



WESTERN AUSTRALIA

Perth Casino Royal Commission

Discussion Paper on
Regulation of Poker Machines
and EGMs
24 December 2021

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Discussion Paper about the regulation of Poker Machines and EGMS

Purpose

1. Part B of the PCRC's terms of reference (**ToR**) requires the PCRC to inquire into, amongst other things, the adequacy of the existing regulatory framework in relation to casino gaming to address certain extant and emerging strategic risks and how that framework may be enhanced, as well as the effectiveness of the GWC in discharging its regulatory functions and responsibilities.
2. This paper seeks to explore the existing regulatory framework governing the use of poker machines in licensed casinos in order to consider whether and, if so to what extent, that framework applies to the electronic gaming machines (**EGMs**) provided for use at the Perth Casino. A significant aspect of this paper concerns statutory construction. The PCRC wishes to provide the interested parties and the public the opportunity to express their views as to the proper construction of relevant statutory terms and in respect of any other matters raised by this paper.
3. Section 22(1)(a) of the *Casino Control Act 1984* (WA) (**CC Act**) provides that:

Subject to this section, the Commission, by notice published in the Gazette, may ... declare any game, except for a game played with poker machines, to be an authorised game for the purposes of this Act
4. Section 22(6) of the CC Act then prohibits a casino licensee from permitting any games other than authorised games from being played at a licensed casino.
5. The effect of these provisions is to prohibit at Perth Casino the playing of a game played with poker machines. However, that term is not defined in the CC Act or elsewhere.
6. There is no reference to the terms 'electronic gaming machines', or 'EGMs', in either the CC Act or the *Gaming and Wagering Commission Act 1987* (WA) (**GWC Act**). The former term is, however, used in the State Agreement, primarily for the purpose of imposing a tax levy on the revenue derived from gaming on such machines.
7. The number of EGMS at Perth Casino has, with the GWC's approval, increased from 200 in 1985 to 2500 at present.¹ The GWC routinely approves new games to be played on EGMS at Perth Casino.
8. Against this background, the focus of this discussion paper is to identify and explore the issues relevant to a determination of the statutory meaning of the term poker machine,

¹ Letter from Sargeant to Felstead (3 December 2012) [CRW.708.001.7596]; Western Australia, Parliamentary Debates, Legislative Assembly, 2 May 2006, 1960 – 1963 [PUB.0025.0001.0001].

whether and to what extent an EGM of the type operated at Perth Casino may (or may not) be a poker machine within the meaning of the CC Act, and the consequential issues that arise from a consideration of those matters relevant to the PCRC's inquiry pursuant to the aspects of the ToR referred to above.

9. The PCRC has not reached a concluded view on any of these matters and would be assisted by submissions from interested parties on the findings open to the PCRC in respect of the above issues and any other aspect of this discussion paper.

Response period

10. A response to this discussion paper is not mandatory, however the PCRC requires any response to be submitted in writing and it must be received via email by no later than close of business on **Thursday, 20 January 2022**. A response should be directed as follows:
 - a. For interested parties with leave to appear: solicitorsassisting@pcrc.wa.gov.au; and
 - b. Any other person or entity: contact@pcrc.wa.gov.au.

Principles of statutory construction

11. The general principles of statutory construction are well settled.²
12. The focus of statutory construction is upon the text of the relevant provision, having regard to its context, purpose and the policy of the provision.
13. In considering the text, weight is to be given to the natural and ordinary meaning of the words used by the legislature, consistent with and by reference to the language of the statute as a whole.³
14. The context includes the existing state of the law, the history of the legislative scheme and the issue or mischief to which the statute is directed.
15. Similarly, the purpose and policy of the legislation must be derived from the statutory text and not from any assumptions about the desirable reach or operation of the relevant provisions.⁴ Preference is to be given to a construction that would promote that purpose.⁵
16. Regard may be had to extrinsic materials to confirm the ordinary meaning of the provision or to determine its meaning when the provision is ambiguous or obscure.⁶ The material that may be considered includes any relevant report of a Royal Commission or committee of

² *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205 [PUB.0033.0001.0615] [31] – [35] (Buss P and Mitchell JA); *Mohammadi v Bethune* [2018] WASCA 98 [PUB.0033.0001.0495] [31] – [36] (Martin CJ, Mazza and Beech JJA).

