

COMMERCE COMMISSION

Decision No. 523

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

SKYCITY ENTERTAINMENT GROUP LIMITED

and

ASPINALL (NZ) LIMITED

The Commission: Denese Bates QC (Chair)
Donal Curtin
Peter JM Taylor

Summary of Application: The acquisition by SkyCity Entertainment Group Limited of all the shares in Aspinall (NZ) Limited.

Determination: Pursuant to section 66(3) (a)/(b) of the Commerce Act 1986, the Commission determines to give clearance to the proposed acquisition.

Date of Determination: 18 May 2004

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EXECUTIVE SUMMARY

The Proposal

1. A notice pursuant to s 66(1) of the Commerce Act (the Act) was registered on 16 April 2004. The notice sought clearance for the acquisition by SkyCity Entertainment Group Limited of all the shares in Aspinall (NZ) Limited.

Association

2. While the Commission notes that operationally, there is no requirement for unanimity on board decisions and Skyline Enterprises Ltd (a significant shareholder in Christchurch Casino Ltd) would appear to have the ability to pass operational measures without regard to the position taken by SkyCity, it cannot necessarily be assumed that SkyCity would not, in the short to medium term, be able to bring real pressure to bear on the decision making process of Christchurch Casino Ltd (CCL).
3. In these circumstances, and in order to properly test the competitive effects of the acquisition by SkyCity of all the shares in Aspinall, the Commission will take a conservative view and assess SkyCity Auckland, SkyCity Hamilton, SkyCity Queenstown, (CCL) and Dunedin Casino Ltd (DCL) as a single entity in the relevant markets post acquisition.

Market Definition

4. The Commission concludes that the relevant markets for this acquisition are as follows:
 - the Auckland casino entertainment market for ordinary gamblers;
 - the Christchurch casino entertainment market for ordinary gamblers;
 - the Dunedin casino entertainment market for ordinary gamblers; and
 - the national casino entertainment market for premium gamblers.

Counterfactual

Factual

5. As a result of the acquisition SkyCity acquire 100% of the shares in Aspinall and through that acquisition hold a 30.7% shareholding and a further 9.8% beneficial interest in CCL.

Counterfactual

6. The Commission considers the appropriate counterfactual to be the status quo.

Competition Analysis

Existing Competition

The Auckland, Christchurch and Dunedin Casino Entertainment Markets for Ordinary Gamblers

7. In the three regional markets examined there is a single casino with high regulatory barriers to new entry. This situation does not change as a result of the acquisition. Therefore, the Commission is of the view that competition is unlikely to be substantially lessened in the factual compared with the counterfactual in the relevant markets.

The National Market for Casino Entertainment for Premium Gamblers

8. The Commission considers the combined entity is likely to be constrained from attempting to exercise any degree of market power post-acquisition in the national market for premium gamblers. The key factors supporting this conclusion are the combination of existing competitors in the form of international casinos, the ability of premium gamblers to readily switch to overseas casinos they visit and the importance of premium gambler visits to casinos.
9. Therefore, the Commission is of the view that competition is unlikely to be substantially lessened in the factual compared with the counterfactual.

Overall Conclusion

10. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the Auckland, Christchurch and Dunedin casino entertainment markets for ordinary gamblers.
11. The Commission also concludes that there would be sufficient existing competition to constrain the combined entity from exercising market power in the national market for casino entertainment for premium gamblers.
12. The Commission is therefore satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the relevant markets.

THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act (the Act) was registered on 16 April 2004. The notice sought clearance for the acquisition by SkyCity Entertainment Group Limited of all the shares in Aspinall (NZ) Limited.

PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the Applicant. Accordingly, a decision on the Application was required by 18 May 2004.
3. The Applicant sought confidentiality for specific aspects of the Application. A confidentiality order was made in respect of the information for up to 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
4. The Commission's approach to analysing this proposed acquisition is based on principles set out in the *Commission's Merger and Acquisition Guidelines*.

STATUTORY FRAMEWORK

5. Under s 66 of the Act, the Commission may grant clearances for acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.¹
6. The Commission considers that it is necessary to identify a real lessening of competition that is not minimal.² Competition must be lessened in a considerable and sustainable way. For the purposes of its analysis, the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.
7. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years.

¹ Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission (1992) 4 TCLR 713-722.

² See Fisher & Paykel Limited v Commerce Commission (1996) 2 NZLR 731, 758 and also Port Nelson Limited v Commerce Commission (1996) 3 NZLR 554.

8. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced service, quality or innovation, for there to be a substantial lessening, or likely substantial lessening, of competition, these also have to be both material and sustainable for at least two years.

ANALYTICAL FRAMEWORK

9. The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
 - with the acquisition in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
10. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
 - existing competition;
 - potential competition; and
 - other competition factors, such as the countervailing market power of buyers or suppliers.

THE PARTIES

SkyCity Entertainment Group Limited (SkyCity Group)

11. The SkyCity Group has a variety of ownership interests in relation to the entertainment industry.
12. In terms of gambling activities in New Zealand, SkyCity Group owns the SkyCity casino in Auckland (SkyCity) in its entirety; 70% of Riverside Casino Limited which owns SkyCity Hamilton in its entirety; and 60% of the shares in Queenstown Casinos Limited, the company that owns SkyCity Queenstown. SkyCity Group also owns SkyCity Casino Management Limited (SkyCity Management) as a wholly owned subsidiary. SkyCity Management operates SkyCity Auckland, SkyCity Hamilton and SkyCity Queenstown.
13. As a result of this wide ranging ownership, SkyCity Group has a significant presence in relation to casinos in New Zealand.
14. SkyCity Group is also involved in gambling activities outside of New Zealand. It has a 100% interest in both SkyCity Adelaide and Darwin casinos, and has a 32.6%

share in Canbet Limited, an internet sports betting site operated from the United Kingdom.

15. SkyCity Group is also a participant in the New Zealand cinema industry. It owns 50.2% of SkyCity Leisure Limited directly and 74.4% on a fully diluted basis. SkyCity Group has submitted a takeover offer for the remaining shares in SkyCity Leisure that is scheduled to close on 8 June 2004.

Aspinall (NZ) Limited (Aspinall)

16. Aspinall is a wholly owned subsidiary of Aspinall Club Ltd (Aspinall UK). Aspinall UK owns and operates various UK casinos. Aspinall has been involved in the Christchurch Casino since its inception in 1994. At the time, the New Zealand regulatory regime stipulated that ownership and management of a casino in New Zealand must include parties experienced in casino management. Consequently, because no New Zealand company had any casino industry experience, bringing in an offshore party such as Aspinall was necessary.
17. Aspinall currently owns a 30.7% share in Christchurch Casino Limited (CCL). In addition, it has a beneficial interest in CCL of 9.8%. This beneficial interest is a consequence of Aspinall's 33.3% shareholding in Christchurch Hotels Limited (Christchurch Hotels) which owns a 68.8% shareholding in Premier Hotels Limited who in turn hold a 30.7% interest in CCL.

Christchurch Casino Limited (CCL)

18. CCL was New Zealand's first casino and was opened in 1994. It is a 'stand-alone' organisation without an attached hotel or other entertainment facilities. CCL claims to offer customers a personalized service, and luxurious and boutique gaming facilities.
19. CCL is planning to build a \$22.5 million cabaret and entertainment centre. In its submission to the Commission CCL indicated this is an attempt to increase its ability to attract premium gamblers.
20. CCL has four main shareholders:
- Aspinall – 40.5%
 - Skyline – 40.5%
 - SPHC (NZ) Holdings Ltd – 10.31%
 - Southern Equities Ltd – 8.6%

Skyline Enterprises Limited (Skyline)

21. Skyline is a tourism company with ventures in Queenstown, Dunedin, Christchurch and Rotorua. Barry Thomas is Chairman of Directors of Skyline.
22. Skyline has a wide range of subsidiaries and associated companies throughout NZ.

23. Queenstown enterprises include:
- Skyline Gondola, Restaurant and Luge
 - Skyline Travel
 - Blue Peaks Lodge
 - Mountain View Lodge
 - Queenstown Casino
24. Dunedin enterprises include:
- Skyline Leisure Lodge
25. Christchurch enterprises include:
- Christchurch Casino
 - Christchurch Hotels
26. Rotorua enterprises include:
- Skyline Skyrides

Other Relevant Parties

27. In the course of the investigation of the proposed acquisition, Commission staff have discussed the application with a number of relevant parties.

Regulatory Agencies

Department of Internal Affairs (DIA)

28. In relation to gaming activities, the DIA has two relevant entities. The first entity is the Gaming Compliance Office which audits and investigates non-casino gaming and issues certificates of approval for casino employees. The second entity is the Casino Inspectorate which regulates all casino gaming activities and management. The DIA has an enforcement objective, and can intervene with respect to any breaches of the Gambling Act 2003.

