Waikiwi Tavern in Invercargill. The Foundation wanted to construct a new tavern on land that was one section and approximately 220 metres away from the existing tavern. But an application for a new venue licence would be limited to nine pokies. The Foundation sought declarations from the High Court that the existing venue licence would apply despite relocation.

[13] On 6 June 2013, in *Waikiwi*, Collins J interpreted the meaning of "venue", as used in "class 4 venue licence" in ss 92 to 94 of the Act.[2] He concluded the purpose of those sections favoured the interpretation that a comparatively minor change in location of the pokies would not alter the venue at which they are housed.[3] He considered s 65(2)(a) showed that Parliament did not contemplate that a venue and its

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2 *Waikiwi*, above n 1.
3 At [28].

location were necessarily synonymous.[4] And Parliament consciously decided not to use "site", as in the predecessor Gaming and Lotteries Act 1977, indicating Parliament intended "venue" to mean something different from "site" which need not be defined by reference to a specific address.[5] He concluded that the relocation of the tavern building would not constitute a change in its venue because the change in location is minor, the name of the tavern, its ownership and management remained the same, and its patrons and the public would regard it as being the same venue.[6]

The 2013 Amendment

[14] In September 2010, the Gambling (Gambling Harm Reduction) Bill was introduced in Parliament as a member's bill by Te Ururoa Flavell MP. The Bill, after its first reading in 2012, was referred to the Commerce Committee of the House of Representatives (the Committee) for consideration. In May 2013, the Department advised the Committee to amend the Bill by inserting a "relocation" regime, requiring territorial authorities to consult about whether existing class 4 venues should be able to relocate within their districts, and permitting transfer if territorial authority consent is given.[7]

[15] On 17 June 2013, 11 days after the *Waikiwi* decision, but apparently not in direct response to it, the Committee reported back to the House on the Bill. The Committee adopted the Department's recommendations about a relocation regime, stating:[8]

> We believe the amendments we propose in clauses 16 and 17 would create certainty for venue operators and allow them to make investment decisions with confidence. Clause 16 would allow territorial authorities to include relocation policies in their class 4 venue policies, which would set out if and when new venues could be granted consent in place of existing venues. Clause 17 would require territorial authorities, at the next review of their class 4 venue policies, to consider whether or not to include a relocation policy. When developing a relocation policy, territorial authorities would have to consider the social effects of gambling in high-deprivation communities.

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4 At [30].
5 At [31].
6 At [33].
7 *Gambling (Gambling Harm Reduction) Amendment Bill: Report of Department of Internal Affairs to the Commerce Committee* (10 May 2013) at 6.
8 Gambling (Gambling Harm Reduction) Amendment Bill 2010 (209-2) (select committee report) at 4.

…

Relocation of venues

We recommend inserting, by new clause 13, new section 97A into the Gambling Act to preserve the rights attaching to previous venues when a licence is transferred to new premises. The new venue would be permitted to operate the same number of gaming machines as was permitted at the old venue. This would apply only if the territorial authority had given consent for the new venue in accordance with its relocation policy.

Venues that were licensed before 17 October 2001 have maintained the right to operate more than nine machines, which is the current legislative limit. A venue currently loses this right if it moves premises, as the licence is attached to the physical venue. This discourages venues from moving to a more suitable location.

New clause 12 provides that no compensation is payable by the Crown or territorial authorities for any loss arising from the enactment of amendments made by clause 17.

[16] On 4 September 2013, during the third reading debate, Mr Flavell stated:[9]

> The bill will also enable gambling venues to transfer out of low socio-economic areas and into areas where communities want them to move. Councils, as a result of my bill, will now have more tools to enable the transfer of gaming venues into other areas, and I am confident that this will enable councils to further reduce the number of gaming venues…

[17] The Bill was passed in September 2013, as the Gambling (Gambling Harm Reduction) Amendment Act 2013. Its purpose is stated:

> **4 Purpose**
>
> The purpose of this Act is to provide additional measures to implement the following purposes of the Gambling Act 2003:
>
> (a) to prevent and minimise the harm caused by gambling, including problem gambling (section 3(b)):
>
> (b) to ensure that money from gambling benefits the community (section 3(g)):
>
> (c) to facilitate community involvement in decisions about the provision of gambling (section 3(h)).

9 (4 September 2013) 693 NZPD 13259-13260.

