**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2013-404-488**
**[2013] NZHC 2538**

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| BETWEEN | THE CANCER SOCIETY OF NEW ZEALAND INCORPORATED<br>First Applicant |
| | THE SALVATION ARMY NEW ZEALAND TRUST<br>Second Applicant |
| | THE PROBLEM GAMBLING FOUNDATION OF NEW ZEALAND<br>Third Applicant |
| AND | THE MINISTRY OF HEALTH<br>First Respondent |
| | AUCKLAND REGIONAL PUBLIC HEALTH SERVICE<br>Second Respondent |
| | SKYCITY AUCKLAND LIMITED<br>Third Respondent |

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| Hearing: | 7 August 2013 |
| Counsel | DA Webb and SE Goodwin for Applicants<br>J Holden for First Respondent<br>G Tompkins for Second Respondent<br>BJ Curry for Third Respondent |
| Judgment: | 30 September 2013 |

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**JUDGMENT OF RODNEY HANSEN J**

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*This judgment was delivered by me on 30 September 2013 at 3.00 p.m., pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: ……*

Solicitors: Crown Law, Wellington
Lane Neave, Christchurch

## Introduction

[1] The Smoke-free Environments Act 1990 (the Act) contains a general prohibition on smoking in a casino but permits smoking in a part of the premises which is an "open area" as defined in the Act.

[2] The third respondent (Skycity) built or refurbished an area of the casino complex called the "Diamond Lounge" for the purpose of creating an area in which gaming machines could be operated by patrons who smoke. The Ministry of Health (the Ministry), which has responsibility for the enforcement of the relevant provisions of the Act, has formed the view that the Diamond Lounge is an "open area" as defined in the Act. The applicants consider the Ministry's view to be erroneous and seek judicial review of the Ministry's actions. The second respondent, Auckland Regional Public Health Service (the Health Service), and Skycity did not wish to be heard on the application and abide the decision of the Court.

## Relevant statutory provisions

[3] Part 1 of the Act provides for smoke-free work places in public areas. Section 13A sets out the requirements for smoking in casinos. One of the purposes of the Act of particular relevance to this proceeding is: [1]

> (a) To reduce the exposure of people who do not themselves smoke to any detrimental effect on their health caused by smoking by others.

[4] Section 13A sets out the requirements for smoking in casinos. No person may smoke in any part of a casino that is not an open area. [2] A casino operator must take all reasonably practicable steps to ensure that no person smokes at any time in any part of the casino that is not an open area.[3] However, the casino operator is not required to prohibit smoking in a part of a casino that is an open area.[4]

[5] An "open area" is defined in the Act as:[5]

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1 Smoke-free Environments Act 1990, s 3A(1)(a). See also s 4(a).
2 Smoke-free Environments Act 1990, s 13A(3).
3 Smoke-free Environments Act 1990, s 13A(1).
4 Smoke-free Environments Act 1990, s 13A(2).
5 Smoke-free Environments Act 1990, s 2.

> **Open area**, in relation to any premises, means a part of the premises that is not an internal area.

[6] An "internal area" is defined as:[6]

> **Internal area**, in relation to any premises or vehicle, means an area within or on the premises or vehicle that, when all its doors, windows, and other closeable openings are closed, is completely or substantially enclosed by –
>
> a) A ceiling, roof, or similar overhead surface; and
>
> b) Walls, sides, screens, or other similar surfaces; and
>
> c) Those openings.

[7] These definitions are not elaborated further. There is no guidance as to what is meant by "substantially enclosed".

[8] The Director-General of the Ministry is responsible for the enforcement of Part 1. For this purpose officers are appointed[7] who are responsible for investigating any complaints made to the Director-General[8] and to commence prosecutions for offences against Part 1 of the Act.[9]

**Genesis of the proceeding**

[9] The Diamond Lounge was inspected by an enforcement officer, Sunder Lokhande, in February 2012. Skycity provided him with a report about the Diamond Lounge from Beca Carter Hollings and Ferner. He passed this on to Ashley Cornor, a consultant to the Ministry, who advised that, based on Beca's report, the Diamond Lounge was an open area for the purposes of the Act. Mr Lokhande subsequently inspected the premises and, after taking measurements and applying Ministry guidelines, also reached the view that the Diamond Lounge was an open area for the purposes of the Act. He advised Skycity accordingly on 9 March 2012.