Casino Control Authority (CCA)

29. The CCA is a quasi-judicial, statutory body that licenses and regulates casinos in New Zealand. The Authority acts in conjunction with the Casino Inspectorate to supervise and inspect casino management and operations.
30. The CCA is set to be disestablished as of 30 June 2004. The move to disestablish will result in the CCA's role being taken over by the DIA and the soon to be established Gambling Commission. The Gambling Commission will consider casino licence applications and hear appeals on the DIA's decisions.
31. Because no more casino premises may be licensed, there is no need to have a full time independent body such as the CCA. The CCA will continue to be responsible

for administering licence conditions, directions, and internal controls, until it is disestablished.

32. The DIA will take over the day-to-day regulatory activities of the CCA such as setting minimum operating standards, game rules, suitability of management, and equipment standards.

New Zealand Casinos

SkyCity Hamilton

33. SkyCity Hamilton is majority owned by the SkyCity Entertainment Group. Tainui Group Holdings Ltd is currently the other shareholder in SkyCity Hamilton with a 30% shareholding. SkyCity Hamilton operates 319 gaming machines and 23 table games.

SkyCity Queenstown

34. SkyCity Queenstown is a small casino regarded by industry players as a boutique casino. SkyCity Queenstown operates 74 gaming machines and 6 table games. The shareholding is distributed as follows:
- SkyCity Entertainment Group Limited – 60%
 - Skyline Enterprises Limited – 40%

Dunedin Casino Limited (DCL)

35. DCL defines itself as a boutique casino, and is located in the Southern Cross Hotel Complex in Dunedin. DCL operates 180 gaming machines and 12 table games.
36. Aspinall also has a beneficial interest in DCL as CCL has a 33% share in the DCL. Aspinall's interest equates to a 13.4% beneficial interest.

37. DCL shareholding is distributed as follows:

- Earl Raymond Hagaman – 42%
- Christchurch Casino Limited – 33%
- Stuart James McLaughlan – 10%
- Minority shareholders – 15%

Wharf Casino Queenstown (WCQ)

38. The WCQ operates gambling facilities in Queenstown and has 75 gaming machines and 6 table games including blackjack, mini-baccarat and American roulette.

39. The WCQ's shareholding is distributed as follows:

- Michael Spencer Stone – 38%
- Philip Dean Griffith – 38%
- Raymond Douglas Pike – 9.5%
- David Ralph Wishing – 9.5%

- Graham Leslie Smolenski – 5%

Australian Casinos

Crown Casino

40. The Crown Casino in Melbourne is one part of the Crown Entertainment Complex which comprises Crown Hotel Melbourne, various restaurants, nightclubs and cinemas. The Crown Casino is one of the largest casinos in the Southern hemisphere, with a gaming floor that stretches for more than half a kilometre.

Burswood Casino

41. The Burswood Casino is located at Burswood in Western Australia. The casino has a total of 123 gaming tables and 1,300 gaming machines.

Conrad Jupiters Gold Coast

42. Conrad Jupiters Gold Coast is one of two flagship hotel-casinos for Jupiters. It is operated by Park Place Entertainment.

Star City

43. Star City is located in Sydney and offers a variety of gambling activities including a TAB lounge, gaming tables and Keno.

44. A complete list of Australian casinos is provided below:

- Wrest Point Hobart and Country Club Casino, Launceston;
- Burswood International Resort Casino, Perth;
- Reef Casino, Cairns;
- Casino, Canberra;
- Crown, Melbourne;
- Star City, Sydney;
- Lasseters, Alice Springs;
- MGM Grand, Darwin;
- Sky City, Adeline;
- Conrad Jupiters, Gold Coast;
- Conrad Treasury Casino, Brisbane; and
- Jupiters, Townsville.

PREVIOUS DECISIONS

SkyCity Limited and Riverside Casino Limited (Decision 337)

45. In Decision 337, the Commission considered the characteristics that distinguish casinos from other forms of gambling, and from other avenues for spending of discretionary income, justified the conclusion that “casino entertainment” formed a separate product market.

46. In terms of a geographic dimension, the Commission considered the casino entertainment market on a regional basis; it held there were separate markets for casino entertainment in Auckland and in Hamilton.
47. The Commission cleared the transaction on the basis that as the two casinos operated in separate geographical markets, the acquisition constituted a bare transfer of prospective dominance in the Hamilton casino entertainment market.

London Clubs International plc and Capital Corporation plc 1997 (London Clubs)

48. The question of whether London casinos operated in an international market was considered in the London Clubs decision. The U.K. Competition Commission found there was not an international market for the majority of players, so rejected the applicant's argument that international casinos provided a competitive constraint and declined the application.
49. Moreover, although it did concede that there was an international "dimension" for some premium players, the Competition Commission fell short of defining this dimension as an actual market. The Competition Commission appeared to base this conclusion on the small number of international premium players. And while the Competition Commission accepted that the revenue these minority international players contributed to casino revenue was important, it considered it was incomparable in terms of the large amount the local-based majority contributed.
50. Another reason given by the Competition Commission for rejecting the idea of a separate premium player market was that most players attended London casinos in conjunction with business or leisure trips, rather than attending London for the sole purpose of attending a casino.
51. Overall, it appears the Competition Commission gave most weight to the idea that the majority of players would be disadvantaged should the combined firm decrease quality and service post-acquisition. The London situation can be distinguished from New Zealand as in London there are a number of different casinos operating in a single geographic region, whereas only one casino operates in the regions with a casino in New Zealand with the exception of Queenstown.

INDUSTRY BACKGROUND

52. The introduction of the Gambling Act 2003 replaces the Casino Control Act 1990. The Gambling Act 2003 states that existing casinos will not be able to expand their gambling activities and no new casino venue licences will be issued. Current licence holders retain their licences.
53. The key differences between the Gambling Act and the Casino Control Act are:
- From July 2004, the Gambling Commission will be responsible for all licensing decisions related to casinos;

- Casino venue licences may be renewed (as permitted under the current Act) at the end of the current licence period.
 - The licence renewal process will:
 - a. Require a Casino Impact Report to be tabled, prepared by an approved person, independent of the applicant.
 - b. Provide for greater community participation at public hearings and through community polls or consultation processes.
 - c. Require the applicants to show how the proposed licence renewal will benefit the local and regional communities and New Zealand generally.
 - d. Anyone will be able to seek a casino operator's licence. However, any new licensed operator will need an agreement with an existing venue licence holder in order to operate at a casino.
54. The Gambling Commission will be responsible for setting new licence conditions and for making amendments to current conditions. A significant change is that the Department of Internal Affairs (DIA) will be permitted to request that the Gambling Commission specify, vary or revoke the conditions attached to each licence. At present, a licence condition can be amended only if the licence holder seeks a change.
55. Existing casinos will not be permitted to increase the opportunities for casino gambling and will not be permitted to provide Internet gambling in New Zealand or directed at New Zealanders. The New Zealand Racing Board may operate TAB outlets in casino premises by agreement with casino operators.
56. In the past, the CCA has viewed New Zealand casinos as distinct and different from one another and has applied the regulations accordingly. In particular, the CCA has recognised the importance of the differences in scale between casinos. For example, the surveillance requirements and staffing needs for the larger SkyCity casino in Auckland are viewed as different to those of the smaller SkyCity Queenstown Casino. The Authority has thus avoided a “one-size-fits-all” approach. Whether the new Gambling Commission, with a pre dominantly new staff, takes a similar approach to the Casino Control Authority remains to be seen.

Developments in the Casino Industry

57. There are currently six casinos operating in New Zealand:
- SkyCity Auckland
 - SkyCity Hamilton
 - Christchurch Casino Limited
 - Dunedin Casino Limited
 - SkyCity Queenstown
 - Wharf Casino Queenstown
58. Casino licences are of two types: those for casino premises and those for casino operators. A premises licence holder does not have to be the manager/operator of

the casino. The premises licence holder can enter into a management contract with a manager. To hold a management contract for a casino a person must hold a casino operator's licence. Operators' licences will be granted by the Gambling Commission and are not limited in number.