[18] Section 101 of the Gambling Act was amended to provide:

> **101 Territorial authority must adopt class 4 venue policy**
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> (1) A territorial authority must, within 6 months after the commencement of this section, adopt a policy on class 4 venues.
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> (2) In adopting a policy, the territorial authority must have regard to the social impact of gambling within the territorial authority district.
>
> (3) The policy—
>
> (a) must specify whether or not class 4 venues may be established in the territorial authority district and, if so, where they may be located; and
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> (b) may specify any restrictions on the maximum number of gaming machines that may be operated at a class 4 venue; and
>
> (c) may include a relocation policy.
>
> (4) In determining its policy on whether class 4 venues may be established in the territorial authority district, where any venue may be located, and any restrictions on the maximum number of gaming machines that may be operated at venues, the territorial authority may have regard to any relevant matters, including:
>
> (a) the characteristics of the district and parts of the district:
>
> (b) the location of kindergartens, early childhood centres, schools, places of worship, and other community facilities:
>
> (c) the number of gaming machines that should be permitted to operate at any venue or class of venue:
>
> (d) the cumulative effects of additional opportunities for gambling in the district:
>
> (e) how close any venue should be permitted to be to any other venue:
>
> (f) what the primary activity at any venue should be.
>
> (5) A **relocation policy** is a policy setting out if and when the territorial authority will grant consent in respect of a venue within its district where the venue is intended to replace an existing venue (within the district) to which a class 4 venue licence applies (in which case section 97A applies).

[19] Section 97A was inserted into the Act. It states:

> **97A Effect of relocation**
>
> (1) This section applies when—

(a) a territorial authority has adopted a relocation policy (as defined in section 101(5)); and

(b) in accordance with that policy, the territorial authority grants consent in respect of a venue (the **new venue**) to replace an existing venue (the **old venue**); and

(c) a new class 4 venue licence is granted in respect of the new venue.

(2) When this section applies,—

(a) the Secretary must cancel the class 4 venue licence that relates to the old venue, in which case—

(i) the cancellation takes effect on the date on which the new class 4 venue licence takes effect; and

(ii) there is no right of appeal against the cancellation; and

(b) despite section 100(1)(b)(i), the maximum number of gaming machines permitted to operate at the new venue at the time when the new class 4 venue licence takes effect is the same as the maximum number of gaming machines permitted to operate at the old venue immediately before the licence relating to the old venue is cancelled; and

(c) for the purposes of this Act,—

(i) if the old venue was a venue to which section 92 applied, the new venue must be treated as a venue to which section 92 applies; and

(ii) the old venue must be treated as if no class 4 venue licence had ever been held by any society for that venue (which means that, under section 98, consent will be required for that venue if a class 4 venue licence is subsequently applied for in relation to it).

[20] A new subsection, s 98(e), was inserted into s 98 of the Act. It requires territorial authority consent where a corporate society proposes to change the venue to which a class 4 venue licence applies. The substance of this subsection is retained in the current s 98(c):

> **98 When territorial authority consent is required**
>
> A territorial authority consent is required in the following circumstances:
>
> …
>
> (c) if a corporate society proposes, in accordance with a relocation policy of the territorial authority, to change the venue to which a class 4 venue licence currently applies.

[21] Section 91 was amended to extend the no compensation clause to loss or damage arising from the operation of the power to adopt a relocation policy. Section 102 was amended to require that territorial authorities review their class 4 venue policies, which are required to be formulated in accordance with the special consultative procedure under the Local Government Act, with associated notice requirements:

> (5A) The first time that a territorial authority commences a review of a policy after the Gambling (Gambling Harm Reduction) Amendment Act 2013 comes into force, the territorial authority must (and may at any other time) consider whether to include a relocation policy (as defined in section 101(5)) in its class 4 venue policy.
>
> (5B) Whenever a territorial authority is considering whether to include a relocation policy in its class 4 venue policy, it must consider the social impact of gambling in high-deprivation communities within its district.

Subsequent practice

[22] Despite the availability of the new relocation policies, the Department considered that *Waikiwi* relocations remained available, as an amendment of a condition of a licence under s 73, because a change in location of a venue consistent with *Waikiwi* would not be a change in venue for the purposes of a relocation policy. Operators of class 4 venues continued to seek relocations on the basis of *Waikiwi*.

