

IN THE MATTER of the Judicature Amendment Act
1972 and the Gaming & Lotteries Act
1977

BETWEEN PUB CHARITY

Applicant

AND THE ATTORNEY-GENERAL

Respondent

Hearing: 3 March 2003

Appearances: W M Wilson, QC, with M Bunting for applicant
M T Parker for respondent

Judgment: 6 March 2003

JUDGMENT OF DURIE J

Introduction

[1] This is an application under the Judicature Amendment Act 1972 for judicial review of a decision on behalf of the Minister of Internal Affairs. The decision relates to the amount that the applicant, the holder of a gaming machine licence under the Gaming and Lotteries Act 1977, is able to pay to site operators for expenses.

[2] The first question is whether, as the applicant contends, the Department of Internal Affairs, which holds delegated authority from the Minister, decided the matter not according to the merits of the case but on the basis of a formula related to the turnover of each site. If so, then a number of questions arise. Was that an unlawful exercise of the discretion delegated from the Minister? Did recourse to the

formula place an unlawful fetter on the exercise of discretion? Was the policy itself contrary to law as giving rise to an unlawful commission?

[3] In this instance the main argument concerns a question of fact, of whether the Department in fact decided according to a formula based upon the turnover of each site. The argument for the Department is that, while mindful of a policy that would limit higher payments to the operators of higher turnover sites, the Department in fact considered the merits of the particular case.

[4] The problem in this case arises from the absence of detailed legislation for gaming machines and the attempt to manage matters through conditions promulgated by a department under statutory powers. I understand the problem may be resolved for the future by the Responsible Gambling Bill which is due to be enacted shortly.

Background

[5] The applicant for review is a charitable trust known as Pub Charity. It is the holder of a gaming machine licence under the Gaming and Lotteries Act 1977. In 1989 Pub Charity became the first non-profit society to receive a gaming machine licence. It now has 3,000 gaming machines at 335 approved sites.

[6] Gaming machine licences are issued under s 8 of the Gaming and Lotteries Act 1977. This allows for games of chance where the object is to raise money for an authorised purpose without commercialising such games for the benefit of licences, site operators or anyone else. An 'authorised purpose' is any charitable, philanthropic, cultural or party political purpose or any other purpose that is beneficial to the community or any section of it (s2). Pub Charity pursues only charitable purposes. It distributed \$30.3 million to communities for those purposes for the year ended 30 September 2001. In that year it also paid \$31.5 million tax.

[7] Licences issue when the Department is satisfied that an applicant is a non-profit society operating gaming machines to raise money for an authorised purpose. There are then a number of provisions to constrain individual benefit or commercialisation. One is provided by statute. The remainder derive from

conditions which the Minister, or the Department under delegated authority, may attach to licences from time to time by s 8(3).

[8] The statute prohibits the payment of commissions. Section 8(2) provides that save for employees of the Society no money is to be paid to any person by way of remuneration or commission for conducting the games, and employees are not to be paid by commission (s 8(2)).

[9] The Department has standardised the conditions to attach to licences according to two types. One type is for clubs with machines on club premises raising money for club purposes. Another is for non-profit societies with their machines on commercial premises held by others who offer hospitality. Hotels and taverns are the obvious examples. Most of these societies distribute proceeds to applicants for grants. Those operating on the premises, as licensees under the Sale of Liquor Act or the like, are referred to as site operators. Societies are required by licence condition to operate machines on approved sites only, the approved site being listed in the licence. Pub Charity is a non-profit, charitable society operating machines on 335 approved sites and distributing money for charitable purposes according to applications for grants. I come now to those restrictions imposed on such a body by the applicable Departmental conditions as are relevant to this case. These conditions are regularly changing but those referred to here are as at 1 October 2002.

[10] Condition 47 requires societies to pay the maximum available funds to authorised purposes and which must be at least 33% of total gaming machine profit for each financial year.