[10] On 17 April 2012, the applicants complained to the Director-General of Health under s 16 of the Act, alleging that the Diamond Lounge is not an open area and that Skycity was in breach of the Act by failing to take all reasonably practicable

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6 Smoke-free Environments Act 1990, s 2.
7 Smoke-free Environments Act 1990, s 14.
8 Smoke-free Environments Act 1990, s 16.
9 Smoke-free Environments Act 1990, s 18.

steps to ensure that no person smokes in any part of the casino that is not an open area.[10] Another enforcement officer, Mr Peter Aye, investigated the complaint. He reviewed the information obtained by Mr Lokhande and the advice he had obtained from Mr Cornor and revisited the Diamond Lounge with Mr Lokhande to assess whether any changes had been made since the original investigation. He also concluded that the Diamond Lounge was an open area, compliant with the Act. He notified the applicants accordingly on 2 May 2012.

[11] The Ministry guidelines used by the enforcement officers as part of their assessment, entitled "Ministry of Health Smoke-free Compliance and Enforcement Manual", (the Guidelines) states in its introduction:

> The purpose of this manual is to:
>
> - assist Enforcement Officers in the investigation of complaints
> - provide advice on the collection and presentation of evidence
> - explain the relevant provisions of the Smoke-free Environments Act 1990.
> - provide a framework for the guidance of Enforcement Officers carrying out functions under the Smoke-free Environments Act 1990.

[12] Chapter 11 of the Guidelines refers to the challenge for enforcement officers of making consistent assessments of whether an area is "open" or "internal" as defined in the Act. To assist with that task the Ministry developed a mathematical tool for analysing spaces – the Open Areas Calculator (the Calculator). The Calculator was used by both enforcement officers in undertaking the assessment which led them to the view that the Diamond Lounge was "open space".

**The proceeding**

[13] The applicants say the Ministry and the Health Service made the following errors in considering and determining their complaint:

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[10] In contravention of s 13A.

(a) They inappropriately relied on the Guidelines rather than applying the statutory test in considering the complaint and therefore made an error of law;

(b) They inappropriately applied the Calculator and its constituent algorithms in considering the complaint which is an erroneous test and not the statutory test and therefore made an error of law;

(c) They concluded that as a matter of fact the Diamond Lounge was an open area under the Act and therefore made an error of fact and law.

[14] As a result of those errors, it is claimed that the Ministry and the Health Service failed to exercise their powers to pursue a complaint under ss 16(3) – (6) of the Act and Skycity has breached the Act by permitting patrons to smoke in the Diamond Lounge.

[15] The applicants seek the following relief pursuant to Part 1 of the Judicature Amendment Act 1972:

> (a) A declaration that the open areas Calculator is inconsistent with the statutory definition of an open area under the Act;
>
> (b) An order quashing the decision of the first and second respondents in respect of the complaint;
>
> (c) Either:
>
> (i) A declaration that the Diamond Lounge is not an open area and that the third respondent is in breach of s 13A of the Act, or alternatively;
>
> (ii) An order that the first and second respondents reconsider the complaint of the applicants in accordance with the provisions of the Act;
>
> ...

In the alternative, they seek declarations under the Declaratory Judgments Act 1908 in the same terms as those sought under the Judicature Amendment Act.

[16] At the hearing, Mr Webb accepted that it would not be appropriate in the context of the proceeding for me to make a finding as to whether or not the Diamond

Lounge is an open area. He is content for me to confine my determination to the question of whether the enforcement officers erred in their use of the Calculator.

[17] Ms Holden agrees with this approach but questions whether there has been the exercise of a statutory power of decision which renders the actions of the enforcement officers amenable to judicial review. She accepts, however, that relief may be available by way of declarations under the Declaratory Judgments Act. I will address first the question of whether there has been a decision which is judicially reviewable.

**Reviewable decision?**

[18] The applicants say the enforcement officers exercised the power of investigation conferred by s 16(3) of the Act[11] and the power to take no further action under s 16(4) on the basis that there was no foundation to the complaint. The Ministry asserts that the enforcement officers simply formed an opinion which is not subject to review.

[19] Section 3 of the Judicature Amendment Act 1972 defines a "statutory power" as:

> **Statutory power** means a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate—
>
> (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
>
> (b) To exercise a statutory power of decision; or
>
> (c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or
>
> (d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or
>
> (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

[11] Which empowers an enforcement officer to make further enquiries by way of investigation in respect of a complaint.