[23] On 6 May 2018, the Secretary announced a revised position, that the *Waikiwi* approach would not be available where a territorial authority had adopted a relocation policy, because it would be contrary to the scheme of the Act. However, in a February 2019 appeal of one of the Secretary's decisions to decline a relocation, the Gambling Commission determined it was bound to apply *Waikiwi*. It stated:[10]

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[10] *Re New Zealand Community Trust* GC04/19, 26 February 2019.

> 27. The word "venue" under the Act, and what constitutes a change of venue was considered in *Waikiwi*. The High Court held that not all relocations were changes in venue. "Venue" was held to have a wide meaning, so that it was possible for minor movements of premises to occur within the same venue. Provided the four criteria were met, the Court held that there would be no change of venue, nor replacement of an existing venue with a new one.
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> 28. The effect of the Amendment is that territorial consent is required only where there is a proposed change of "venue". The Amendment made no change to the statutory meaning of "class 4 venue" and "place", which the Court relied upon. The Amendment applies expressly to relocations or movements that constitute changes of "venue", and not to relocations within an existing venue. Accordingly, in the Commission's view, the effect of the Amendment was to change the provisions that apply to a proposed change of venue without altering what a change of venue is. Movements which meet the four *Waikiwi* criteria do not trigger the application of the Amendment and the test in *Waikiwi* continues to apply in those cases.

[24] The Secretary did not appeal. Instead, the Department resumed consideration and approval of *Waikiwi* relocation requests.

[25] Feed Families Not Pokies was formed "to rid Aotearoa New Zealand of pokie machines as soon as possible, forever, by peaceful and lawful means". On 23 May 2023, Feed Families Not Pokies applied for a declaratory judgment in these proceedings, that:

> A. The Secretary of Internal Affairs has no power to amend the location of a venue on a class 4 venue licence granted under the Gambling Act 2003.
>
> B. Section 73 of the Gambling Act 2003 does not authorise:
>
> a. A corporate society to apply to amend the location of a class 4 venue:
>
> b. The Secretary of Internal Affairs to amend the location of a class 4 venue.
>
> C. If a territorial authority has not adopted a relocation policy as part of its class 4 venue policy under s 101 of the Gambling Act 2003, the relocation of all class 4 venues within the territorial authority district is not authorised by law.
>
> D. If a territorial authority has refused or failed to grant consent under s 98 of the Gambling Act 2003 for a new venue to replace an old venue under a relocation policy, the relocation of that class 4 venue is not authorised by law.
>
> E. Since 14 September 2013, amendment to the location of a venue on the register of class 4 venues maintained under s 90 of the Gambling

Act 2003 has only been authorised following relocation in accordance with s 97A of that Act.

F. Any other remedy deemed appropriate by this Court.

[26] By 7 August 2023, according to uncontradicted evidence of Mr David Hay, the chairperson of Feed Families Not Pokies:

(a) the Secretary granted 24 out of 33 applications for relocations, four were withdrawn, three were refused, and two were still under consideration;

(b) All venues except two were allowed to operate more than nine pokies:[11]

(i) 25 could operate 18 pokies;

(ii) four could operate 16;

(iii) one could operate 14;

(iv) one could operate 13; and

(c) the relocation policy of the relevant territorial authority would not have allowed any of the relocations, except for one, granted by the Secretary up to 7 August 2023.

[27] On 24 August 2023, the Department advised it had again formed the view that *Waikiwi* relocations were not lawful. It advised that applications made before 21 September 2023, eight weeks from the date of the announcement of the change of position, would still be considered in accordance with *Waikiwi*. It stated it would not apply *Waikiwi* to any application received after 21 September 2023, unless an applicant could establish they had been unfairly prejudiced by the Secretary's change of position.

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[11] If a venue meets the conditions under s 92, then the maximum number of pokies they are allowed to operate is 18, instead of nine: see Gambling Act 2003, s 92.

Submissions

[28] Mr McKillop and Mr Emanuel, for Feed Families Not Pokies, submit:

(a) *Waikiwi* has no application to any relocation request from the date the Amendment Act came into force. The Act cannot now be construed to permit alterations to licences through the condition amendment process of s 73. The term "location" is not defined, but s 67(1)(l) means that venues are places that have locations. The "conditions" of a licence that may be amended under s 73(1)(c) do not include the location of a venue, but only the matters in s 70(1)(g)(i) and subs (j). Amending the location would be inconsistent with the wording of ss 70 and 73 and the overall scheme of the Act requiring territorial authority consent by reference to their own policy. Only the relocation process under s 97A permits relocation of an existing class 4 venue licence from one location to another. Section 97A(1)(b) defines new and old venues. Taken as a whole the relocation provisions deal with movement from one place to another. Grandfathered rights can be retained, but only where a territorial authority policy permits that.

