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**COMMERCE COMMISSION**  
**Commerce Commission**

**Decision No. 337**

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

**SKY CITY LIMITED**

**and**

**RIVERSIDE CASINO LIMITED**

**The Commission:** K M Brown  
E C A Harrison  
E M Coutts

**Summary of Proposed  
Acquisition:**

Acquisition by Sky City Limited, or an interconnected body corporate, of up to 55% of the shares in Riverside Casino Limited.

**Determination:** Pursuant to s 66(3)(a) of the Act, the Commission determines to give clearance for the proposed acquisition.

**Date of Determination:** 28 January 1999

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## **THE PROPOSAL**

- 1 The business acquisition for which clearance is sought under section 66 of the Commerce Act 1986 (the Act) is the proposed acquisition by Sky City Limited (Sky City), or an interconnected body corporate, of up to 55% of the shareholding in Riverside Casino Limited (Riverside). Riverside is the applicant for a casino premises licence in Hamilton.

## **THE PROCEDURES**

- 2 The notice was registered on 23 December 1998. Section 66(3) of the Act requires the Commission to clear, or to decline to clear, a notice given under the section within 10 working days, unless the Commission and the applicant who gave the notice agree to a longer period. As no extension has been agreed, a determination is required by 28 January 1998. (The working days were calculated in accordance with section 2 of the Act which defines 'working days' as excluding, inter alia, those days from 25 December to 15 January.)
- 3 Sky City sought confidentiality for some of the information in the notice, and a confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination. When the order expires, the provisions of the Official Information Act 1992 will apply.
- 4 The Commission's decision is based on an investigation conducted by staff and their subsequent advice to the Commission.

## **THE INVESTIGATION**

- 5 The Commission contacted the following parties during the investigation:

Casino Control Authority (CCA)  
New Zealand Racing Industry Board  
New Zealand Lotteries Commission  
The Gaming Machine Association of New Zealand  
Department of Internal Affairs

## **THE PARTIES**

### **Sky City**

- 6 Sky City was formed to operate a casino and associated facilities in Central Auckland. Stage I of the project was opened to the public in February 1996, while the Sky Tower was opened in August 1997. The company's shares were listed on the New Zealand Stock Exchange in early 1996 to coincide with the opening of the casino. A controlling interest (64.5%) is held by Brierley Investments Limited.

### **Riverside**

- 7 Riverside was formed to apply for a casino premises licence in Hamilton, and, if its application is successful, to construct and own casino premises. The company has no other business interests. A casino premises licence application was made to the CCA in August 1997, and was amended in December 1998.

## **BACKGROUND TO CASINO OPERATION**

- 8 Until recent years casinos were not permitted to operate in New Zealand. The Casino Control Act 1990 established the CCA and empowered it, inter alia, to issue casino licences and specify the applicable conditions, to determine policy for supervising and inspecting casinos and to approve the games to be played and their rules. Casino licences are of two types: those for casino premises and those for casino operators.
- 9 The Casino Control Act provided that no more than one initial premises licence should be granted in the North Island, and no more than one in the South Island. Once the initial casinos commenced operation, each would be given a period of two years during which no further licence would be granted in that island. In addition, for five years after operations commenced, no further licences would be granted for casino premises to be located within a radius of 100 kilometres of the sites of the initial casinos.
- 10 The two initial casinos were established in Christchurch and in Auckland, and commenced operating in November 1994 and January 1996 respectively. The Christchurch casino had 428 machines and 37 tables, while the Sky City casino in Auckland had 1,094 machines and 112 tables. The Christchurch casino is a 'stand-alone' organisation, that is, without an attached hotel or other entertainment facilities. The Auckland casino complex includes the 328 metre high Sky Tower, a hotel, and a theatre in addition to bars and restaurants.
- 11 The CCA decided in December 1998 to grant a casino premises licence to Dunedin Casino Limited. The proposed casino will have 170 machines and 12 tables, and is expected to open on 1 October 1999.
- 12 The CCA is currently considering two applications for casino premises licences in Queenstown. Sky City has a 60% shareholding in one of the two applicants.
- 13 The Casino Control (Moratorium) Amendment Act of December 1997 imposed a three-year moratorium on casino premises applications, retrospective to October 1997. This moratorium expires on 16 October 2000. The purpose of the moratorium is to allow further research to be undertaken on the impacts of casinos, including problem gambling, before further licence applications were considered.
- 14 The Riverside Casino application in respect of Hamilton was lodged before the moratorium came into force. The hearings for this application will commence in the second half of February and may be concluded by about May 1999.
- 15 In late 1997, Sky City was an applicant for casino premises licences in Wellington and in Hamilton, but neither application could be considered by the Authority because of the moratorium.