³ *Graham v Western Australian Planning Commission* [2014] WASCA 243 [PUB.0033.0001.0301] [43].

⁴ *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 [PUB.0033.0001.0141] [26].

⁵ *Interpretation Act 1984* (WA) s 18 [PUB.0033.0001.0416].

⁶ *Interpretation Act 1984* (WA) s 19(1) [PUB.0033.0001.0416].

inquiry that was laid before either House of Parliament before the time when the provision was enacted.⁷

17. Generally speaking, the task when considering extrinsic materials is to identify the policy of the statute to better understand its language and the intended operation of the statute. An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit.⁸
18. Protective or remedial legislation (or a protective or remedial provision)⁹ is to be construed beneficially, being as widely as its language will fairly allow.¹⁰ This is a manifestation of the general principle that legislation is construed purposively. The principle is relevant when choosing between different interpretations or when there is uncertainty as to meaning of relevant words.¹¹
19. It is also a principle of construction that a legislature intends to attach the same meaning to the same words when used in a subsequent statute in a similar connection.¹² Further, statutory texts enacted by the same legislature are to be construed, so far as possible, to operate in harmony and not in conflict.¹³ This principle is relevant here because the term 'poker machine' also appears in section 85 of the GWC Act, which refers to the authorisation of games for use in a casino under the CC Act. Accordingly, the term poker machine can be expected to bear the same meaning in the authorisation provision of the CC Act as in the section of the GWC Act which refers to it.
20. Section 8 of the *Interpretation Act 1984* (WA) provides that legislation shall be considered to be 'always speaking' and, where legislation is expressed in the present tense, 'it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning'. The meaning of this principle has been explained as follows:¹⁴

[A] statute should generally be construed so as to apply to all things coming within the denotation of its terms, having regard to their connotation at the time of enactment. The connotation of a word or phrase is its essential attributes, which are to be determined as at the time of enactment. The denotation of a word or phrase is the class of things that, from time to time, may be seen to possess those essential attributes sufficiently to justify the application of the word or phrase to them.

⁷ *Interpretation Act 1984* (WA) s 19(2)(b) [PUB.0033.0001.0416].

⁸ *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 [PUB.0033.0001.0141] [89].

⁹ *Nilant v Macchia* [2000] FCA 1528 [PUB.0033.0001.0591] [42].

¹⁰ *Bull v Attorney-General* (NSW) [1930] HCA 60 [PUB.0033.0001.0114] 384.

¹¹ *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 [PUB.0033.0001.0520] [92] (Gageler J), [32] – [33] (French CJ, Kiefel, Bell and Keane JJ).

¹² *Harrison v Melhem* [2008] NSWCA 67 [PUB.0033.0001.0343] [131] (Mason P); *Lennon v Gibson and Howes Ltd* [1919] UKPCHCA 2 [PUB.0033.0001.0488] 287.

¹³ *Commissioner of Police v Eaton* [2013] HCA 2 [PUB.0033.0001.0246] [98].

¹⁴ *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 212 [PUB.0033.0001.0186] [82] (Emmett JJA and Ball J, with whom Bathurst CJ, Beazley P and Macfarlan agreed).

The ordinary meaning of the term poker machine

Dictionary definitions

21. As is observed below, in addition to the term 'poker machine', the terms 'fruit machine' and 'roulette machine' are also used in the GWC Act.
22. Poker machine and fruit machine are terms defined in each of the Macquarie Dictionary, the Oxford English Dictionary, the Cambridge Dictionary and the Collins English Dictionary as follows:

The Macquarie Dictionary:

poker machine *noun* a coin-operated gambling machine, with images such as playing cards, pictures of fruit, etc., on a set of (usually three or four) wheels which are set in motion by pressing a button or pulling a lever, the score depending on the combination of symbols visible when the wheels come to rest.

fruit machine *noun* *Chiefly British and US* a poker machine, originally displaying its score in the form of replicas of various fruits.