[20] I am satisfied that the Ministry's investigation and determination that the Diamond Lounge was open space, with the consequence that Skycity was at liberty to permit patrons to smoke in the area, involved the exercise of a power of decision. The enforcement officers' actions plainly affected the rights and privileges of Skycity and, on that basis, would be amenable to review.[12] As Mr Webb said, the sole issue for an investigating officer is whether or not the subject of the investigation has met its duties to comply with the Act and, if not, whether it is liable under the legislation.

[21] The nature of the power is analogous to that in issue in *Unitec Institute of Technology v Attorney-General*[13]where it was held that the power of the New Zealand Qualifications Authority to investigate or enquire into the attributes of an institution and advise the Minister was reviewable notwithstanding that the exercise of the power affected, but did not prescribe or determine, the rights or status of the body concerned.

[22] In submitting that the enforcement officer investigating the complaint about the Diamond Lounge's smoking area arrived at an opinion which is not reviewable, Ms Holden relied on *R v Sloan.*[14] In that case, the proprietor of two takeaway food businesses devised a scheme which he thought converted the use of amusement machines installed in the businesses in a way which took them outside the scope of the Gaming and Lotteries Act 1977. Inspectors of Gaming wrote letters stating that, in their opinion, the game was illegal, directing that operations cease immediately and threatening enforcement action under the Gaming and Lotteries Act 1977. Hardie Boys J held that the inspectors were not empowered to decide whether an act was unlawful but simply to form an opinion and, on the basis of that opinion, to institute the necessary procedures for the decision on legality to be made by the Court.[15] He said that the forming of an opinion of this kind is not reviewable because it does not amount to a decision and went on to say:[16]

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12 *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA).
13 *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (HC) at [170].
14 *R v Sloan* [1990] 1 NZLR 474 (HC).
15 At 478 – 479.
16 At 479.

> Even if that be too restrictive a view, the inspectors' conclusions on the legality of the operation do not decide, prescribe or affect Mr Sloan's "rights, powers, privileges, immunities, duties, or liabilities", to use the words of the definition of statutory power of decision in s 3 of the Judicature Amendment Act. That occurs only when a decision to prosecute is made: or perhaps not until the Court gives judgment on the prosecution.

[23] The present case is immediately distinguishable because the enforcement officers' decision effectively foreclosed a decision to prosecute. As already observed, that directly impacts on rights and liabilities. In my respectful view, the conclusion reached by the inspectors cannot simply be characterised as the expression of an opinion. It may be based on an opinion but it is, nevertheless, a determination which has important legal consequences. They include the foreclosure of legal steps which could lead to a judicial determination.

[24] A decision of this nature[17] was accepted in *Orlov v New Zealand Law Society*[18] to be amendable to judicial review. I think Mr Webb was right to say that decisions such as *Unitec* and *Orlov* suggest that the law may have moved on since *Sloan*. Certainly, those decisions are more in keeping with the liberal approach to the operation of the Judicature Amendment Act sanctioned in cases such as *Webster v Auckland Harbour Board*.[19]

**Guidelines and Open Areas Calculator**

[25] The Guidelines and Calculator were developed by a panel which acted as an advisory committee to the Ministry. According to its terms of reference,[20] the panel's primary purpose was to:

> ... determine whether an area is "substantially enclosed" for the purpose of the Smoke-free Environments Act 1990 and to outline steps that may be taken to categorise an area as an "open area" where applicable.

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17 By a Standards Committee to refer a matter to the Disciplinary Tribunal under the Lawyers and Conveyancers Act 2006.

18 *Orlov v New Zealand Law Society* [2013] NZCA 230 at [49]. See also *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [59] – [60].

19 *Webster v Auckland Harbour Board*, above n 12.

20 *Draft Terms of Reference for the Advisory Committee on Open and Enclosed Areas* ("ACOEA": Smoke-free Environments Act 1990) at 504, para 38.

[26] The Calculator was developed to assist with the assessment of whether an area was "substantially enclosed". The purpose of the Calculator is summarised in Part 2 of the Guidelines as follows:

> **2 Purpose of the "Open Areas Calculator"**
>
> 2.1 The purpose of the Open Areas Calculator is to provide an objective standard to help determine the meaning of the word "substantially" for the purposes of the "internal area" definition.
>
> 2.2 In other words, it is intended to assist two different people, given the same facts, to reach the same conclusion as to whether or not a space is "substantially enclosed". This is achieved by addressing the degree of enclosure of a space in mathematical terms.