## MARKET DEFINITION

16 Section 3(1A) of the Commerce Act provides that:

“...the term ‘market’ is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them”.

17 The Commission’s Business Acquisitions Guidelines provide information on how the Commission approaches the task of market definition. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in terms of s 47(1) of the Act in any of those markets.

18 Markets are defined in relation to product type, geographical extent and functional level. The boundaries of the product and geographical markets are identified by considering the extent to which prospective purchaser would be likely to substitute other products and other geographical regions in response to a change in relative prices of the products concerned.

19 A properly defined market will include products which are regarded by buyers as being not too different (the ‘product’ dimension), and not too far away (the ‘geographical’ dimension). A market defined in these terms is one within which a hypothetical profit-maximising sole supplier of a product could impose at least a small yet significant and *non-transitory* increase in price (the ‘*ssnip*’ test), assuming other terms of sale remain unchanged. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product.

20 Markets are also defined in relation to functional level, because it is usual for the production, distribution and sale of products to proceed through a series of levels. For example, the functional level between manufacturers and wholesalers might be called the ‘manufacturing’ market, while that between wholesalers and retailers is usually known as the ‘wholesaling market’. Functional levels may be combined, and it is now common for manufacturers to undertake the wholesaling function within their own organisations. In relation to the Sky City application, it does not seem appropriate to distinguish a functional level.

### Product Markets

21 The applicant has suggested four possible relevant product markets. These are (a) ‘the casino experience’, (b) ‘the casino experience together with other forms of gaming’, (c) ‘the casino experience plus other “night out” forms of entertainment’, and (d) ‘the casino experience plus other forms of gaming plus other “night out” forms of entertainment’.

22 While other perspectives may also be important, casino attendance can be seen as the consumption of an intangible product, that is, as a recreational outlet. According to Eadington, “consumers of gambling activities voluntarily participate in an exciting

interactive endeavour that satisfies a variety of psychological and social needs: it is indeed adult play”<sup>1</sup>.

- 23 The Commission has found a considerable variation in the way in which industry participants and observers view the market in which casinos operate. Some of these views are outlined below.

Mr David Bale, New Zealand Lotteries Commission

- 24 In a 1993 conference paper, the chief executive of the New Zealand Lotteries Commission, David Bale, suggested that there are two markets: “public gaming” and “gambling”. Mr Bale said that “public gaming” included activities such as *Lotto*, and was characterised by low entry costs, a large number of customers, relatively large prizes, high odds, a lack of a skill requirement and very limited instantaneous re-investment opportunities. He said that the ‘gambling’ market included horse and dog racing, gaming machines and casinos. Mr Bale considered this market to be characterised by higher entry costs, a smaller number of customers, low odds, the need for some skill, and an ability to re-invest.
- 25 Mr Bale stated that, from a marketing viewpoint, these two markets differed significantly in respect of the characteristics of the customers, the channels of distribution and the methods of communicating with the customers.
- 26 In Mr Bale’s view, a casino is “a single point geographic event like a theme park. Unlike a national brand such as *Lotto* or the TAB, the casino has to physically attract its customers through a single door”. This structure meant that for casinos, “frequency of use can only be high in practical terms for people within say a 160 kilometres radius or 1.5 hours drive”. Mr Bale noted that a further implication was that, except for local people, a visit to a casino would be a planned decision.
- 27 Mr Bale added that he considered that casinos would compete with restaurants and single point holidays. He also commented that a visit to a casino may be an additional attraction to conference delegates.
- 28 Mr Bale confirmed to the Commission that his views on the analysis of gambling and gaming markets continued to be in line with those outlined above, provided that it was assumed casinos would continue to be relatively limited in number.