Oxford English Dictionary:

poker machine *n.* originally U.S. a coin-operated gaming-machine which pays out according to the combination of symbols (usually representations of playing cards) appearing on the edges of the wheels spun by the operation of a lever.

fruit machine *n.* a coin- or token-operated gaming machine which pays out according to the combination of symbols (often representations of fruit) appearing on the edges of wheels spun by the operation of a lever

Cambridge Dictionary:

poker machine *noun* Australian English. a slot machine.

fruit machine *noun* UK. a slot machine.

slot machine *noun* a machine that you try to win money from by putting coins into it and operating it, often by pressing a button or pulling a handle.

The Collins English Dictionary:

poker machine *NOUN* *Australian and New Zealand.* a fruit machine.

fruit machine *NOUN* *British.* A gambling machine that pays out when certain combinations of diagrams, usually of fruit, are displayed.

23. Having regard to these definitions, the terms poker machine and fruit machine appear to be synonyms, save that there is a greater likelihood that a fruit machine will display fruit symbols rather than card or other types of symbols.
24. The features of a poker machine/fruit machine that appear to be shared by all of the dictionary definitions referred to above are that:

- a. money (or a token that represents money) is required to be inserted into the machine to play a game; and
 - b. the machine pays out money (or a token that represents money) for a win i.e. if a particular combination of symbols is displayed by the machine.
25. Three of the four dictionaries define a poker machine by reference to the feature that a score or win in respect of the game is derived from a combination of symbols displayed by the machine.
 26. Two of the four dictionaries define a poker machine by reference to whether the machine displays symbols on a set of wheels.
 27. The Macquarie Dictionary and the Collins English Dictionary also define the word pokie or pokies as a colloquial or an informal word to describe a poker machine(s).
 28. The term roulette machine is not defined in any of the above-mentioned dictionaries. The Parliamentary debates record that term as having been used, without explanation, during second reading speeches introducing or amending the GWC Act.¹⁵ The PCRC has been unable to identify any authoritative information as to the historical nature of roulette machines. In the present day, it appears that the term roulette machine is used to describe an electronic version of the roulette table game that requires a degree of interaction by the player to place virtual counters or chips and spin the roulette wheel by pressing a button.¹⁶

Ordinary usage

29. It appears that the EGMs at Perth Casino are generally understood to be poker machines. This was recognised, for example, in the briefing notes prepared by the then Department of Racing, Gaming and Liquor for the incoming Minister for Racing and Gaming in 2013. The notes include the observation that ‘the general perception of video gaming machines at Crown Perth is that they are ‘pokies’’.¹⁷
30. Similarly, in other Australian jurisdictions where gaming machines are permitted in pubs and clubs, the terms poker machine, pokies, EGMs and electronic gaming machines appear to be used interchangeably to describe any electronic machine that has the three features referred to in [24] and [25] above.¹⁸
31. This possibly indicates a community perception as to common essential attributes between ‘traditional’ poker machines; and contemporary poker machines and electronic gaming

¹⁵ Western Australia, Parliamentary Debates, Legislative Assembly, 26 May 1987, 1379 [PUB.0016.0013.0223]; Western Australia, Parliamentary Debates, Legislative Council, 15 September 1987, 3599 [PUB.0033.0002.0003]; Western Australia, Parliamentary Debates, Legislative Council, 29 April 1998, 2107 [PUB.0016.0013.0271]; Western Australia, Parliamentary Debates, Legislative Assembly, 21 May 1998, 3046 [PUB.0016.0013.0219];

¹⁶ A Gentleman, ‘Roulette Machines: the crack cocaine of gambling’, *The Guardian*, 27 May 2013, accessed 20 December 2021 [PUB.0033.0001.0291].

¹⁷ Department of Racing Gaming and Liquor, Briefing Notes: For the Minister for Racing and Gaming (March 2013) [DLG.8001.0033.5138] 71.

¹⁸ See, for example, M Walker, K Matarese, A Blaszczynski, L Sharpe, ‘Explaining the attraction of poker machines: cognition or conditioning?’ (2004) [PUB.0033.0001.0869].

machines, which might be relevant to the construction exercise having regard to the principle that statues are always speaking, as explained at [20] above.