(b) There is now no need for an extra-statutory licence amendment process. These are not de minimis matters in terms of the scheme and purpose of the Act. The premise of the 2013 amendments construed as a whole, consistently with their purpose, is that changes in location will be subject to territorial authority relocation policies and require a new venue licence application under s 98(c). There had been no established practice until the 2013 Amendment Act was passed. The relocation provisions cover the field.

(c) The vague and impressionistic administrative assessment under the *Waikiwi* process would allow class 4 venue operators to skirt local democratic decision-making, including on the desirable numbers of pokies in an area, and is not authorised by law.

[29] The Secretary supports the position of Feed Families Not Pokies on the basis that the Act has one relocation regime that does not leave room for the *Waikiwi* process. Mr Conway, for the Secretary, submits:

(a) The High Court's interpretation of "venue" in *Waikiwi* was reached in the absence of the specific statutory language governing relocations, which now draws a nexus between location and venue. Treating a change of location as a change of venue fits more closely with the natural meaning of the words and the scheme of the Act. There is no longer room in the Act for a venue to be deemed to be the same "venue" at a new "place". For example, s 97A(2)(c) indicates that a venue moving to a new location will constitute a new venue. The *Waikiwi* process undermines the purpose of the relocation regime, which plainly intended to place the question of venue relocation in the hands of territorial authorities. The considerations to which a territorial authority must have regard in determining its relocation policy are consistent with the purposes of the Act.

(b) However, the Secretary maintains that other information on a licence, such as the venue's name, can be amended under s 73 and opposes any declaration to the contrary. Otherwise, there would be no scope for amendment of the name of a venue on a licence. It would be illogical for s 71(4) to empower the Secretary to require a corporate society to apply for a licence amendment that the Secretary did not have power to grant. Section 71 indicates certain information may change without the licence necessarily needing to be amended. Feed Families Not Pokies accepts the Secretary's current position on the power to amend licences under s 73.

[30] Mr Smith, for the Gaming Machine Association, submits:

(a) The proposed interpretation is contrary to the statutory text, scheme, and purpose and will not achieve a workably coherent scheme for the administration of class 4 venue licences. The definition of "venue" is

linked to "place", which is defined inclusively and expansively. It envisages a degree of movement of a venue while staying within a defined place. Section 31(b) supports that. Section 65(2)(k) envisages that a venue could be, but is not allowed to be, part of a place at which another venue is located.

(b) The Court should confirm that the *Waikiwi* decision remains good law. It promotes the purpose of the Act as a whole, strands of which pull in different directions. The criteria are perfectly workable and are not superseded. A relocation policy adopted under s 101(5) applies only where a venue "replaces" an existing class 4 venue. That implicitly requires a change in venue. A minor relocation under *Waikiwi* does not amount to a change of venue and does not trigger s 98(c), so no territorial authority consent is required for them. The law is comfortable with de minimis exceptions.

(c) The purpose of the 2013 Amendment Act was to facilitate relocation of venues out of low socio-economic areas by enabling venues to retain their pokies numbers. That purpose is not undermined by a minor *Waikiwi* relocation. It makes sense for there to be a power to amend licence information, including from venue operator or staffing or marketing changes. The concession that changes to street numbers can be changed is significant in acknowledging that s 73 enables minor changes to a venue licence and the information displayed on it.

Are *Waikiwi* relocations lawful now?

[31] In 2013, the High Court in *Waikiwi* interpreted the text of the Gambling Act in light of its purpose and context, as required by the predecessor to s 10 of the Legislation Act 2019.[12] The effect was that a comparatively minor change in the location of pokies could be made that would not alter their "venue" for the purposes of a class 4 licence. Now, the issue is whether interpreting the Gambling Act as subsequently amended by the 2013 Amendment Act gives the same result. Under s 30

[12] Interpretation Act 1999, s 5.

of the Legislation Act, amending legislation is part of, and must be construed with, the legislation that it amends.

[32] There is nothing to indicate that, in passing the 2013 Amendment Act, Parliament was responding specifically to the *Waikiwi* decision that was argued on 30 May 2013 and delivered on 6 June 2013. But, both before and after that decision, Parliament was clearly aware of the general issue of what parameters should be placed on the relocation of class 4 venues. That is demonstrated by the Department's advice to the Committee on 10 May 2013, the Committee's report of the Bill back to the House on 17 June 2013, and the Parliamentary Debates from 9 May 2012 to 4 September 2013.