59. CCL and SkyCity were established in Christchurch and Auckland, and commenced operating in November 1994 and January 1996 respectively. The CCL had 428 machines and 37 tables, while the SkyCity casino in Auckland had 1,094 machines and 112 tables on opening. The CCL 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.
60. All casinos in New Zealand are considered "grind" casinos by industry participants interviewed in both Australia and New Zealand. A grind casino is one that relies on local, non-premium players for the majority of its revenue. Revenues from non-premium players make up [] of SkyCity's total revenue and [] of CCL's total revenue.
61. SkyCity is currently completing work on a new convention centre, exhibition centre and a five-star hotel with an estimated cost of \$165 million. CCL intends to add a \$22.5 million cabaret and entertainment centre to its existing facilities. Industry participants indicate the ability to offer gamblers both gambling and other entertainment options in a single facility is important to attract customers to a casino. The effort to provide an integrated entertainment offering is reflected both in New Zealand and internationally.
62. The regulatory regime in New Zealand imposes restrictions on a wide range of casino operations, from the number of gaming machines and table games allowed to the payout percentages for the games operated by the casino. This leaves service levels and venue conditions as the primary differentiators between casinos. The comments below demonstrate that this is a feature of casinos internationally.
- "In addition to the fixed price paid for each game played at a casino, there is also a flexible element to the price paid by gamblers by way of charges, if any, for food, beverages, membership fees and other ancillary services. The discounting of these charges is the main source of price competition between casinos in London. The combination of the price charged for gaming (the odds) and all other charges constitutes the relevant total price for the purposes of our market definition test."³
63. Providing a full entertainment experience is one tactic to attract gamblers. A second tactic applied by casinos both in New Zealand and internationally is to provide a range of services to gamblers that are dependent upon the amount spent gambling during a visit to the casino. The greater the amounts spent, the larger the

³ UK Competition Commission Decision "London Clubs International plc and Capital Corporation plc" 1997 http://www.competition-commission.org.uk/rep_pub/reports/1997/404london.htm

value of the complimentary services delivered to the gambler. These complimentary services include: beverages, food, travel, accommodation and in the case of SkyCity Auckland and SkyCity Queenstown, a commission scheme, where based on a certain level of spend a gambler is guaranteed a percentage of that spend will be returned regardless of how much is actually won or lost.

64. Complimentary services are considered integral to the successful operation of any casino that attempts to attract premium players. SkyCity defines premium players as an individual who will spend at least \$2,000 per visit to the casino. SkyCity does not set a specific number of visits a player must make to the casino to qualify as a premium player but the typical premium player makes multiple visits to the casino during the year. CCL indicates it takes a holistic approach that is not predicated on a single dollar amount in assessing which customers to target with complimentary services. Casinos track the amount a player actually spends during a given visit and then calculate an expected win rate that the casino is likely to make from that level of spend. This then provides the casino with an ability to determine the value of complimentary services that it is worth directing at each premium gambler.
65. A constraint on a casino's ability to attract premium customers is its ability to manage the risk associated with players who can both win and lose large sums of money in a very short time period. As an example, a []. A small casino like CCL is even further restricted in its ability to cater to premium customers as it does not have the financial base SkyCity has to withstand large wins by premium customers. This is reflected in the lower table limits CCL, DCL and the WCQ apply compared to SkyCity.
66. SkyCity notes that it is able to offer gamblers in Queenstown relatively high limits on table games in relation to the small size of the Queenstown operation. This is possible because of the Queenstown casino's ability to rely on the financial backing of the larger SkyCity Entertainment Group.

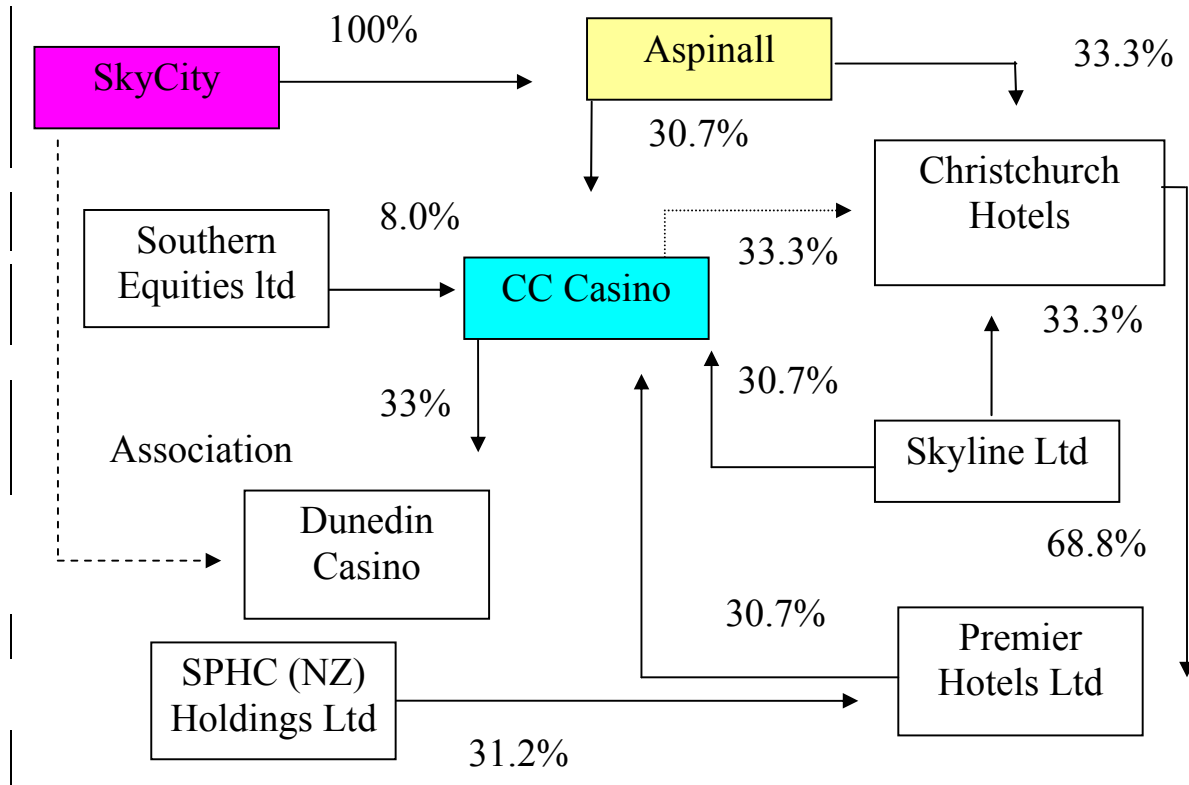
ASSOCIATION

67. The acquisition by SkyCity of a 30.7% shareholding in CCL and a 9.8% beneficial interest in CCL meets the definition of acquisition as described in the Commission's Mergers and Acquisitions Guidelines.

“The Act defines acquires to include transactions such as gifts, purchases or exchange. Acquire also has an extended meaning and includes taking on by way of lease, hire or hire purchase.”

68. Figure 1 outlines the post acquisition ownership status of CCL.

Figure 1: SkyCity / Aspinall Transaction



69. The individual shareholdings in CCL are somewhat difficult to calculate due to the circular shareholding structure as shown in Figure 1. The table below sets out the exact individual shareholdings in CCL.

Table 1: CCL Shareholdings

Shareholder in CCL	Direct Interest	Beneficial Interest	Total
Aspinall	30.7%	9.8%	40.54%
Skyline	30.7%	9.8%	40.54%
SPHC (NZ) Holdings Ltd		10.31%	10.31%
Southern Equities Ltd	8.0%	0.6%	8.6%
Total			100%

70. Section 47(3) and (4) of the Commerce Act provides for when bodies corporate are deemed to be associated and it states:

- (3) For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.

71. The factors the Commission takes into account in determining association include the:
- nature and extent of ownership links between the companies;
 - presence of overlapping directorates;
 - rights of one company to appoint directors of another; and
 - nature of other shareholder agreements and links between the companies concerned.

SkyCity / CCL Association

72. The Commission recognises that a 30.7% direct shareholding and a 9.8% indirect beneficial interest is substantial and will typically confer a measure of control to the party holding this amount of shares.
73. Currently, there are four directors on the CCL board. These directors include Barry Thomas, Phillip Hensman, James Osbourne and Arthur Pitcher. Mr Pitcher is also Managing Director of CCL. Mr Thomas and Mr Hensman represent Skyline. Mr Osbourne and Mr Pitcher represent Aspinall. Mr Osbourne is represented by an alternate director, Martin Kennedy. None of the positions on the board are designated in legal terms for a particular shareholder. Therefore, a shareholder does not have a specific director appointment right. The apparent equal representation is a matter of historical convenience, and does not reflect any legal rights under the constitution for a shareholder to appoint a director.
74. A change of directors of CCL can occur only by way of special resolution, which means a vote of not less than 75% of the shareholders in CCL. In effect, any change in directors requires approval by both the major shareholders. Further, the appointment of alternate directors is permitted under the CCL constitution and requires board approval.
75. Moreover, a change in the Chairman or Chairman's term requires a special resolution, which means a vote of not less than 75% of the shareholders in CCL. As SkyCity does not possess the required majority it is likely Mr. Thomas's position as Chairman will exist for so long as he wishes to retain it.

76. [

]

77. While it is possible the position taken on board issues by Mr. Pitcher may align with the interests of Skyline / Mr Thomas, the Commission assumes, for the purpose of a conservative analysis, that Mr. Pitcher will align himself with the SkyCity director in the near term. If Mr. Pitcher were to align himself with Skyline

/ Mr Thomas then the control Skyline / Mr. Thomas exerts on CCL is reinforced and further reduces SkyCity's ability to exert control on the CCL board.