32. Having regard to both the dictionary definitions and the ordinary understanding and usage of the term poker machine, it may be posited that a necessary feature of a poker machine is that it is a freestanding device of proportions that permit the player to stand or sit 'at' the device to play a game and that the machine is designed and made purely for that purpose (i.e. to play a game). On that basis, and by way of illustration, if a game that could be played on such a machine were instead played on a computer or mobile phone through an online gambling website, the computer or mobile phone would not be understood in any ordinary sense to be (or to become by reason of that use) a poker machine.

QUESTIONS.

1. WHAT IS THE ORDINARY MEANING OF THE TERM POKER MACHINE?
2. TO WHAT EXTENT DO THE DICTIONARY DEFINITIONS REFERRED TO IN THIS PAPER INFORM THE STATUTORY MEANING OF THE TERM 'POKER MACHINE' IN THE CC ACT?
3. MAY IT BE ACCEPTED THAT THE TERMS POKER MACHINE, EGM AND ELECTRONIC GAMING MACHINE, AS A MATTER OF ORDINARY USAGE IN AUSTRALIA, HAVE THE SAME MEANING?

Context, purpose and policy considerations

Historical prohibition on poker machines in Western Australia

33. From the time of its enactment, Part VI of the *Police Act 1892* (WA) (**Police Act**) contained prohibitions against the establishment and operation of common gaming houses, and the playing of games of chance in any public place or place to which the public had access.¹⁹
34. In 1961, section 89A was inserted into the *Police Act*.²⁰ That section empowered the Governor to specifically prohibit the use or possession of 'slot machines', which were defined as being, in essence, machines operated by the insertion of a coin or valuable token, or upon payment of valuable consideration.
35. By way of proclamation first made in 1962, and made again in the same terms in 1963, the Governor prohibited the use or possession of, amongst other things, machines 'of the kind generally known and described as a poker machine, fruit machine or roulette machine or

¹⁹ *Police Act 1892* (WA) s 86, 66(6) [PUB.0033.0001.0756].

²⁰ *Police Act Amendment Act 1961* (WA) s 2 [PUB.0033.0001.0866].

[which] is a mechanical device in the nature of, or similar to, any of them'.²¹ The term poker machine was not defined in the proclamation.

36. In 1987, section 89A and other provisions of the Police Act concerned with gaming were repealed after the introduction of the then Gaming Commission Act 1987 (**GC Act**) (now the **GWC Act**).²² Pursuant to sections 85(1) and (4) of the GC Act the prohibition of poker machines was continued.
37. The prohibition on the approval of poker machines did not appear in section 22(1)(a) of the CC Act as enacted.
38. However, the prohibition now found in section 22(1)(a) was inserted some nine months later, when the CC Act was amended by the *Acts Amendment and Validation (Casino Control) Act 1985* (WA). The amending bill was introduced to Parliament immediately after the bill which became the CBIA Act.²³
39. Section 23 of the CC Act, as referred to in the second reading speech, had originally provided that it was a defence to a prosecution under, amongst other provisions, Part VI of the Police Act, to show that the relevant game (or instrument necessary to the conduct of that game) was lawful under the CC Act. The amendments to that section clarified that the defence was not available in respect of games played with poker machines.
40. A 1996 review of the then GC Act recommended that, amongst other things, the term poker machine be defined in that Act and reference to the definition be made in the CC Act.²⁴ The review did not propose a definition. The recommendation was endorsed,²⁵ but no definition was inserted.
41. Between 1962, when poker machines were first expressly prohibited in Western Australia, until the enactment of section 22(1)(a) in 1985, poker machines evolved from purely mechanical machines that used fixed, mechanical reels or wheels to display combinations of symbols. The first electromechanical machine was developed in the United States in 1963 which allowed for winnings to be automatically dispensed to the player and incorporated electronics to weight particular symbols. Electromechanical machines ultimately led to the obsolescence of the lever used to start a game. The first video poker machines, using graphical rather than mechanical reels, were developed, again in the United States, in the

²¹ Western Australia, Government Gazette, No 15 (16 February 1962) 477 [PUB.0032.0017.0008] 59; Western Australia, Government Gazette, No 70 (6 September 1963) 2710 [PUB.0004.0002.0261] 59.