[11] Condition 18 requires societies to maintain a written 'site agreement' with each site operator. These shall:

(a) Set out the licence conditions and the legal requirements with which the site operator, as the society's representative, must comply;

(b) Set out the duties that the society requires the site operator to perform;

- (c) Show the amount and nature of all expense payments to be made to the site operator;*
- (d) Show the total amount of payments to the site operator in the "per machine per week" format;*
- (e) Include a requirement for the site operator and their representative(s) to co-operate with the department and its representatives;*
- (f) Be signed by the authorised representatives of the society and the site operator.*

[12] The primary condition for consideration in this case is condition 56 of 1 October 2002. This provides that societies shall apply gaming machine funds only to expenses that are actual, reasonable and necessary to the gaming machine operations and that payments to site operators, or site payments, are subject to a maximum standard amount unless a dispensation is obtained. Mr Parker for the respondent stressed in submissions that these conditions must be read in historical context. That context illustrates the department's drive to keep site payments to a minimum both to maximise the return to authorised purposes and to avoid commercialisation or undesirable practices like societies luring site operators by excessive payments. At the same time site operators must be properly reimbursed for the cost of having the machines on their site.

[13] To that end 'site expenses' have been seen as having at least two elements: 'site rentals', which reflect the value that may be placed on a site having regard to its turnover, and 'operational expenses' like labour, electricity or insurance.

[14] To mid 1997 the Department dealt with the matter by the simple expedient of a financial cap on all site expenses. This was replaced in 1997 by two provisions, that licensees were to reimburse site operators for actual, reasonable and necessary expenses while at the same time imposing the minimum return to authorised purposes of 33%, as earlier referred to. That position prevailed until 1 October 2001 when the Department reintroduced a maximum amount payable. Because some societies, Pub Charity included, were paying above that amount on some sites, these were given until 1 October 2002 to rearrange payments to ensure compliance or to

seek a dispensation. By that date the conditions had been amended again. The conditions cited below are as at 1 October 2002.

[15] Condition 56 is more particularly as follows:

(1) The Society shall apply gaming machine funds¹ only to expenses which are lawfully incurred and necessary to the Society's gaming machine operations.

(2) The Society shall not make payments to any site operator² that exceed \$150 per gaming machine per week (excluding GST) in total, unless the society has applied for and received approval from the department for dispensation to make higher payments. Any such application must be made in writing and must be substantiated by a fully documented case. While the department will consider each application on its merits, there is no presumption that any dispensation will be granted.

(3) The society shall not pay a service provider to perform duties listed in the site agreement as duties to be performed by the site operator.

(4) Payment of expenses shall be made by fully auditable electronic lodgement, or by cheque

[16] Associated with the conditions the Department has published extensive 'guidelines', those for 1 October 2002 comprising 94 pages. The guidelines relating to condition 56 begin by amplifying the meaning of 'actual', 'reasonable' and 'necessary'. No issue is taken with any of that in this case. They provide more particularly:

Condition 56 places responsibility on societies to ensure that any expenses claimed as a deduction from gaming machine funds is lawful and necessary. The department's policy, based on legal advice, is that, to be considered legitimate, such expenses must be actual, reasonable and necessary to the society's good business practices and must comply with the Gaming and Lotteries Act 1977.

¹ 'Gaming machine funds' means funds from gaming machine profit, and interest on those funds, retained in the Society's bank account or accounts (as required in these licence conditions) and used for payments to authorised purposes and meeting the society's actual, reasonable and necessary expenses.

² 'site operator' means the occupier of a site, not owned or leased by the society, who owns the business operating at the site and is the signatory of the site agreement and is the holder of any 'on' liquor licence for the site. The site operator is responsible for day-to-day site compliance with all relevant licence conditions and legislation relating to the operation of gaming machines.

The department's policy defines the terms "actual", "reasonable" and "necessary" in the following manner:

Actual – based on the actual expenses of the gaming operation and able to be substantiated. (This rules out for example, payments based on projected future expenses, or commissions based on machine numbers or turnover rather than actual hours worked).

Reasonable – taking into account the size of the operation, normal market value for the goods and services provided.

Necessary – to the gaming operations of the society. The society must exercise good business practice and due care to ensure that expenses are clearly related to the society's function of raising funds for authorised purposes.

In these guidelines the term "expenses" is used to mean lawfully incurred expenditure that a society can deduct from its gaming account.

[17] The guidelines then consider a range of expenses that might be reasonable depending on the size and nature of the operation and the overall return to authorised purposes. Again, these present no difficulty in this case.