78. As matters stand at the moment it appears unlikely that one of the other shareholders in CCL will be able to acquire sufficient further shares to alter the current control exercised by Skyline/ Mr. Thomas.
79. SkyCity and CCL informed the Commission that pre-emptive rights currently exist for all of the shares held in CCL. If the shares are placed up for sale, the other existing shareholders in CCL have the first option to purchase. In the case of a share sale, the other shareholders in CCL will have the option to purchase in equal amounts the shares for sale. CCL's constitution states:

The shares specified in a Transfer Notice received by the Company must be first offered to the holders of the same Class of shares. If more than one shareholder of that Class wishes to accept the offer they will be entitled to accept the Shares offered in the same proportion as between themselves as their existing holding in that class.⁴

80. If the seller and buyer of the shares are not able to agree on a fair value either party can submit the proposal to arbitration. If the parties fail to agree on a single arbitrator then the matter is determined by two arbitrators.
81. SkyCity purchased the shareholding in CCL by buying 100% of the shares in Aspinall. This allowed SkyCity to avoid the pre-emptive rights clause in the CCL constitution.
82. The pre-emption provisions do not, in the view of the Commission, impact on the short term control of CCL exercised by Skyline/Mr. Thomas as described in para 75 above.
83. The question the Commission considers relevant in determining whether CCL and SkyCity are associated as a result of the transaction is the extent to which SkyCity would be able to exert a degree of influence on the key strategic decisions of CCL?
84. Typically, a shareholding of greater than 20% requires the Commission to closely examine the issue of association. In the current situation the existing board structure and underlying shareholdings mitigate against SkyCity being able to exert a substantial amount of influence over how CCL operates and competes in the casino industry in the short term.
85. Post acquisition Skyline/ Mr.Thomas will be able to control much of the strategic and operational direction of CCL. That situation must be balanced against the fact that SkyCity post acquisition will acquire a substantial minority shareholding in CCL. While Mr. Thomas controls the CCL board the ability of SkyCity to exert substantial influence, in the absence of agreement by Mr. Thomas, is limited.

⁴ CCL Constitution p.18.

86. The Commission notes that some degree of influence will be available to SkyCity. For example, special resolutions require 75% of the votes of those shareholders entitled to vote and voting on the issue. Special resolutions are required for:

- an alteration to or revocation of this Constitution or the adoption of a new Constitution;
- a major transaction;
- an amalgamation;
- the liquidation of the Company.

87. While the Commission notes that operationally there is no requirement for unanimity on board decisions and Skyline/Mr.Thomas would appear to have the ability to pass operational measures without regard to the position taken by SkyCity, it cannot necessarily be assumed that SkyCity would not, in the short to medium term, be able to bring real pressure to bear on the decision making process of CCL.

88. In these circumstances, and in order to properly test the competitive effects of the acquisition by SkyCity of a direct and indirect interest in CCL, the Commission will take a conservative view and assess the acquisition on the basis that it results in SkyCity and CCL becoming associated parties.

Conclusion on SkyCity / CCL Association

89. The Commission proposes to take a conservative approach and consider CCL and SkyCity as associated for the purposes of the competition analysis. In the competition analysis the Commission will assess SkyCity Auckland, SkyCity Queenstown, SkyCity Hamilton and CCL as one head within the relevant markets for the purpose of assessing the question of whether the proposed acquisition would result, or would be likely to result, in a substantial lessening of competition under s 47(1) of the Commerce Act.

SkyCity / DCL Association

90. CCL currently holds a 33% shareholding in Dunedin Casinos Limited (DCL). The SkyCity acquisition of the Aspinall shareholding in CCL will give SkyCity a 13.5% beneficial interest in DCL. The Managing Director of CCL, Arthur Pitcher, is an alternate on the board of DCL. The Chair of CCL, Barry Thomas sits on the board of DCL as a director. Mr. Thomas, as the director selected by CCL to sit on the DCL board, has the option of removing Mr. Pitcher from his position as the alternate director.

91. DCL presently has 5 directors on its board including an independent director who acts as chairman. The independent director does not have a vote where the number of directors (including the independent director) is an even number.

92. In an interview with the Commission, [

] [

] comments suggest that SkyCity will exert a measure of influence on the operation of DCL. [

The Commission notes that the control Skyline/Mr. Thomas exert on CCL gives Skyline and Mr. Thomas the ability to control who CCL appoints as a director to DCL. As CCL is likely to appoint a director representing the interests of CCL/Skyline, SkyCity is unlikely to be able to exert influence on DCL in the short term.

93. [

]

94. In a situation where SkyCity and Skyline have a commonality of interest due to their interests in CCL, there may be scope for the two parties to exert influence on the way DCL is operated. The Commission considers that the industry experience SkyCity holds will give it the ability to exert an influence above its 13.5% beneficial interest.

95. In these circumstances, and in order to properly test the competitive effects of the acquisition by SkyCity of a direct and indirect interest in CCL, the Commission will take a conservative view and assess the acquisition on the basis that it results in SkyCity and DCL becoming associated parties.

Conclusion on SkyCity / DCL Association

96. SkyCity and DCL are to be treated as one head within the market for the purpose of assessing the question of whether the proposed acquisition would result, or would be likely to result, in a substantial lessening of competition under s 47(1).

MARKET DEFINITION

97. The Act defines a market as:

. . . “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.”⁵

98. For competition purposes, a market is defined to include all those suppliers, and all those buyers, between whom there is close competition, and to exclude all other suppliers and buyers. The focus is upon those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who produce, or could easily switch to produce, those goods or services. Within that broad approach, the Commission defines relevant markets in a way that best assists the analysis of the

⁵ Commerce Act s3[]

competitive impact of the acquisition under consideration, bearing in mind the need for a commonsense, pragmatic approach to market definition.⁶

99. For the purpose of competition analysis, the internationally accepted approach is to assume the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The smallest space in which such market power may be exercised is defined in terms of the five dimensions of a market discussed below. The Commission generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.

Product Dimension

100. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. For each initial market so defined, the Commission considers whether the imposition of a SSNIP would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market.
101. The greater the extent to which one good or service is substitutable for another, on either the demand-side or supply-side, the greater the likelihood that they are bought and supplied in the same market. The degree of demand-side substitutability is influenced by the extent of product differentiation.
102. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.
103. Close substitute products on the supply-side are those between which suppliers can easily shift production, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.
104. Decision 337 concluded that casino entertainment existed as a distinct product separate from other forms of gambling. A survey produced by the Department of Internal Affairs supports the view that the casino experience is distinct, with 58% of respondents noting they go to a casino for entertainment purposes. A trip to the casino is specifically selected by customers for the unique entertainment experience provided by table games and gaming machines.

“The casino was the only gaming activity that the majority of participants said they played for entertainment. The importance of the entertainment factor of casinos is probably influenced by

⁶ Australian Trade Practices Tribunal, *Re Queensland Co-operative Milling Association*, above note 10; *Telecom Corporation of NZ Ltd v Commerce Commission & Ors* (1991) 3 NZBLC 102,340 (reversed on other grounds).

the relative infrequency of participation in this activity. Therefore, the activity is viewed as a special event or occasion.”⁷

105. The concept of casino gambling as a distinct experience from other forms of entertainment is reinforced by a survey conducted by the Australian Institute for Gambling Research in 1998:

“Christchurch residents gave two equally important reasons for returning to the casino: for social engagement or meals (53.8%) and for entertainment leisure (also 53.8%). Auckland residents gave entertainment / leisure as their main reason for return visits (53.1%).”

Table 2: Gambling Expenditure 2003

Activity	Expenditure in 2003
Racing	\$234,000,000
NZ Lotteries Commission	\$239,000,000
Gaming Machines (outside casinos)	\$941,000,000
Casinos	\$457,000,000
Total	\$1,871,000,000

106. As shown in the table above, casino gambling makes up a significant portion of the total amount spent on gambling activities annually. Decision 337 stated:

“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”.

107. In the course of the investigation into the proposed acquisition the Commission did not find any evidence to suggest a different product dimension to that found in Decision 337. The conclusions reached in Decision 337 on the relevant product market are therefore considered applicable in that the unique characteristics of casino entertainment are sufficient to justify a separate product market.

Casino Labour

108. The Commission notes that CCL in its submission to the Commission argued that the transaction would result in a substantial lessening in competition in the market for casino labour in New Zealand.
109. Section 3(1A) of the Act defines “market” as “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” (emphasis added).
110. Section 2(1) provides that the term "services" "does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service". As a result, and as noted in *Gault on Commercial Law*, (Wellington,

⁷ “People’s Participation in and Attitudes to Gaming: 1985-2000”, p 139, Department of Internal Affairs

Brookers, 1994) the definition of “services” in s 2(1) of the Act includes work done under a contract for services, but not the performance of work under a contract of service (i.e. a contract of employment). The Act therefore relates to markets for the services of independent contractors but not markets for employment services. Casino staff are employees as opposed to independent contractors.

111. The Commission therefore considers that a market for casino labour in New Zealand is not a relevant market for the purposes of an analysis under s 66 of the Act.

Conclusion on Product Markets

112. The Commission therefore concludes that the relevant product dimension for the purposes of assessing the present Application is casino entertainment.