Ord Minnett Study

- 29 A study released by Ord Minnett in October 1998 suggested that gambling activities could be considered in two groups. One was “wagering”, which included racing and sports betting run by the TAB, while the other was “gaming products” which included lotteries, non-casino gaming machines and casinos. However, the study suggested that non-casino gaming machines do not compete with casinos because the former are characterised by a non-profit regulatory environment, small venues and a low jackpot prize limit.

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Eadington, W.R., *Contributions of Casino-style gambling to local economies*, The Annals of the American Academy of Political and Social Science, March 1998, p 55.

- 30 The study noted that in the year ended 30 June 1998, gambling expenditure was approximately evenly divided between the four major categories of activity as follows:

	%
Racing and sports betting	22
Lotteries	28
Casinos	24
Gaming machines	<u>26</u>
	<u>100</u>

#### Australian Institute for Gambling Research study

- 31 In November 1998 the Australian Institute for Gambling Research submitted to the New Zealand CCA a commissioned report entitled *Study on the Social and Economic Impacts of New Zealand Casinos*. The project leader for the study was Professor Jan McMillen of the University of Western Sydney, who is also Executive Director of the Institute.
- 32 The report noted that the introduction of casinos had not led to a reduction in spending on other forms of gambling, but to an expansion in the total expenditure on gambling. This led to the view that “at one level the impact of casinos on the overall national gambling market has been one of complementarity rather than substitution”. The report further noted that casinos appear to have been a catalyst for change in other forms of gambling.
- 33 A survey of casino patrons conducted as part of the study found that if money had not been spent on casino gambling, 37.5% said that they would have spent it on other forms of entertainment, 25.7% on housing items, 8.7% on other forms of gambling, while 6% would have saved the money. 15% of the respondents did not reply to the question.

#### Other Studies quoted by the applicant

- 34 Research for Sky City is conducted on a continuing basis by UMR Insight Limited. A recent report concluded that “Main Gaming Floor patrons see Sky City as basically a ‘stand-alone’ entertainment destination...not especially aligned to any other particular sector of the entertainment market...(and that)...Sky City seems to create business that would not otherwise exist”.
- 35 In the application, Sky City expresses the view that there is an “entertainment market in which customers spend discretionary income and choose between a range of entertainment options”.

#### Other studies

- 36 A study undertaken in 1997 by Business and Economic Research Limited (BERL), for the New Zealand Lotteries Commission, found that there were significant differences in the price elasticities of demand for different forms of gambling. BERL

estimated that for *Lotto* the price elasticity was  $-1.054$ , for racing including the TAB it was  $-0.720$  while for gaming machines and casinos the elasticity was  $-0.801$ . That is, the demand for lottery products is more sensitive to price changes than is that for casinos and gaming machines which in turn is more sensitive than that for race betting.

- 37 The decision of the CCA on the Dunedin application determined after considering the experience of Christchurch that, while gaming machines outside casinos might suffer an initial downturn if the casino were to be established, the effect was likely to be temporary.

### Conclusion on Product Markets

- 38 The Commission has noted that there is a range of views on the market/s in which casinos operate, and that there are some arguments which support the adoption of a broad definition. However, in the Commission's view, the characteristics which distinguish casinos from other forms of gambling, and from other avenues for the spending of discretionary income, appear sufficient to make it appropriate to consider casino entertainment to be a separate product market. Further, it is the Commission's practice to analyse markets initially in terms of the narrowest definition in the range of possible definitions. If no competition concerns are apparent using a narrow definition, then it follows that there would be no concerns if the acquisition was analysed in terms of a wider definition.