[27] The Calculator is based on a series of algorithms. The floor space of an area and the area of permanent openings on the roof/ceiling and the walls that surround the area are the inputs. The Calculator then determines the total area of permanent openings required to achieve an acceptable indoor air quality.[21] A comparison is then made between the openings in the given space and the area of permanent openings required in order to achieve the prescribed rate of air flow.

[28] The applicants submit that the use of the Guidelines and Calculator for the purpose of determining whether an area is an "open area" or is "substantially enclosed" (and therefore an internal area), does not apply the words of the statute. They say the Act requires a commonsense answer to a simple question. The Guidelines and Calculator introduce the issue of air quality which the applicants say is no part of the statutory test. Their case, as I understand it, is that the Guidelines direct enforcement officers away from the enquiry required by the statutory definition and effectively substitute a test which turns on assumed or postulated standards of air quality. The Guidelines thereby purport to give effect to a policy that is outside the scope of the legislative purpose of the Act and operate as an unlawful fetter on the discretion of enforcement officers.[22]

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[21] Derived from NZS 4303:1990 which for a "smoking lounge" (the highest prescribed rate) requires a supply of outdoor air of 30 litres per second per occupant.

[22] *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [39] – [40]; *British Oxygen Ltd v Minister of Technology* [1971] AC 610 (HL), *Findlay v Secretary of State for the Home Department* [1984] 3 All ER 801 (CA), *Works Civil Construction Ltd v Accident Rehabilitation and Compensation Insurance Corporation* [2001] 1 NZLR 721 (HC) at [49]. See also *The Criminal Bar Association of New Zealand Inc v The Attorney-General and anor* [2013] NZCA 176 at [118].

[29] For the Ministry, it is said that the Calculator is a legitimate tool for assisting enforcement officers to determine in a consistent way what is an open space and what is an internal space. Ms Holden says that the Guidelines enable enforcement officers to derive assistance from the Calculator but ultimately to make their own decision on whether a space is substantially enclosed.

**Scheme of legislation**

[30] The extension of the Act to restrict smoking in certain types of public places, including casinos and gambling machine venues, was effected by the Smoke-free Environments Amendment Act 2003 (Amendment Act). It led to the insertion of Part 1 which has, as one of its purposes, s 4(a) which reads as follows:

> (a) To prevent the detrimental effect of other people's smoking on the health of people in workplaces, or in certain public enclosed areas, who do not smoke or do not wish to smoke there; ...

The Amendment Act also inserted the statutory definitions of "internal area" and "open area".

[31] The Amendment Act started out as the Smoke-free Environments (Enhanced Protection) Amendment Bill (the Bill). Mr Webb explained that it was introduced against a background of international concern about the effects of second-hand smoke, particularly in the employment environment. The second reading of the Bill took place shortly after the International Framework Convention on Tobacco Control (the Convention) was adopted. It was ratified by New Zealand on 27 January 2004. Article 8 provides:

> Protection from exposure to tobacco smoke
>
> 1 Parties recognise that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
>
> 2 Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke **in indoor workspaces, public transport, indoor public places and, as appropriate, other public places.** (emphasis added.)

[32] The scheme of the Amendment Act is to prohibit or restrict smoking in situations which may result in exposure to second-hand smoke. In the case of licensed premises, restaurants, casinos and gaming machine venues, this is achieved by prohibiting smoking in any part of the premises that is not an open area.[23] Mr Webb explained that as the Bill progressed through Parliament, an alternative proposal was put forward proposing measures to reduce the effects of second-hand smoke through ventilation and air quality control. Rather than use "open areas", a "minimum air quality standard" was proposed.[24] The "minimum air quality standard" was ruled out by the Select Committee on the basis that there is no international evidence to demonstrate that ventilation systems are effective in reducing exposure to second-hand smoke to a safe level.[25] While this concerned the use of ventilation systems rather than the natural ventilation with which the Calculator is concerned, Mr Webb submitted that it shows that Parliament rejected the idea that an indoor area could be adequately ventilated to counter the effects of second-hand smoke. Parliament recognised that a total ban on smoking in enclosed areas was necessary. In the event, the definitions of "open area" and "internal area" remained unchanged from the inception of the Bill through to the final wording of the Act.

[33] The scheme of the Amendment Act is broadly similar to legislation operating in a number of overseas jurisdictions which also ban smoking in "enclosed or substantially enclosed premises". Smoke-free legislation in Northern Ireland, England, Wales and New South Wales uses the wording "enclosed or substantially enclosed" while others[26] use the word "enclosed".