Customer Dimension

113. The Commission examines the extent of, and potential for, suppliers to discriminate between customers within identified relevant markets. Where a significant group of buyers within a relevant market is likely to be subject to price discrimination, the Commission considers whether it would be appropriate to define additional markets based on particular uses for a good or service, particular groups of buyers, or buyers in particular geographic areas that are captive to those products, and in the face of a price increase unable to switch.

Premium Gamblers

114. Premium gambling has developed as a differentiated product internationally and to a degree here in New Zealand. As noted in the Industry Background section, all casinos in New Zealand are considered grind casinos. There are no casinos in New Zealand that fully ascribe to the U.K. gambling club model that caters exclusively to premium gamblers.
115. SkyCity and CCL operate distinctly separate facilities that cater to premium gamblers. SkyCity and CCL assess which customers are worth targeting for complimentary services based on the level of spend the customer has previously made or is expected to make during a visit. Both SkyCity and CCL note that a strict reliance on a set dollar spend to qualify as a premium gambler is not always the case and often a holistic approach is taken. However, the Commission notes that the key determinants are the amount a customer typically wagers while at the casino and how often the customer visits the casino.
116. SkyCity and CCL operate sophisticated IT systems that are capable of tracking the spend and attendance of premium gamblers. The IT systems give the casinos the ability to discriminate between customers in a highly targeted fashion.

“Most casinos have some form of computerized tracking system that records your detailed playing history. With the insertion of your slot club card, onboard software knows your name, address,

interests, denomination of play, when you play your favourite machines, how much you have invested [] your winnings at any given hour...”⁸

117. As an example, CCL has a “Top 200” club it uses to identify premium gamblers to facilitate delivering targeted services. SkyCity employs a “gold card” which premium gamblers use to acquire points that can later be used to purchase services like travel and accommodation. These types of services are used to entice premium gamblers to visit the casino. Customers qualifying as premium customers will often receive a variety of complimentary services including air travel, accommodation and entertainment.
118. SkyCity indicates that a customer spending more than \$2,000 per visit is likely to qualify as a premium gambler. The number of premium customers receiving complimentary travel and accommodation services in New Zealand is small. The Commission notes that the size of this market is small in numbers and revenue when compared to the total revenue generated by the casino industry in New Zealand.

Table 3: NZ Premium Gamblers as Submitted by SkyCity

Area	Premium Customers in NZ
Auckland	[]
Christchurch	[]
Wellington/ Nelson	[]
Rest of NZ	[]
SkyCity Queenstown	[]
Total	[]

119. A premium gambler based in Auckland may not receive free travel or accommodation from SkyCity, but may receive an offer from CCL. The same applies for a Christchurch based premium gambler who may receive an offer from SkyCity to gamble in Auckland.
120. SkyCity spent [] on complimentary services provided to national premium customers and approximately [] for complimentary services to international customers in the 2003/4 financial year. SkyCity Queenstown spent approximately [] on complimentary services to international and national premium gamblers as well as [] for commission programmes for international premium gamblers.
121. In comparison CCL spent [] on player expenses for its top 200 premium gamblers. DCL stated it spent []. The Wharf Casino does not attempt to attract premium gamblers with significant complimentary services. For instance, it provides food and accommodation only and does not fund travel for premium gamblers.

⁸ www.casinocitytimes.com, Mark Pilarski, 4 April 2004

Table 4: SkyCity Auckland Complimentary Services Costs for the 2003/4 Financial Year

SkyCity Auckland Complimentary Services	Cost of Complimentary Services
Auckland Members room	[]
Special Events	[]
National Premium Customer Services	[]
International Premium Customer services	[]
Services provided to International Premium Customers on Commission Schemes	[]
Commission Payments to International Premium Customers	[]
International Sales Office Costs	[]
Total costs	[]

Table 5: SkyCity Queenstown Complimentary Services Costs for the 2003/4 Financial Year

SkyCity Queenstown Complimentary Services	Cost of Complimentary Services
National and International Customer Services	[]
Commission Payments to International Premium Customers	[]
Total costs	[]

Table 6: CCL Complimentary Services Costs for the 2003/4 Financial Year

CCL Complimentary Services	Cost of Complimentary Services
National and International Customer Services	[]
Total costs	[]

Ordinary Gambler

122. Ordinary customers make up the main portion of both SkyCity and CCL's total revenue [] for SkyCity and [] for CCL. While ordinary gamblers may receive varying levels of complimentary services these services do not compare to the level of services received by players who are included in the premium customers recognised by the casinos.
123. The Commission concludes that casino customers who do not spend above \$2000 per visit and who do not qualify for significant complimentary services make up the majority of casino customers and are best described as ordinary gamblers.

Conclusion on Customer Dimension

124. The identification of distinct customer dimensions is a conservative approach to defining the market. If no competition concerns are raised applying this approach they are unlikely to occur with the application of a broader market definition. The Commission therefore considers that the appropriate customer dimensions for assessment are premium gamblers and ordinary gamblers.

Geographic Dimension

125. The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised.

Regional Market for Ordinary Gamblers

126. In Decision 337, the Commission defined regional markets for casino entertainment. The boundaries for the geographical markets were considered commuting distances. Applying a similar approach to the present clearance application results in SkyCity Auckland, SkyCity Hamilton, CCL and DCL operating in separate geographical markets for ordinary gamblers. SkyCity Queenstown and the Wharf Casino are the only two casinos that operate in the same regional market.
127. Data from the Department of Internal Affairs indicates that ordinary gamblers are unlikely to travel beyond commuting distances to attend a casino. A survey conducted in 1995 and again in 2000 concluded that 87% of respondents in 1995 and 84% in 2000 did not make a trip to another town especially to go to a casino in the last 12 months.⁹ Ordinary gamblers are located in close regional proximity to a casino and only a small minority of those gamblers travel to a non-local casino.
128. While there may be a group of ordinary gamblers who travel around New Zealand to gamble, they are unlikely to represent a significant group of customers. This conclusion is supported by the research conducted by the DIA and in interviews with industry participants both in New Zealand and Australia. The Commission considers that a geographic area comprising the greater Christchurch area is appropriate for assessing the SkyCity / Aspinall transaction.
129. Notwithstanding the assumed association between SkyCity and DCL, the Commission also considers that a geographic area comprising the greater Dunedin area is appropriate for assessing the SkyCity / Aspinall transaction.
130. The Commission will also consider a geographic area comprising the greater Auckland area to assess whether ordinary gamblers could face a reduced level of complimentary services in SkyCity Auckland as a result of the acquisition.

⁹ "People's Participation in and Attitudes to Gaming: 1985-2000", p 138, Department of Internal Affairs

Conclusion on Regional Geographical Markets

131. The Commission concludes that the relevant geographical markets are:
- Auckland;
 - Christchurch; and
 - Dunedin.
132. The Commission will not assess the Hamilton or Queenstown regional markets as there is no change in the level of competition from the pre acquisition to the post acquisition scenario.

National Market for Premium Gamblers

133. The travel and accommodation complimentary services that premium gamblers receive make them more likely, as a customer group, to visit non-local casinos. As this customer group travels widely, a regional market is inappropriate. The question then becomes, where are the sources of casino entertainment the premium gambler will go to in the event of a reduction in the quality/amount of complimentary services delivered by CCL and/or DCL?
134. CCL in its submission opposing the SkyCity acquisition stated:
- “CCL accepts that there will be some premium customers who can increase the frequency with which they visit an overseas casino. For most, however, the additional cost, time and inconvenience of travelling overseas (even to Australia) would be such to prevent such regular switching.”¹⁰
135. The Commission interviewed premium gamblers from lists provided by both SkyCity and CCL. Most of these premium gamblers take at least several trips a year to Australia to gamble. Of the premium gamblers who travel, most typically receive some form of travel and accommodation complimentary service from the casinos they visit in Australia, the U.S. and the UK.
136. Most premium gamblers interviewed did not consider that travelling to Australia, the U.S. or even the U.K. imposed significant constraints. An exception to this willingness to travel was a premium gambler from Christchurch who indicated that he only travelled to Queenstown on occasion and would simply gamble less if CCL reduced the quality of service in the Aspinall Room.
137. The CCL statement that “most” premium gamblers find it inconvenient to travel to casinos outside New Zealand does not reflect the reality of the great majority of gambling patterns articulated to the Commission by premium gamblers who were interviewed.
138. Those premium gamblers who had enjoyed travel and accommodation complimentary services from either SkyCity or CCL were asked what they would do if they found a reduction in the level of these complimentary services. In the

¹⁰ CCL Submission 26 April 2004 p17.

event of reduced travel and accommodation complimentary services the premium gamblers indicated they would simply not go as often to the casino or they would increase the number of visits they make to international casinos.