[18] The guidelines then consider 'site expenses' and provide as follows:

If a society operates gaming machines on premises other than its own, there must be a site agreement in place for each site (see condition 18). The site agreement provides for the society to pay the site operator a site rental and to reimburse the site operator for reasonable costs incurred by having gambling machines on the site.

Licence condition 56 limits the total amount payable to the site operator to a maximum of \$150 per machine per week (excluding GST). This limit has been set because of the department's concern that site payments have, in some cases, amounted to effective commercialisation of gaming machine operations. This is a maximum payment and lesser amounts may be paid. The \$150 limit may only be exceeded in extraordinary circumstances, where the department grants a dispensation for a higher amount to be paid in a given case.

A society that wishes to exceed the \$150 limit in relation to a specific site must make application, in writing, to the department for dispensation. The application must be accompanied by substantial evidence showing good reason for the higher payment. Factors that the Department may take into account when considering an application includes the value that the society places on the site as a generator of gaming machine profit, or genuinely higher than usual

labour expenses due to increased duties performed by the site operator for the benefit of the society. Each case will be considered on its merits.

....

[19] These guidelines indicate a particular view about dispensations which is not in the conditions, namely that dispensations will be granted only in extraordinary circumstances. However, the predominant concern is with the following provisions which prescribe the basis on which dispensations will be allowed.

Dispensation assessment process

A dispensation will depend on the applicant making a case for a higher payment based on extraordinary site costs and a higher than average gaming machine profit. Dispensations are based on the track record of a site. By “track record” we mean data about the gaming machine profit and the necessary expenses associated with a site and the value a society might reasonably attach to that site. This value is generally measured in terms of its ability to generate funds for the community.

To assess whether a dispensation for a higher site payment is justified, it is necessary for details of the site’s scale of operations to be known and supported by evidence. This involves information about the number of machines, the hours of gaming operation, the number of staff employed on gaming machine duties and the weekly gaming machine profit figures.

A form has been developed for societies to use when making a case for a dispensation (the Site Payments Dispensation Assessment form (“SPDA” – sample attached)).

Societies whose applications for dispensation do not meet the criteria will be given a full explanation. The department will not approve any further application in relation to such sites unless there are significantly changed circumstances. No site operator will be able to obtain increased payments by changing, or threatening to change, societies.

Societies must keep a record of their dispensations, which they must produce on request.

Criteria for dispensations

(Note: these criteria are currently being reviewed. Any changes will be notified on the department’s website.)

On the basis of the data collected and taking into account the need to minimise the commercialisation effect of higher site payments, we have set the following maximum site payment amounts for defined ranges of GMP (all figures are ex GST)³:

GMP range (\$000s/12 wks)	GMP range (\$M/12 mths)	Site payment (pmpw)
250 - 300	1.0 – 1.2	200
300 - 350	1.2 – 1.4	250
350 – 450	1.4 – 1.8	300
450 – 550	1.8 – 2.2	350
550 +	2.2 +	500

Application of these figures must be based on actual, not predicted, site GMP performance. There must be documentary evidence to support such performance and a copy of that evidence must accompany the application for dispensation.

In no case will a payment in excess of \$500 be approved.

Sites generating less than \$250,000/12 weeks, or \$1M/12 months will not be eligible for a dispensation and payments to such sites must not exceed the \$150 limit.

The site payment steps listed above are the maximum amounts that will be approved. Societies don't have to make the maximum payment.

....

Common questions about dispensation applications

- Q. What happens if the site's GMP performance drops below the level for which dispensation was granted?
- A. It will be a condition of all dispensations that the payment level approved is a maximum amount and entitlement to that amount, or any agreed level up to that amount, will be dependent upon maintenance of the requisite GMP level. The dispensation for a given site will lapse where the site has failed to generate the requisite level of GMP for more than one 12-week period in any 12 months.
- Q. Can sites with fewer machines, but good GMP per machine, get dispensations?
- A. Only if they meet the criteria stated in this guideline. The department rejected the concept of per machine performance as

³ GMP or Gaming Machine Profit

a basis for dispensations. Such an approach would too closely resemble payment by commission.