[34] In some of those jurisdictions regulations have defined the meaning of "substantially enclosed". In Northern Ireland, England and Wales, premises are substantially enclosed if they have a ceiling or roof but there are openings in the

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23 Smoke-free Environments Amendment Act 2003 s 8. Section 8 of the Amendment Act inserts ss 12 – 13B into the Act itself.

24 Supplementary Order Paper 2003 (117) Smoke-Free Environments (Enhanced Protection) Amendment Bill 1999 (310-2).

25 Smoke-free Environments (Enhanced Protection) Amendment Bill 1999 (310-2) (Select Committee Report) at [11].

26 New York, South Australia, Queensland, Australian Capital Territory and Northern Territory.

walls of an aggregate area of less than half of the area of the walls.[27] New South Wales legislation provides that a public place is substantially enclosed if the total area of the ceiling and wall surfaces is more than 75 per cent of its total notional ceiling and wall area.[28]

[35] None of the overseas smoke-free legislation, to which I was referred, employ airflow or air quality standards for the purpose of determining what is an "open area". Rather, guidelines issued pursuant to statutory authority for the purpose of determining what is "enclosed" or "substantially enclosed" provide an objective standard by reference to the aggregate area of openings in the walls as a proportion of the total area of ceilings and walls.[29]

[36] Mr Webb relied on *O'Shannessy v Blacktown Workers Club*[30] as authority for the proposition that the use of airflow to determine whether a space was enclosed has been specifically rejected elsewhere. The New South Wales Supreme Court found the lower Court had erred in having regard to airflow in determining whether a gap (as defined in the Regulations) existed. However, the decision turned on the interpretation of the Regulations. (The definition of "gap" made no reference to airflow.) It does not represent a wholesale rejection of the use of airflow to determine whether a space is enclosed or not. Indeed, "walls" and "ceilings" in the New South Wales regulations are defined as structures that prevent or impede airflow.

[37] However, that does not detract from the applicants' submission that in following overseas legislative models, Parliament chose to define the spaces in licensed premises, restaurants, casinos and gaming machine venues in which smoking is permitted (or not) solely by reference to the physical characteristics of the space, in particular whether or not it is enclosed or substantially enclosed. In contrast, the provisions affecting smokers in hospital care institutions, residential disability care institutions and rest homes provide for dedicated smoking rooms

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27 The Smoke-free (Premises and Enforcement)Regulations 2006 (UK), reg 2; and The Smoke-free Premises etc. (Wales) Regulations 2007, reg 2.

28 The Smoke-free Environment Regulation 2007 (NSW), cl 6.

29 As in the examples referred to above.

30 *O'Shannessy v Blacktown Workers Club* [2010] NSWSC 1153 (14 October 2010).

equipped with a mechanical ventilation system.[31] The means by which protection from second-hand smoke is achieved in schools and early childhood centres is different again.[32] Effective ventilation is one of the matters to be considered.[33]

**Operation of Guidelines and Calculator**

[38] The Calculator, however, explicitly introduces air quality as a factor to be considered in determining whether an area is substantially enclosed. First, it provides that in measuring floor area, permanent fixtures such as garden areas, fountains, pool tables and the like should be subtracted. The Calculator stipulates that only floor areas that can be occupied by people are relevant because permanent fixtures:

> ... effectively reduce the number of smokers in the space and therefore reduces the air flow required through the space to adequately clear the contaminants of smoking.

[39] Secondly, for the purpose of determining the aggregate area of openings required, their siting and size must be taken into account. The Calculator considers five different opening arrangements, "each of which result in different air flow characteristics within a space".[34] In the result, according to an example set out in the Guidelines, the area of openings required as a proportion of floor area ranges from 20 per cent where there are openings of equal size on opposite sides of the space to 38 per cent where openings are of unequal size on adjacent sides of a space. This arises because the optimal flow of ventilation is achieved by areas of equal size on opposite sides of a space and the least efficient with openings of unequal size on adjacent walls.

[40] By these means, the Calculator achieves its designers' objective of factoring in projected levels of air quality when determining whether a given space is substantially enclosed. Mr Webb pointed out that this can lead to outcomes which plainly seem to be at odds with the statutory definition. For the purpose of

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31 Smoke-free Environments Act 1990, s 6(1)(b).