[33] The thrust of the 2013 Amendment Act was to place the locus of decision-making about relocation of licenced venues with each territorial authority. That is clearly demonstrated by:

(a) The requirement in s 102 on every territorial authority to consider whether to include a relocation policy in its class 4 venue policy.

(b) The power of a territorial authority in s 101(3)(c) to include a relocation policy in its class 4 venue policy, and the specification in s 101(4) of relevant considerations for the territorial authority in considering that.

(c) The requirement in s 98(c) (as it now is) for territorial authority consent to a proposal to change the venue to which a class 4 licence applies.

[34] More specifically, Parliament answered the question of whether a venue licence that benefited from the grandfathering provision could continue to do so on relocation. As the Commerce Committee stated:[13]

> The new venue would be permitted to operate the same number of gaming machines as was permitted at the old venue. This would apply only if the territorial authority had given consent for the new venue in accordance with its relocation policy.

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[13] Gambling (Gambling Harm Reduction) Amendment Bill 2010 (209-2) (select committee report), above n 8, at 4.

[35] That is the effect of the plain meaning of:

(a) the definition of the "relocation policy" in s 101(5) "setting out if and when the territorial authority will grant consent in respect of a venue … where the venue is intended to replace an existing venue … to which a class 4 venue licence applies";

(b) the requirement in s 98(c) for territorial authority consent "if a corporate society proposes, in accordance with a relocation policy of the territorial authority, to change the venue to which a class 4 venue licence currently applies";

(c) the requirement in s 67(1)(f) on the Secretary to refuse to grant a class 4 venue licence unless satisfied the territorial authority has provided consent; and

(d) the circumstance envisaged by s 97A where a territorial authority "grants consent in respect of a venue (the ***new venue***) to replace an existing venue (the ***old venue***)" in accordance with its relocation policy.

[36] I do not accept the submission of the Gaming Machine Association that a minor relocation does not amount to a change in venue for the purposes of the definition of relocation policy in ss 101(5) and 98(c). Section 101(5) states that a relocation policy sets out if and when an authority will grant consent "where the venue is intended to replace an existing venue". The same language of "replace" is used in s 97A. That is quite different from the statutory wording considered by Collins J in *Waikiwi*. As the Secretary submits, the interpretation there was reached in the absence of specific statutory language governing relocations. There is no longer room in the Act, as amended, for a venue to be deemed to be the same "venue" at a new "place".

[37] Rather, the plain meaning of "where the venue is intended to replace an existing venue", in the Act as amended, encompasses exactly the sort of situation that was considered in *Waikiwi* not to be covered by the Act before it was amended — where the change in location is minor, the name of the tavern, its ownership and management

remained the same, and its patrons and the public would regard it as being the same venue.[14]

[38] Counsel devoted some time to textual arguments about when a class 4 venue licence may be amended and under what authority. A "venue" has a "location" at a "place" in the text of the Act. Each word has a distinct meaning, as illustrated by ss 65(2)(a), 65(2)(k), 67(1)(l), 70(1)(f) and the definition of "place" in s 4. But they are all inter-related terms, and all have to be read in light of the purpose and context of the Act, as amended in 2013.

[39] Counsel also made submissions about the implications of the above interpretation for what the Act empowers by way of change to conditions of a class 4 licence. That, too, is reasonably straightforward:

(a) Section 73, entitled "[A]mending class 4 licence" requires, in subs (1)(c), a corporate society to apply to the Secretary to amend its licence if it proposes to "change any condition of the licence". The Secretary's power to amend a licence is implicit in this provision.

(b) The Secretary's power to amend a "condition" in a licence is explicit in s 70(3)(a). The "conditions" of a licence are those matters specified in s 70(1) to be "conditions", including the three paragraphs of s 70(1) and the conditions specified in s 70(2).

(c) Otherwise, the power to amend a licence also applies to "information" — the other matters listed in s 70(1) that are not conditions. That is explicitly envisaged by the power in s 71(4) of the Secretary to require a corporate society to apply for amendment under s 73 as a result of notification of significant changes listed in s 71(1), which include changes to matters that are "information" in s 70(1).

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14 *Waikiwi*, above n 1, at [33].