The application and the decision now challenged

[20] Licenses are for one-year terms ending 31 October. Where an application for renewal has been made before then, the old licence continues in force until the renewal application has been disposed of (see s 8(3C)). Counsel for Pub Charity and for the Department expressed different views on whether Pub Charity's licence as presently continued in force is that for the year ending 31 October 2001 or 31 October 2002; but that is not something I need determine. It is at least clear that the new conditions were not to apply to Pub Charity before 1 October 2002. Nor need I determine another point of whether the conditions are the conditions that issued with the licence, as the licence itself states, or whether that has been overridden by the application of s 8 (3D). That provision allows the Minister or the Department to vary or amend any conditions at any time. I think the more likely position is that neither the Minister nor the Department has purported to do so or to do anything more than set out the conditions that are to be applied upon a renewal, but again, that is not a matter I need determine.

[21] In any event Pub Charity sought dispensation in respect of 22 sites. Three were declined, these being the applications at issue in the current proceedings. The applications in respect of the three in issue were made on 6 September 2002 with an accompanying letter advising as follows:

All three [site operators] are currently being paid Site Payments of \$250 per machine per week under the actual and reasonable regime. The \$250 Site Payment is reimbursement for the sites' actual costs. There is no premium or site rental component to the site payment

All three sites' GMP are less than \$1 million GST exclusive per annum, and GMP for all three sites are less than \$250,000 GST exclusive for the last 12 weeks. The three applications for Site Payment dispensations are made on the basis of recovery of actual and reasonable expenditure incurred in operating gaming machines, and not on turnover.

[22] Mr I R Bray, chief executive of Pub Charity, deposed in these proceedings that the 33% minimum return to authorised purposes was maintained on each of

these sites. Were the return to drop below that level the site payments would be reduced accordingly.

[23] In addition, Pub Charity retained a specialist, Mr W Hodder, to assess the actual, reasonable and necessary expenses of the three sites. Mr Hodder was the National Manager, Gaming Compliance until April 2002 when he established his private consultancy practice. He also filed affidavits in this case. No challenge has been made to his conclusions that the payments formerly made, none of which involved any payment for site rentals, were reasonable and necessary.

[24] The Department made known its decision to decline by letter of 12 September 2002. This commented as follows:

Licence Condition 56(3) requires that a society shall not make payments to any site operator that exceeds \$150 per machine per week (excluding GST) in total, unless the society has applied for and received approval for dispensation to make higher payments.

You acknowledge that none of these sites achieve gaming machine profit (GMP) of \$1 million exclusive of GST per year or \$250,000 over a 12-week period. You indicate that the site payment dispensation should be made on the basis of actual and reasonable expenses incurred by the sites.

The Department consulted with gaming machine societies in relation to the site expenses involved in operating the machines. From the information gained the guidelines to Licence Condition 56, relating to site expenses, were developed.

Since that time there have been over 100 applications for dispensation to site payment assessments made. The average labour costs per machine per week of all dispensations granted in [sic: is] \$103.94. That includes all sites with GMP ranging from \$250,000 per week to over \$550,000 per week excluding GST. All those sites operate 18 gaming machines. I believe those sites have extraordinary labour costs due to the work generated by higher than average GMP.

The sites that you have applied for site payment dispensation indicate total labour costs of between \$135.68 and \$182.54. I do not believe that level of expense is justified for the scale of operation.

You also seek to include "subjective costs". You indicate on the form that these costs would still be incurred if there were no gaming machines being operated. Any expenses must relate directly to the operation of the gaming machines. I do not believe that the

“subjective costs” are actual, reasonable or necessary to the society’s gaming machine operations.

I am not prepared to allow a dispensation from Licence Condition 56(3) in relation to the site payments for the three sites you have submitted.

....

[25] The decision-maker in question was the Team Leader of Gaming Licensing in the Department, Mr G Duffy. In further explanation he added in his affidavit:

All but one of the 25 applications declined were due to the society not providing evidence that the site was generating higher than average gaming machine profit and had correspondingly higher than average expenses. None of those sites generated gaming machine profit exceeding \$250,000 over a 12 week period or \$M1 over a 12 month period. The applications did not fall within the criteria set for a higher site payment. The remaining application was declined as the site it related to was not on the society’s licence and was therefore ineligible.