139. The premium gamblers indicated they might increase the number of trips taken to Australia and Las Vegas. The interviews with the premium gamblers illustrated that they are the type of customer that is highly mobile and expects a significant level of service given their average spend in the casino they visit.
140. In interviews with senior managers at Star City and Jupiters Gold Coast, both casinos stated they compete on an international basis for premium gamblers by providing a range of complimentary services not available to ordinary gamblers or even local premium gamblers. Both casinos believe that reducing or removing the package of complimentary services they offer would simply mean that premium gamblers would go to another casino in Australia, the U.S., the UK or Asia.
141. SkyCity currently has representatives in Sydney, Hong Kong, Thailand, Jakarta and Singapore that it uses to attract premium gamblers to its casinos in Auckland and Queenstown. Star City set up a representative in New Zealand 18 months ago and Crown Casino has recently set up a representative in New Zealand. SkyCity spends [] on recruiting and delivering services to international premium gamblers. The international competition for premium gamblers by providing complimentary services underscores that these services are an essential requirement for any casino attempting to attract these types of gamblers. The only cost the premium gambler faces in substituting an international casino for a New Zealand casino is the additional time incurred on a longer flight and meeting the destination countries' immigration requirements.
142. In the course of its investigation the Commission has found no compelling evidence that suggests the gambling options available to premium gamblers are limited to a national boundary. However, the Commission is obligated under the Commerce Act to assess the impact of the proposed acquisition on a market in New Zealand for goods and services. Therefore the Commission will adopt a national market definition and assess the constraint overseas casinos exert on the New Zealand market in the competition analysis.
143. The Commission concludes that the relevant geographical market for premium gamblers is national.

Conclusion on Market Definition

144. The Commission concludes that for the purposes of the analysis of this application the relevant markets are:
- the Auckland casino entertainment market for ordinary gamblers;
 - the Christchurch casino entertainment market for ordinary gamblers;
 - the Dunedin casino entertainment market ordinary gamblers; and
 - the national casino entertainment market for premium gamblers.

COUNTERFACTUAL AND FACTUAL

145. In reaching a conclusion about whether an acquisition is likely to lead to a substantial lessening of competition, the Commission makes a “with” and “without” comparison rather than a “before” and “after” comparison. The comparison is between two hypothetical future situations, one with the acquisition (the factual) and one without (the counterfactual).¹¹ The difference in competition between these two scenarios is then able to be attributed to the impact of the acquisition.

Factual

146. As a result of the acquisition SkyCity acquire 100% of the shares in Aspinall and as a result hold a 30.7% direct shareholding in CCL and a further 9.8% indirect beneficial interest. The acquisition results in SkyCity being associated with both CCL and DCL. The Commission considers that while SkyCity may not have the ability to exert substantial influence on CCL and DCL immediately post acquisition there is scope for SkyCity to gain this ability in the near term. As a result, the Commission will consider SkyCity Auckland, SkyCity Hamilton, SkyCity Queenstown, CCL and DCL as a single entity in the relevant markets.

Counterfactual

147. The applicant has not suggested a counterfactual in its application. The Commission interviewed James Osbourne, the Managing Director, of Aspinall Club Ltd. Mr. Osbourne informed the Commission that [

]

148. As Aspinall [], the Commission considers the appropriate counterfactual is the status quo.

COMPETITION ANALYSIS

149. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors). Supply-side substitution by near competitors arises either from redeployment of existing capacity, or from expansion involving minimal investment, in both cases involving a delay of no more than one year.

150. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration caused by a reduction in the number of competitors in a market

¹¹ Commerce Commission, *Decision 410: Ruapehu City Lifts Ltd/Turoa Ski Resorts Ltd (in receivership)*, 14 November 2000, paragraph 240, p 44.

by an acquisition is an indicator of the extent to which competition in the market may be lessened.

151. The Commission identifies market shares for all significant participants in the relevant market. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used.
152. An aggregation that would result in a low concentration level is unlikely to be associated with a substantial lessening of competition in a market. On this basis, indicative safe harbours may be specified.
153. A business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:
 - where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of a 40% share; or
 - where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.
154. The Commission recognises that concentration is only one of a number of factors to be considered in the assessment of competition in a market. In order to understand the impact of the acquisition on competition, and having identified the level of concentration in a market, the Commission considers the behaviour of the businesses in the market. Specifically, the Commission seeks to understand the dynamics of the competition that would exist between the remaining firms in the market, compared to what would exist in the absence of the merger.
155. Assessing the regional casino entertainment markets as defined in the market definition section using market share data based on revenue is of limited value. In the Auckland, Christchurch and Dunedin casino markets for ordinary gamblers those casinos are the only operator in that region. Therefore market share is 100% for all three casinos.
156. For the national casino market, using a casino's total revenue to determine market share is of little value in assessing the options available to premium gamblers faced with a reduction in the complimentary services provided by CCL and DCL. The approximate number of premium gamblers residing in New Zealand provides the most relevant indicator of the size of the customer group facing a potential competitive detriment from the SkyCity / Aspinall transaction.

Table 7: NZ Premium Gamblers as submitted by SkyCity

Area	Premium Customers in NZ	Premium Customers as a %
Auckland	[]	[]
Christchurch	[]	[]
Wellington/ Nelson	[]	[]
Rest of NZ	[]	[]
SkyCity Queenstown	[]	[]
Total	[]	100%

Table 8: Premium Gamblers as submitted by CCL

Area	Premium Customers in NZ and International	Premium Customers as a %
Auckland	[]	[]
Christchurch	[]	[]
Wellington/ Nelson	[]	[]
Rest of NZ	[]	[]
International	[]	[]
Total	[]	100%

157. The contribution of premium players to total revenue ranges from [] for SkyCity Auckland, [] for SkyCity Queenstown and [] for CCL. []

158. Post acquisition the SkyCity Group will be involved with five of the six casinos in New Zealand that deliver services to premium gamblers. This situation potentially gives the SkyCity Group the ability to affect the casino experience for virtually the entirety of the [] premium gamblers visiting a casino in New Zealand. The Commission concludes this level of control over the premium gamblers' casino experience represents a level of aggregation outside the Commission's safe harbours. The Commission will consider the impact of this aggregation on premium gamblers in the analysis of existing competition.

The Auckland, Christchurch and Dunedin Casino Entertainment Markets for Ordinary Gamblers

Existing Competition

159. The Commission has defined regional markets for casino entertainment for ordinary customers. In the three regions assessed, Auckland, Christchurch and Dunedin, there is only a single casino where ordinary gamblers experience casino entertainment.

Conclusion on Existing Competition

160. As there is no change in the level of existing competition, the Commission is of the view that competition is unlikely to be substantially lessened in the factual compared with the counterfactual in the Auckland, Christchurch and Dunedin casino entertainment markets for ordinary gamblers.

National Casino Entertainment Market for Premium Gamblers

Existing Competition

International Casinos

161. International casinos, particularly Australian, U.S. and Asian casinos provide a significant competitive constraint on New Zealand casinos. To place this constraint in an international context, there appears to have been an increase in the number and spread of casinos globally in recent times, as well as climbing gross gaming wins of casinos worldwide. For instance, in the London Clubs International decision, the U.K. Competition Commission accepted that the \$10 billion gross gaming win of all casinos in the late 1980s had increased to approximately \$40 billion by the mid 1990s.
162. From the point of view of the casino industry, both Australian and New Zealand casinos consider there is competition between the two countries' casinos. The situation is competitive in relation to three aspects: New Zealand-based premium gamblers, Australian-based premium gamblers and premium gamblers who reside in locations other than New Zealand and Australia.
163. Australian casinos may compete with New Zealand casinos for a New Zealand based premium gambler, and vice versa. New Zealand casinos and Australia casinos may also compete for a premium gambler who resides outside of New Zealand and Australia.
164. In terms of addressing the notion that New Zealand and Australian casinos compete, the New Zealand casino industry is viewed by Australian casinos as 'emerging', with a customer base that is 'broadening.' In terms of marketing, at least two major Australian casinos each have a sales office and a representative in Auckland. At least one has a marketing strategy for New Zealand. Furthermore, lower airfares and an increase in flexible flight times have enhanced Australian casinos' effectiveness as competitors of New Zealand casinos, and vice versa.
165. However, one Australian casino interviewed said that most resources are channelled into markets where the greatest returns are promised, such as the Chinese premium gambler market or Australian-based premium gamblers. Overall, the level of investment by Australian casinos in attracting New Zealand-based premium gamblers specifically is small relative to the costs incurred attracting Asian based premium gamblers. However, this should not be taken to mean they are an ineffective constraint.