32 Smoke-free Environments Act 1990, s 7A.

33 Smoke-free Environments Act 1990, s 7A(3)(b).

34 They are: equally sized openings on opposite sides of a space; equally sized openings on adjacent sides of a space; unequally sized openings on opposite sides of a space; unequally sized openings on adjacent sides of a space; and an opening on only one side of a space.

determining whether the Diamond Lounge is an open area, in terms of the Guidelines, the floor area was calculated by subtracting the area taken up by gaming machines. If one or two of the gaming machines were removed, the room would change from being an open area to being "substantially enclosed" without any changes to windows, doors or other openings.

[41] Ms Holden argued that the Calculator's output is ultimately about the size of the permanent openings within a space and is therefore consistent with the "substantially enclosed" measure in the Act. But the fact remains that under the Guidelines whether or not a space is substantially enclosed depends on factors other than its physical dimensions. There is nothing in the Act to mandate such an approach.

[42] Ms Holden further submitted that under the Guidelines, enforcement officers are still able to formulate their own opinions and reach their own conclusions as to whether an area is an "open area" or an "internal area". She said other information may displace the Calculator's output as to the size of permanent openings required. It is ultimately up to the individual enforcement officer to assess whether an area complies with the Act.

[43] The only passage in the Guidelines which might be thought to offer some support for this submission is under the heading "Frequently Asked Questions" which concludes with the following question and response:

> **Is the Open Areas Calculator the only way to determine whether a space is 'substantially enclosed'?**
>
> The Open Areas Calculator is a guide that is intended to help enforcement officers to make consistent judgments as to whether spaces are 'open' or 'internal'. It is ultimately a tool that provides information to help enforcement officers decide whether to exercise their enforcement discretion. The ultimate question is always whether an area is *substantially enclosed*. Output from the Open Areas Calculator is not the *only* information that can be taken into account when determining an answer to that question.
>
> For example, the Open Areas Calculator is based on a number of simplifications and assumptions. On the facts of a given case, more precise information may be available as to the airflow through a space (for instance, an Architect or Engineer may provide premises-specific calculations). This can be taken into account as information that suggests an area is/is not substantially enclosed, at an enforcement officer's discretion.

[44] While the response makes it clear that the output of the Calculator should not dictate the enforcement officer's decision, it confirms that the only further factor that might affect the outcome relates to airflow through the space. It does not invite or require the enforcement officer to revisit the statutory definition.

[45] Other passages in the Guidelines make it clear that a decision as to whether an area is substantially enclosed is to be determined by the Calculator subject only to weighing other factors that may affect airflow. The purpose of the Calculator is said to provide "an objective standard" to help determine the meaning of the word "substantially". In other words, say the Guidelines:

> It is intended to assist two different enforcement officers given the same facts, to reach the same conclusion as to whether or not a space is "substantially enclosed".

[46] The procedure set out in the Guidelines is a step-by-step guide for enforcement officers, beginning with the need to identify the relevant part or parts of the premises and concluding with reporting letters. For the purpose of the penultimate step, assessing compliance, enforcement officers are directed to:

> 7.1 Compare the minimum opening areas determined by the Open Areas Calculator against those actually measured (or proposed).
>
> 7.2 If the area of the actual or proposed openings on every side of the space is at least 90% of the minimum determined by the Open Areas Calculator, the area is not 'substantially enclosed'.[35]

[47] The enforcement officers followed the Guidelines in determining that the Diamond Lounge was open space. Their decisions were determined by the application of the Calculator. That was an error.

[48] The Ministry's goal of achieving predictability and consistency is laudable. The use of the word "substantial" introduces an element of subjectivity into the assessments that have to be made under the Act. The imposition of an inflexible standard is avoided at the cost of certainty. The use of Guidelines to promote a consistent approach to the judgments enforcement officers are called upon to make is entirely proper provided they do not introduce extraneous considerations which have

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[35] The reference to 90% of the minimum refers to a "rule of thumb" which ensures that "a conservative approach is taken to enforcement".

the effect of unlawfully fettering the exercise of the decisionmaking power. However well intentioned, that is what happened here. The simple factual question of whether or not a space is substantially enclosed is replaced by a calculation intended to assess airflow through the space. That is contrary to the clear scheme and purpose of the statute.

**Relief**

[49] The applicants are entitled to the following relief:

(a) A declaration that the Open Areas Calculator is inconsistent with the statutory definition of an open area under the Act;

(b) An order quashing the decision of the first and second respondents in respect of the complaint;

(c) An order that the first and second respondents reconsider the complaint of the applicants in accordance with the provisions of the Act.

[50] The applicants are entitled to costs. If the parties are unable to agree, I will consider memoranda.