All applications approved were within the criteria set out in the licence conditions, i.e. the extraordinary site costs were claimed in the context of higher than average gaming machine profit. Although some had claimed expenses which I did not consider reasonable or necessary, if the site was eligible for a dispensation based on the gaming machine profit criteria, I would approve it but draw the society’s attention to the apparent unreasonable or unnecessary expense. The 42 applications approved for a lesser amount than that claimed did not meet the criteria for the amount sought based on the gaming machine profit but did qualify for a lesser amount on the same criteria. The labour and direct costs of those sites appeared reasonable and necessary.

The applicant made application for dispensations for 22 sites. Of those applications, 3 have been declined, these being the applications at issue in the current proceedings.

The applications for dispensations for those three sites were determined in accordance with the same policy criteria as eight other applications made on the same date by the applicant. All of the eight other applications were made using the form issued by the Department and all eight were approved.

The eight applications approved all met the criteria for a dispensation for higher site payments as the gaming machine profit for each site all exceeded \$250,000 over a 12 week period and the expenses appeared reasonable and necessary. The three applications declined related to sites that did not generate that level of gaming machine profit.

I have applied the policy criteria consistently to all applications. These proceedings and one other I have recently been made aware of are the only challenges to the determinations made.

Arguments

[26] I accept Mr Wilson's submission for the applicant that, on the evidence, the fiscal cap and dispensation regime was primarily to control site rentals. That claimed for actual, reasonable and necessary expenses in this case had no site rental component, he then submitted, and the only question was whether that claimed was indeed actual, reasonable and necessary. He submitted that on Mr Hodder's evidence that had been affirmatively established. More importantly, for the purposes of review, the Department did not address the three sites' actual, reasonable and necessary expenses, he argued, but determined the level of costs that could be paid according to a formula based on site turnovers compiled from the historical data of societies generally.

[27] In making its decision in that way, Mr Wilson argued, the Department had failed to take account of relevant considerations (the actual, reasonable and necessary expenses) and had relied instead on that which was irrelevant (its own formula). The Department had failed to take into account a mandatory relevant consideration as considered in *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 183, or at least a permissible relevant consideration which had a material effect as considered in *R v Broadcasting Complaints Commission, ex parte Owen* [1985] 2 All ER 522, 532-533 per May LJ. The irrelevant consideration was also central to the decision and was invalid as a result - see *Poananga v State Services Commission* [1985] 2 NZLR 385, 393-394.

[28] Further, Mr Wilson submitted, and indeed it is the essence of the complaint, the Department applied a fixed rule of policy that constituted an unlawful fetter on the Department's discretion. It used a formula and did not consider the merits of the case. He conceded that in present circumstances where the Department is called upon to assess site expenses it must be open to the Department to develop a policy that would assist it in measuring claims. That put the case within the second category considered by Tipping J in *Practical Shooting Institute v Commissioner of*

Police [1992] 1 NZLR 709, 718. However, sufficient room must remain for the proper exercise of discretion, and decision makers must not shut their ears to the merits of the particular case – see *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158 (CA). That had not been done in this case, he argued. The policy was in absolute terms and explicitly ruled out exceptions.

[29] Finally, he submitted, an error of law arose from out of the Department's own formula in that site payments become proportionate to turnover constituting payments according to a commission which is unlawful in terms of s 8(2). An error of law by a decision-maker is a ground of review in itself *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129, 133-135 (CA); *Peters v Davison* [1999] 2 NZLR 164, 181 (CA).

[30] For the respondent Mr Parker argued that the Department had developed a policy which was necessary and proper to satisfy the Act's requirements for a maximum return to authorised purposes and to maintain an effective block on commercialisation while reimbursing reasonable expenses. The policy was to peg site expenses, especially site rentals, to site turnover according to a stepped scale, the steps being sized so as not to create payments on the basis of a commission. An important assumption of the policy was that a site rental payment was appropriate, representing the value that the site had to the society and which in turn was referable to turnover.

[31] Pursuant to that policy, if a society could not establish a turnover beyond the minimum threshold, or did not seek to do so, as in this case, then the application was doomed to fail.

[32] The society gave practical effect to the requirement that expenses be actual and reasonable by ensuring compliance with industry averages.