166. On the New Zealand side, SkyCity has an office and representatives in Sydney, and although CCL does not have a permanent office with a representative, it does send staff over to Sydney and Melbourne to network and source Australian business. SkyCity also manages relationships with international junket¹² operators who bring groups to the casino.
167. The third aspect, of competing for the premium gambler who resides elsewhere, is best illustrated by the fact that New Zealand, Australia and the U.S. have numerous premium gambler offices across the globe. For example, SkyCity Auckland has overseas sales offices in Sydney, Hong Kong, Singapore, Bangkok, and Jakarta; the annual cost of the overseas offices is [], part of this cost being travel and entertainment for international premium gamblers.
168. CCL does not have a permanent sales office overseas, but a representative travels to Singapore to source custom. Moreover, industry sources suggest a current point of rigorous competition between New Zealand and Australia is the capture of the Chinese-based premium gambler.
169. Bolstering the effectiveness of Australian casinos as a competitive restraint, is the fact there are seven of them and that they offer better facilities in terms of more opulent private gaming rooms. They include the Crown Casino (Melbourne); Star City (Sydney); Jupiters (Gold Coast); Treasury (Brisbane); Burswood (Perth) and SkyCity (Adelaide). New Zealand-based premium gamblers frequent most of these casinos on a fairly regular basis.
170. One reason there is this willingness to switch is because Australian and U.S. casinos currently offer similar incentives to New Zealand casinos. In fact, in its application, SkyCity acknowledges that the market-rate level of complimentary services is set 'Australian' wide and the rate for commissions is set 'international' wide. SkyCity Auckland has recently increased commission rates for premium gamblers to match the rates Australian casinos provide.
171. A further point relates to scale. International casinos are comparatively larger than most New Zealand casinos, with the exception of SkyCity Auckland. Therefore, they have the scale to offer the bigger stakes and tournaments that premium gamblers find attractive.
172. Based on information supplied by CCL, DCL and SkyCity, smaller New Zealand casinos like CCL find it difficult to compete with the larger scale casinos as they cannot afford to offer the higher stakes the premium gambler commonly prefers. For example, there are significantly higher maximums on Baccarat at SkyCity Auckland and SkyCity Queenstown compared to CCL. Further, some Australian casinos offers higher table limits than SkyCity Auckland.

¹² A "junket" is an industry term referring to a group of gamblers who visit the casino as part of an organised trip.

173. Therefore while CCL competes for premium gamblers, the Commission does not consider it exerts a significant competitive constraint on New Zealand or international casinos. The Commission considers that international casinos place a significant constraint on the ability of the SkyCity Group to reduce complimentary service levels post acquisition.

Premium Gamblers

174. The Commission's finding that international casinos provide an alternative to New Zealand casinos is strengthened when the premium gamblers' point-of-view is taken into account. The players themselves and industry experts consistently placed the premium gambler market in the context of an international setting. The Commission's investigations reveal that premium gamblers move relatively freely between New Zealand, Australia and U.S. casinos due to their enhanced capacity to travel.
175. Moreover, most premium gamblers interviewed said that if there was a decline in complimentary services post-acquisition they would most likely decrease or cease visiting CCL and increase their visits to Australian casinos and, to a lesser extent, U.S. casinos. In interviews it was clear that premium gamblers consider that Australian casinos, at least, are substitutable for New Zealand casinos.
176. The capacity to travel derives from two factors. First, casinos often pay or partially pay for a premium gambler's accommodation and travel to and from the casino. Both U.S. and Australian casinos provide this service. In New Zealand, CCL provides a 'travel card' to certain out-of-town premium gamblers to enable them to visit CCL free of charge. The 'travel card' covers flights from Sydney, Auckland and Wellington, as well as accommodation at a local hotel. SkyCity also offer free travel and accommodation to premium gamblers in certain circumstances.
177. The conditions associated with the free travel and accommodation offered by casinos vary. For instance, some Australian and U.S. casinos will reimburse players after they have reached a certain level of play on a trip, whereas CCL pays for the premium gamblers' travel directly through the 'travel card'. Competition amongst airlines both in New Zealand and Australia has lowered prices and increased the frequency of flights, making it easier for casinos to fund and operate travel schemes successfully. Free travel and accommodation is regarded amongst premium gamblers as a standard benefit.
178. The second factor identified by the Commission in relation to the capacity to travel is that the premium gamblers' personal wealth means they have the ability to travel between casinos both nationally and internationally. The premium gamblers are not restrained by the costs associated with travel to the same level as their ordinary gambler counterpart. According to one premium gambler, factors such as work commitments, rather than financial costs, limit a premium gambler's ability to travel. Like the casinos, the premium gamblers' personal travel capacity is bolstered by lower airfares and increased frequency in flight times.

179. This personal travel ability is important in the sense that should casinos cease offering free flights, offer only partial payment for travel, or if the casino policy is one which refunds flights on the basis of level of spend per visit and the premium gambler fails to make that required threshold, the premium gambler can still travel on their own accord. For a premium gambler the difference in cost and inconvenience between travelling from Christchurch to Auckland and Christchurch to the east coast of Australia is not material. Casinos implementing a reduction in complimentary service levels are likely to experience a significant drop in premium gambler visits.
180. Comments from industry participants and the premium gamblers themselves suggest premium gamblers travel extensively. More specifically, many of those premium gamblers interviewed travelled to casinos throughout New Zealand, Australia and the United States. The number of offshore visits and visits to national casinos per year varied among premium gamblers, but overall they travelled frequently. For instance, in terms of national travel, one premium gambler based in Christchurch visits SkyCity Auckland casino 10-15 times per year and Queenstown twice a year.
181. Another premium gambler based in Christchurch attends CCL once a week, various Australian casinos approximately 15 times a year, and Las Vegas 2-3 times a year. These examples are representative of the international travelling habits of most premium gamblers interviewed. The premium gamblers also illustrated a sustained interest in frequenting national and international casinos, having been patrons for many years.
182. One strong motive for premium gamblers to travel so extensively both nationally and internationally is organised tournaments. Many premium gamblers said they travelled overseas to play in tournaments, black jack was noted in particular. These tournaments relate to one-off events specific to a casino, typically played over a weekend.
183. Further, travelling to national and international casinos as extensively and frequently as premium gamblers do means they are considerably experienced and have a depth of knowledge of casinos in general and, more particularly, casino services and benefits, far beyond what an ordinary customer would possess. Industry participants offered additional reasons for the premium gamblers' sophistication: they attribute the premium gamblers thorough knowledge to increased transparency in the industry and the dissemination of information about casinos on the Internet.
184. In particular, rigorous competition in the international casino industry means casinos now 'spell out' to patrons the complimentary services on offer. As a consequence of their high level of awareness, premium gamblers expect a certain level of complimentary services and benefits, and can discriminate between casinos more readily. An Australian gaming manager provided an anecdotal example of customer discrimination: [] lost a significant proportion of its premium gamblers' patronage to other casinos due to removing the commission aspect of the

package. While the premium gamblers still went to [] they limited their spend to a ‘little flutter’, and saved their major gaming for casinos which offered commission schemes.

185. Another example provided by some premium gamblers is Wrest Point Casino: premium gamblers no longer play at the Tasmania casino after the casino reduced services and abandoned premium gambler benefits.
186. Premium gamblers expect a certain level of complimentary services and benefits from casinos. Casinos are aware of this expectation and the importance of delivering a high level of complimentary services to attract premium gamblers. The amount of money casinos channel into complimentary services is considerable, and reflects the significant proportion of total revenue generated by these types of customers.
187. For instance, SkyCity Auckland’s budget for complimentary services for 2003/4 was approximately [], and [] for commission programmes. SkyCity estimates that premium gamblers account for approximately [] of SkyCity Auckland’s total revenue which ranges from [] and [] for SkyCity Queenstown which is [].
188. SkyCity Queenstown’s budget for its complimentary services was [], and [] for its commission programme. CCL spends [] annually on complimentary services and estimates revenue from premium players at [].

Table 9: Premium Customer Costs and Revenue

Area	Premium Gambler Complimentary Services Costs	Revenue from Premium Gamblers	Percentage of Total Revenue
SkyCity	[]	[]	[]
SkyCity Queenstown	[]	[]	[]
CCL	[]	[]	[]

189. The Commission’s investigation suggests the premium gambler market is comprised of mainly players of Asian origin and that this number is increasing both in New Zealand and Australia. This high representation, and the significant revenue they bring in, means that Asian premium gamblers wield considerable countervailing power and can dictate, to some extent, the terms and quality of what the casinos supply.
190. The number of Asian players the Commission was able to interview was small, and what was learnt of them as a premium gambler group was gained mostly through non-Asian representative sources. However, there is general consensus among casino representatives and New Zealand regulatory bodies that Asian casinos also act as a constraint. While the majority of premium gamblers the Commission spoke with were Europeans who frequented Australian, New Zealand and U.S. casinos, it

can be reasoned that Asian premium gamblers would also add Asian casinos to the list of locations they frequent.

191. Supporting this observation is the conduct of the casinos themselves, as many cater specifically to Asian premium gamblers such as offering bigger stakes and particular games. For instance, SkyCity Auckland has provided food to the tastes of Asian premium gamblers, brought in new games favoured by Asians, and added more baccarat tables as the game has a large Asian following.
192. The Chinese market, in particular, appears to be increasing worldwide; one international gaming manager considers it is 'going through the roof'. Several major U.S. and Australian casinos have opened offices in China or dispatched representatives to China to organise groups of premium gamblers. SkyCity Auckland has a sales representative in Hong Kong to source business from China.
193. Like their non-Asian counterparts, the Asian premium gambler is highly mobile. One industry insider suggested that Asian customers have 'no loyalty' to a particular casino and so are more likely to travel to other casinos. One example of Asian mobility was offered by a premium gambler. He said recent changes in U.S. custom procedures, such as tightening security and taking players' fingerprints, was considered to be intrusive by many Asians, and U.S. casinos experienced a 40% decline in Asian custom as a result of Asians taking their business to other countries like Australia.
194. The Commission concludes that the ability of premium gamblers to switch the casinos they frequent and the importance of the revenue generated by these premium gamblers will constrain the SkyCity Group post acquisition.