(d) The power to amend a licence can be overridden by other provisions, such as where consent to a new venue to replace an old venue is required to be granted under a relocation policy and s 97A.

[40] The provisions of the Act need to be read in light of the purpose of the Amendment Act which refers to particular aspects of the purpose of the Act overall. In particular, the purpose in s 3(h) is relevant to the relocation policy provisions: to facilitate community involvement in decisions about the provision of gambling. Read in light of that purpose, the Act, as amended in 2013, sets out a comprehensive legislative and regulatory regime that covers the field in governing the relocation of a venue. The territorial authority, through its relocation policy and its consent power, decides on relocations. A change in the location of a venue will only apply if the territorial authority so consents in accordance with its relocation policy. That extends to, and includes, the sorts of "minor" relocations which the High Court had found a safety valve for in *Waikiwi*. I accept that the *Waikiwi* workaround would now undermine the purpose of the Act, as amended in 2013, of placing the decision on venue relocations in the hands of territorial authorities.

What relief should be granted?

[41] Feed Families Not Pokies originally sought five related declarations that remove any doubt about the continued application of *Waikiwi*. As an alternative, Mr McKillop submits the Court could issue a single declaration stating the *Waikiwi* approach has been unlawful since 14 September 2013. He accepts the Secretary's position on relief: that fairness requires those who have received the benefit of past decisions on the basis of *Waikiwi* to be individually challenged as parties, and have the opportunity to make submissions on relief, which is discretionary.

[42] Mr Smith submits the text and scheme of the Act are not consistent with the declarations sought. The declarations sought would unsettle the local democratic outcomes reflected in policies which do not allow for relocation, due to their understanding that *Waikiwi* applies. Instead, the Association seeks alternative declarations that minor *Waikiwi* relocations can continue to be made in accordance with ss 70(1) and 73 of the Act. Mr Smith agrees that it would be unfair and

unprincipled to craft declarations which prejudice third parties who are not present at the hearing. The decisions were made consistently with decisions of the High Court, the Gambling Commission, and departmental policy.

[43] It follows from my decision on the interpretation of the Act, on the basis of both legislative text and purpose, that what has become known as a *Waikiwi* application is not available under the Act as amended in 2013. I issue a declaration to that effect.

[44] Mr Conway accepts, of course, that the Secretary could not make an unlawful decision once the Court issues a declaration about the law. But I accept that a number of third parties have relocated their class 4 venues in reliance on the Secretary's approval of their applications in accordance with *Waikiwi.* As Cooke P explained in 1989 in *Minister of Education v De Luxe Motor Services (1972) Ltd*:[15]

> It is better not to say anything more about these issues, because unfortunately the case has miscarried. The successful tenderers have not been made parties to the proceedings and have been given no opportunity to be heard. They should have been cited by the applicants in the High Court as respondents … Their interests are directly affected by the judicial review application. Natural justice requires that whose granted rights are in jeopardy be given the opportunity of being heard. That has been the practice in cases where an applicant for judicial review or a prerogative writ has been challenging the grant of a licence or concession to someone else.

[45] That passage was quoted by the Supreme Court in *Ririnui v Landcorp Farming Ltd* in 2016, stating that the fundamental issue regarding setting aside a contract made by a public body was "the existence and extent of prejudice to third parties".[16] The same point applies here.

[46] Here, some applications may have been permitted by a territorial authority's policy. Some territorial authorities do not have a "sinking lid "policy. It is not possible to treat all the applications as a group. For those decisions, which are not directly challenged in this proceeding, to be invalidated, they must be directly challenged by judicial review. That would allow the Court to consider, in the exercise of its discretion

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15 *Minister of Education v De Luxe Motor Services (1972) Ltd* [1990] 1 NZLR 27 (CA) at 34.
16 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [123] and [130].

to grant relief, the impact on those who relied on the Secretary's decisions in any retrospective invalidation of a licence.

Result

[47] I declare that what has become known as a *Waikiwi* application is not available under the Act as amended in 2013. That declaration does not invalidate the amended licences granted by the Secretary since then.

[48] My preliminary inclination is to award costs to the applicant, and against the third respondent, on a category 2 basis. If costs cannot be agreed between the parties, the applicant may file a memorandum of no more than four pages within 15 working days of the date of this judgment, with memoranda of up to the same length from the respondents within 10 working days of that, and a reply of up to the same length within five working days of that.

Palmer J