[33] Mr Parker relied upon the opinion of Sharp J in *Ankers v Attorney-General* [1995] 2 NZLR 595, 599 that the use of a formula to promote consistency in the exercise of discretion is unobjectionable provided it is seen as a guide and not a rule.

[34] In oral presentation, Mr Parker's second argument appeared to be the main, that in any event, and in proof that the formula was not a rule, the question of whether expenses were actual, reasonable and necessary was in fact considered by the decision-maker and was found to be unreasonable. This emerged from Mr Duffy's comments in the letter advising of his decision. It was also apparent from the disproportionate level of expense in relation to the turnover. In any event, he submitted that it was obvious upon analysing the claimed expenses that they could not be justified.

[35] Mr Parker finally submitted that the stepped scale using defined thresholds with maximum site payments for each step was sufficiently removed from the normal criteria for a commission. The normal criteria contemplated a sliding scale with a defined ratio between gross machine profit and site payment.

Consideration

[36] I find I am unable to accept the presumption in Mr Parker's argument that the policy in the guidelines could stand legitimately as the primary basis for the Department's decision. First to be settled, in my view, is the material the decision-maker is obliged to consider as a matter of law, and the principles or objectives which provide a context in which that material is to be viewed.

[37] One must start with the statute. Despite its paucity of prescription, which I understand will be rectified shortly, the statute provides for both process and principles. As for principles, a society's objective is to raise money for authorised purposes (s8(1)). Associated with that is a restriction on remuneration and commissions (in s 8(2)) that tells that expense recovery must bear no element of reward for profitability.

[38] As to process, the objectives and principles are to be achieved by conditions made upon a grant of licence which may be added to, varied or amended from time to time (s 8(3) and (3D)). Process is pivotal to this case, in my view. Given the very wide discretion conferred through the ability to impose conditions, and the power to change those conditions frequently and at will, there can be no relief for licence

holders with onerous responsibilities unless the conditions are clear and are to be found readily in one place. To determine appropriate action, a licence holder should need to look no further than to the conditions from time to time attaching to the licence, either upon the grant or renewal of that licence, or upon a clear direction to amend or replace them. In this case the licence itself supports that view. It requires compliance with all the provisions of the Act and Regulations “and the Licence Conditions issued with this Licence”. It does not require compliance with anything else.

[39] Specifically, the guidelines have no status at all. I think this is indicated in the Introduction to the guidelines at page 1 that the guidelines “are intended to assist societies in their understanding of the licence conditions”. They are there for nothing more. Mr Duffy in his affidavit added that the purpose of the guidelines is to advise licensees of the policy relating to the conditions. That is not what the guidelines themselves say, but no harm is done so long as the policy then described purports merely to explain the conditions and in a way that does not add to, vary or amend them. Such addition, variation or amendment can only be done by formal action pursuant to s 8 (3D). The difficulty is that the guidelines in this case introduce a whole new set of concepts that are not provided for in the Act or the conditions and are not established in any regulations.

[40] This is not to say that the guidelines have no value. To the extent that they assist in understanding they do have value. Insofar as they describe averages, thresholds or benchmarks that serve as indicators of the reasonableness of expenses they again have value in flagging to societies the criteria that the department proposes to use. What is plain in law, however, in my view, is that these guides, while they assist when applying the rules set out in the conditions, cannot serve to substitute for them. And that, in my view, is precisely what has happened

[41] The conditions do not lack for clarity. The Society shall apply funds only to expenses lawfully incurred and necessary to the Society’s gaming machine operations, briefly expressed as ‘actual, reasonable and necessary’, but capped at \$150 per gaming machine per week without particular dispensation. Shorn of the superfluous material in the guidelines, and looking only to the legally binding

material in the conditions, the inquiry invoked by the condition can be no larger than whether, in the circumstances, payments above that amount are reasonable and necessary. Presumably Pub Charity has a strong case if payments above the cap have in fact been accepted under the former regime that applied a reasonable and necessary test. Whether or not that is so, however, I think the test is clear in terms of the conditions, which alone have binding force, of whether that actually paid in the past, and proposed to be continued for the future, is reasonable and necessary.