Dunedin Casino Limited

195. SkyCity and CCL both operate private rooms for premium gamblers. DCL does not have a dedicated room for premium gamblers and relies on a curtain partition to segregate premium gamblers from other casino customers. The DCL GM, Rod Woolly, stated that DCL is in the process of developing a separate area for premium gamblers. Mr. Woolly also stated that DCL does not currently attempt to attract international premium players. [

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196. For the 2003-2004 financial year DCL spent [] on accommodation for premium players. These expenditures illustrate that DCL is a very minor player in its ability to compete for premium gamblers. Mr. Woolly also noted that DCL would find it difficult to cater to any more than [] premium gamblers at one time with its current facilities.
197. Therefore, as DCL currently competes for premium gamblers on a limited basis [], the Commission does

not consider it exerts a significant competitive constraint on New Zealand or international casinos.

The Wharf Casino Queenstown

198. The WCQ does not have premium gambling facilities or operate a program that attempts to attract premium gamblers. CCL itself notes that the WCQ is a “very small and locally focussed operation”.¹³ The managing director of the WCQ stated that it [

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199. Therefore, as the WCQ does not actively compete for premium gamblers, the Commission does not consider it exerts a competitive constraint on New Zealand or international casinos.

Christchurch Casino Limited

200. CCL submitted to the Commission that it spent [] in 2003 on complimentary services to premium gamblers. CCL also stated that it earned [] from premium players which is [] of CCL’s total revenue. CCL is concerned that SkyCity post-acquisition will attempt to reduce the [] spent on complimentary services for premium gamblers.

201. This is an argument that presumes SkyCity is willing to risk reducing the [] earned from premium gamblers for the purpose of saving [] annually. This argument is inconsistent with the relatively small cost associated with providing complimentary services relative to the revenue generated from these customers.

202. CCL has further suggested that SkyCity will attempt this cost saving exercise to reduce complimentary services in order to funnel premium gamblers who previously went to CCL to SkyCity. The Commission notes that given the ability of Skyline/Mr. Thomas to presently control the operations of CCL, SkyCity does not, in the near term, have the ability to force CCL to pursue such a strategy.

203. An additional concern that influences casinos to offer complimentary services to premium gamblers is the risk of the premium gambler choosing not to gamble. The requirement to attract gamblers to the casino is emphasised by the recent investments by both SkyCity Auckland and CCL in refurbishing existing facilities and adding additional entertainment facilities. It is unlikely SkyCity post acquisition will seek to undermine CCL’s ability to achieve a return on this investment by reducing the level of complimentary services provided to premium gamblers.

204. Regardless of whether a customer is an ordinary or premium gambler, casinos seek to encourage that gambler to return as often as possible to the casino. The more

¹³ CCL letter to the Minister of Internal Affairs, 4 May 2004.

often a gambler visits the casino the higher the probability of the casino extracting a return from that gambler's spending.

205. Casinos are competing primarily against non-consumption. As all casinos in New Zealand are grind casinos, the majority of their revenue is derived from repeat ordinary gamblers. As CCL and SkyCity operate in a monopoly situation for these clients, the fact these facilities are spending multimillion dollar sums on renovations and upgrades suggests that it is critical for casinos to present gamblers with attractive facilities and entertainment options.
206. The proportion that premium gamblers contribute to total casino revenue is significant, even though their numbers are relatively small compared with ordinary customers. They therefore exert an influence on casinos, in that a casino must pay attention to premium gambler needs and concerns or risk losing a substantial part of its turnover.
207. The actual proportion of what premium gamblers contribute to a casino's total revenue varies from casino to casino. For instance, premium gamblers contribute a minimum of [] of SkyCity Auckland's total annual revenue, [] to SkyCity Queenstown's total annual revenue and [] to CCL's total annual revenue. In relation to Australian casinos, where numbers of premium gamblers are larger, premium gamblers' contribution to total annual revenue can range from a third through to a half.
208. CCL in its submission to the Commission stated that CCL is a maverick competitor in the national market. While CCL is undertaking renovations and most industry participants interviewed considered the Club Aspinall facilities the best in New Zealand, this does not represent maverick behaviour. The renovations both CCL and SkyCity Auckland are undertaking are common in the casino industry where refits occur on a cycle commensurate with upper end hotels.
209. CCL figures for its Club Aspinall room demonstrate a [] in 2004. [] This undermines the argument that CCL is acting as a maverick competitor in the premium gambler market pre acquisition. []
210. A maverick in a market will typically force other competitors to lower prices or compete more aggressively. It does not appear that CCL is offering a level of complimentary services that is sufficient to compel other casinos to alter their complimentary service offerings.
211. The Commission considers that it is unlikely SkyCity would seek to reduce the complimentary services provided to premium gamblers as a result of the acquisition given the importance of generating repeat visits by premium gamblers.

Other Factors

Regulatory Bodies

212. CCL in its submission suggested that with SkyCity acquiring a shareholding in five of the six casinos in New Zealand there was a risk that the regulatory bodies, the Gambling Commission and the DIA, would become “captured” by SkyCity. This capture could result in SkyCity using its influence to push regulatory initiatives that unfairly burden smaller casinos.

213. The Commission explored this concern with both the CCA and DIA. The CCA stated that it applied a case by case assessment and did not consider a one size fits all approach in applying the casino regulatory regime.

214. CCL submitted a letter to the Minister of Internal Affairs raising the possibility of regulatory capture as a result of the SkyCity transaction. Chris Blake, the Chief Executive of DIA, responded to the regulatory capture issue in a letter to Chapman Tripp, the law firm representing CCL. Mr. Blake made four key points:

- it is common in Australia for a single casino to operate within a jurisdiction and the DIA is unaware of any regulatory capture issues raised in these areas.
- both the Gambling Commission and the DIA will set regulatory requirements and it is difficult to envision both bodies being captured by SkyCity.
- under the Gambling Act 2003, the Gambling Commission and the DIA have the power to demand information from casinos. The regulatory bodies do not have to accept at face value information volunteered by the casinos in New Zealand.
- SkyCity operates in a number of different jurisdictions and it will quickly become apparent if its operating practices in New Zealand are at a lower standard than elsewhere. Mr. Blake concluded:

“For these reasons, I do not share your view that the possible purchase of the Aspinall shares by SkyCity could lead to the “capture” of casino industry regulators.”¹⁴

215. While the approach the Gambling Commission will take is uncertain at this point, the comments from the CCA and DIA suggest that the regulatory bodies in the casino industry recognise that different casinos require different regulatory approaches. None of the regulatory bodies cited an increase in SkyCity’s shareholding in other casinos affecting their approach to regulation.

216. The Commission does not consider the potential for “regulatory capture” as argued by CCL in its submission as a likely outcome of the proposed transaction.

¹⁴ DIA letter to Chapman Tripp, 14 May 2004.

Conclusion on Existing Competition in the National Casino Entertainment Market for Premium Gamblers

217. The Commission considers the combined entity is likely to be constrained from attempting to exercise any degree of market power post-acquisition in the national market. The key factors supporting this conclusion are the combination of existing competitors in the form of international casinos, the ability of premium gamblers to readily switch the casinos they visit and the importance of premium gambler visits to casinos. Therefore, the Commission is of the view that competition is unlikely to be substantially lessened in the factual compared with the counterfactual.

OVERALL CONCLUSION

218. The Commission has considered the probable nature and extent of competition that would exist in the following markets:

- the Auckland casino entertainment market for ordinary gamblers;
- the Christchurch casino entertainment market for ordinary gamblers;
- the Dunedin casino entertainment market for ordinary gamblers; and
- the national casino entertainment market for premium gamblers.

219. The Commission considers that the appropriate counterfactual is the status quo.

220. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the Auckland, Christchurch and Dunedin casino entertainment markets.

221. The Commission also concludes that there would be sufficient existing competition to constrain the combined entity from exercising market power in the national casino entertainment market for premium gamblers.

222. The Commission is therefore satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition, in the following relevant markets:

- the Auckland casino entertainment market for ordinary gamblers;
- the Christchurch casino entertainment market for ordinary gamblers;
- the Dunedin casino entertainment market for ordinary gamblers; and
- the national casino entertainment market for premium gamblers.

DETERMINATION ON NOTICE OF CLEARANCE

223. Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by SkyCity Entertainment group limited of 100% of the shares of Aspinall (NZ) Limited.

Dated this 18th day of May 2004

Denese Bates
Division Chair
Commerce Commission