### **Geographic Markets**

#### Applicant's submissions

- 39 The applicant submits, without accepting a narrow product market definition, that if the relevant product market is 'casino entertainment', a casino in Hamilton would not be in the same geographic market as the Sky City casino in Auckland.
- 40 In support of this view, the applicant provided details from a study conducted for it by UMR Insight Limited which showed that most of Sky City's patrons come from Auckland, that only [ ] come from Hamilton and that only [ ] are from the Waikato, Bay of Plenty and Coromandel districts. In the applicant's view, there would be only insignificant numbers "choosing between visiting Sky City and a Hamilton casino, or not attending Sky City when they would otherwise have done so".
- 41 According to the applicant, even from Southern Auckland it would take about one hour to drive to Hamilton, compared with 30 to 35 minutes off-peak for a drive to Auckland. In addition, the latter drive would be "less demanding' because in the applicant's view the road to Hamilton "is narrower, more windy and generally considered to be more dangerous".
- 42 Transit New Zealand informed the Commission that the four lane divided road which now extends from Bombay to Mercer is likely to be continued to Hamilton within the next five to ten years, and that this is expected to increase the average traffic speed.



Were this development likely to be significantly closer to completion, a different weighting might be given to this element in the Commission's assessment.

- 43 The applicant notes Australia's experience with the expansion of gaming machines and casinos. The establishment of facilities in Brisbane led to the visits by Brisbane residents to Jupiters casino on the Gold Coast declining significantly. A similar result was quoted after gaming machines became legal in Victoria, as Melbourne visitors to the gaming clubs on the New South Wales side of the Murray River fell greatly in number.
- 44 The applicant stated that 'higher end' estimates would be that a Hamilton casino could attract 4.9 to 5.9% of Sky City's customers, but that this would include only 2 to 2.5% of its Auckland customers.

#### Other Studies and Reports

- 45 The November 1998 report by the Australian Institute for Gambling Research concluded that "the core of the casinos' market is ...local demand, supplemented by regional residents and domestic travellers...There is a relatively small number of tourists for whom a casino visit is the sole or dominant reason for visiting New Zealand, Auckland or Christchurch".
- 46 The chief executive of the New Zealand Lotteries Commission emphasised to the Commission the importance of the geographical location of casinos in relation to their market position. He said that a study he had undertaken some years ago on Australian casinos revealed that 66% of patrons came from within 15 square miles of the casino.

#### Commission Assessment

- 47 The central question is whether those in Auckland wishing to attend a casino would consider a casino in Hamilton to be a practicable substitute, and vice versa. One of the elements in this decision would be the travelling time and driving conditions between the two cities.
- 48 According to the Automobile Association Incorporated, the distance between central Auckland and central Hamilton is 126 kilometres. The Association's suggested travel time is one hour 55 minutes, but it does not quote peak and off-peak times.
- 49 Metropolitan Auckland covers a considerable distance from north to south. Of the southern suburbs, Papakura is 34 kilometres from central Auckland, while at the extreme southern end, the small settlement of Bombay is 46 kilometres from the centre. These two localities are therefore 92 and 80 kilometres respectively from Hamilton. Therefore, even for the southern suburbs of Auckland, the Sky City casino is considerably closer than the proposed Hamilton casino would be, and the road to Auckland is markedly better. While there can be considerable differences in the time taken to travel into Auckland at different times of the day, it is likely that residents of the southern suburbs would consider the journey to Auckland to be quicker and easier than the journey to Hamilton.