[42] In this case, the Department invokes a policy the merits of which are not for this Court to determine. This may be broadly described as a policy to relate expense payments, and especially site rentals that are open to some manipulation, to stepped levels of turnover. Mr Parker was able to elaborate on the soundness of this policy in the light of the history of game machine operations and the scope for practices inimical to perceived statutory goals. I think Mr Parker recognised, however, that the policy has no status in law and can operate only to the extent that it does not interfere with that legally required by the Act and the licence conditions. With some skill, Mr Parker submitted that the Department, mindful of the importance of its policy, set out to give effect to it while yet determining the application on the basis that the proposed payments were not reasonable.

[43] However, I think it plain from its letter of 12 September 2002, and the passages previously quoted, that the Department was in fact deciding matters according to its policy. That policy was well into formulation and was soon to be promulgated in the guidelines of 1 October 2002. The evidence is then that the decision maker was primarily concerned with how the proposal might fit with the formula and not whether, on an analysis of the particular case, the actual costs were reasonable and necessary.

[44] Certainly some mention was made of certain costs but insufficient by far to show that the primary concern was to consider the merits of the particular case. Only two matters were particularly mentioned. In his letter of 12 September 2002 Mr Duffy considered that the labour costs could not be justified having regard to the scale of operations. While this appears to examine the actual costs, it does so only against the yardstick of its own policy threshold related to turnover and is not in fact

an analysis of that reasonable or necessary for the particular site. The only other reference was to the disallowance of “subjective costs” on the basis that these costs would still be incurred if there were no gaming machines being operated. While this is evidence of some consideration of the merits of the case, it does little to detract from the primary basis for the decision that the application was outside the formula that the Department had decided to develop.

[45] As mentioned in the introduction to this decision, the first question is whether, as the applicant contends, the Department decided the matter not according to the merits of the case but on the basis of a formula related to site turnovers. I am satisfied that that was indeed the case.

[46] There was little dispute over the consequential law. Dealing with each, the first question is whether there was an unlawful exercise of the discretion delegated from the Minister for failing to take into account relevant considerations and for taking into the account the irrelevant. In this case the decision-maker failed to take into account the actual, reasonable and necessary costs associated with the gaming machine operation actually incurred by the site operator which in my view was a mandatory consideration. Instead, the essential reason for the decision was that the application did not fit a formula based on turnover. Compliance with a formula was not in itself a relevant consideration.

[47] The second question is whether recourse to the formula placed an unlawful fetter on the exercise of discretion. The policy has been cited at length in this decision. It is a policy expressed in absolute terms, which explicitly rules out the possibility of exceptions based upon the merits of the case. As apparent from Mr Duffy’s evidence as cited, it was also absolutely applied. I am satisfied that it served as an unlawful fetter on the Department’s discretion.

[48] The final question is whether the policy itself was contrary to law as giving rise to an unlawful commission. The ordinary meaning of commission in its present context was addressed by the Federal Court of Australia in *Brown v Commissioner of Taxation* (2001) 187 ALR 714, 108 (judgment upheld on appeal at [2002] FCA 318)

A commission is a sum or percentage allowed to an agent or salesman for his services – *Macquarie Dictionary*. It might also be described as a payment to an agent proportional to an amount involved in a transaction – see *Shorter Oxford English Dictionary*.

[49] The Department relies upon a distinction between stepped amounts and a sliding scale, but I think the distinction is artificial. Whether one descends by the staircase or the banister, at any point along the way one's relative position in the well is the same. Insofar as site payments are determined according to turnover, it must bear the character of a commission contrary to the intention of the Act. The position is only otherwise if the formula is but a guide, a measure based on averages by which the prospect of expenses above the norm can be flagged.

[50] That has really been at the heart of this decision, that the guidelines were not a guide but a command when the lawful approach required a sensitive consideration of the particular case.

Outcome

[51] The applicant is entitled to the relief sought in the statement of claim. There is a declaration that the decision to refuse the applicant's application was unlawful and there is an order quashing the decision.

Costs

[52] If costs are not agreed, counsel may submit memoranda.

Dure J

Signed at 10.00 a.m./p.m. this 6th day of March 2003

Solicitors

Buddle Findlay, Wellington, for applicant

Crown Law Office, Wellington, for respondent