- 50 According to the figures provided by the applicant, 21.8% of Auckland residents attending the Sky City casino (14.6% of total attendees) are from South Auckland. However, most of the South Auckland residents would be likely to live less than 35 kilometres from the centre of Auckland, while most Auckland residents in other districts are much closer.
- 51 In the Commission's view the difference between the distance to the Sky City casino and that to the proposed Hamilton casino is sufficiently large to make it unlikely that many Auckland and Hamilton residents would see the two casinos as substitutable. It was pointed out to the Commission, that, when there was only one casino in Australasia, in Hobart, some New Zealanders travelled to Tasmania for the purpose of visiting that casino. Presumably a number of Aucklanders travelled to Christchurch when that was the only New Zealand casino. The indications both from overseas studies and from the experience in New Zealand are that, with the exception of some resort destinations, particularly Las Vegas, most casino patrons originate from within what might be described as commuting distance of the casino concerned.

### **Conclusion on Market Definition**

- 52 For the purpose of analysing the competition issues arising from the proposed acquisition, the Commission concluded that the relevant markets are those for casino entertainment in Auckland and for casino entertainment in Hamilton.

### **COMPETITION ANALYSIS**

- 53 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, clearance must be declined.
- 54 In *Port Nelson Ltd v Commerce Commission* [ ] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:
- ...dominance involves more than high market power; more than mere ability to behave "largely" independently of competitors; and more than power to effect "appreciable" changes in terms of trading. It involves a high degree of market control.
- 55 The Commission has noted the extensive regulatory powers of the CCA. Section 16 of the Casino Control Act 1990 prescribes that the functions of the Authority are:
- (a) To consider applications for, and to grant, casino licences....:
  - (b) To determine the conditions of the licences to be issued....:
  - (c) To consider and determine appeals in relation to the issue, cancellation, and suspension of certificates of approval....:
  - (d) To advise the Minister on matters relating to the administration of this Act and of regulations made under this Act:
  - (e) To determine policy in relation to the supervision and inspection of casinos:
  - (f) To approve the games to be played in casinos and the rules under which such

games are to be played:

(g) To carry out such other functions as are conferred on the Authority by or under this Act or any other Act.”

56 In addition to the extensive powers given to the CCA, the Casino Control Act requires the Secretary of Internal Affairs to appoint casino inspectors to supervise the conduct of gaming and to receive and investigate complaints.

57 Even though the CCA has a powerful role in regulating the operation of casinos, there would be scope for casinos which were in the same geographic market to offer differences in price- related aspects of the delivery of their products (particularly the pay-out ratio on gaming machines and the denomination of the tokens required for playing games), on intangible or quality issues such as the standard of service and amenities and on the range of games offered. A casino has the ability to change the range of its offerings by discontinuing games, or by adding games which have been authorised by the CCA. There is therefore the potential for dominance concerns in some circumstances.

58 However, in the case of the present application, the Commission has found that the proposed Hamilton casino would operate in a different geographic market from that in which the Auckland casino operates. Consequently, the acquisition by Sky City of a controlling interest in the proposed Hamilton casino would not result in aggregation of market share. If the Auckland casino is, and the proposed Hamilton casino would be, dominant in their respective markets, then the proposed share acquisition would constitute a bare transfer of the prospective dominance in Hamilton in terms of section 48 of the Act. It would not increase dominance in the casino entertainment market in Auckland.

59 The Commission therefore concludes that the proposed acquisition would result, and would not be likely to result, in any person acquiring or strengthening dominance in any market in terms of section 47(1) of the Act.

## CONCLUSION

60 The Commission has considered the likely impact of the proposal in the two relevant markets, which are those for:

- casino entertainment in Auckland, and
- casino entertainment in Hamilton.

61 Having regard to the factors set out in section 3(9) of the Act, and the other relevant factors, the Commission concludes that the proposal would not result, and would not be likely to result, in Sky City or any other person acquiring or strengthening a dominant position in a market.

**DETERMINATION ON NOTICE SEEKING CLEARANCE**

- 62 Accordingly, pursuant to section 66(3) of the Commerce Act 1986, the Commission gives clearance for the acquisition by Sky City Limited, or a wholly owned subsidiary, of up to a 55% shareholding in Riverside Casino Limited.

Dated this                                  day of January 1999

**K M Brown**  
**Member**

**E C A Harrison**  
**Member**

**E M Coutts**  
**Member**