²² Acts Amendment and Repeal (Gaming) Act 1987 (WA) s 59 [PUB.0033.0001.0001].

²³ Western Australia, Parliamentary Debates, Legislative Council, 21 February 1985, 166 – 170 (Hon DK Dans, Leader of the House) [PUB.0016.0013.0262]; Western Australia, Parliamentary Debates, Legislative Assembly, 12 March 1985, 795 [PUB.0016.0013.0182]. Both bills were dealt with in a cognate debate in the Legislative Assembly.

²⁴ Hon M Evans, Review of the *Gaming Commission Act 1987*, report (1996) [PUB.0004.0002.0129] 71 – 72. The review explained that such changes were needed in order to prevent the proliferation of machines which courts had ruled were not captured by section 85(1)(a) of the GC Act because they did not offer a prize worth more than the cost of playing the game. Games of this kind were held to come within an exception provided by section 39(2)(e) of the *Gaming and Wagering Commission Act 1987* (WA) [PUB.0004.0005.0107].

²⁵ Hon M Evans, Review of the Gaming Commission Act 1987, report (1996) [PUB.0004.0002.0129] 9.

mid to late 1970s. In 1984, a US patent was issued for an electronic gaming device using a random number generator for the selection of reel stop positions.²⁶

Interaction between the CC Act and the GWC Act

42. Section 85(1) of the GWC Act has, since it was enacted as the GC Act, prohibited the conduct of gaming or the playing of games with 'unlawful gaming machines', while section 85(4) has prohibited the possession of such machines.

43. The word 'gaming machine' is defined in section 84(1) of the GWC Act as follows:

gaming machine means a machine which –

(a) is constructed, adapted or used for playing a game of chance by means of that gaming machine;

(b) a player pays (except where he has an opportunity to play without payment as the result of having previously played successfully) to play –

(i) by inserting money, or money's worth in the form of a token; or

(ii) in some other way; and

(c) by the chances inherent in the action of the machine, determines the outcome of the game,

whether or not provision is made for the manipulation of the machine by a player;

44. The essential attributes of a gaming machine for the purposes of the GWC Act thus appear to be that it is a game of chance where the outcome of that game is determined by the 'action of the machine' and which a player must pay to use.

45. The term 'unlawful gaming machine' is defined in section 84(1) of the GWC Act as meaning a machine of a kind referred to in sections 85(1)(a) or (b).

46. Section 85(1) as passed in 1987 (as part of the GC Act) provided as follows:

(1) The conduct of gaming by means of, or the playing of games using or the making of bets by reference to –

(a) any machine (not being a video machine authorized for use in the Burswood Casino pursuant to the *Casino Control Act 1984*) of the kind generally known or described as a poker machine, fruit machine or roulette machine or any machine in the nature of or similar to a machine of that kind;

(b) any other gaming machine, not being a machine used-

(i) as a slot machine; or

(ii) in accordance with a permit or written law; or

²⁶ Wikipedia, slot machines (18 June 2021) [PUB.0018.0002.0071].

(c) gaming equipment of a kind which contravenes, or in the circumstances in which it is found contravenes, a prohibition proclaimed under subsection (2),

is prohibited and constitutes unlawful gaming, and a game played with that gaming equipment or in relation to which it is used shall for the purposes of section 42(2) be deemed to be an unlawful game.

47. Section 85(1)(a) has subsequently been amended. The section as it currently exists includes, in essence, video machines that reproduce 'any kind of game': (a) declared to be an authorised game under section 22(1)(a) of the CC Act; (b) commonly played in casinos in Australia or elsewhere; or (c) variations of such games. The amendment to section 85(1)(a) could be regarded either as an indication that the section originally did not extend to such video reproductions, or otherwise as confirming the wide scope of the term 'a machine of that kind' as it originally appeared in section 85(1)(a). It may be that whichever possibility is correct does not have a bearing on the proper construction of the term poker machine.
48. It may be that the 'machine' that is being referred to in subsection (a) is a 'gaming machine' as defined in the GWC Act (which definition is referred to above). This finding is open because subsection (b) refers to 'any *other* gaming machine' (emphasis added). If so, a 'poker machine' for the purposes of the GWC Act and, therefore, the CC Act, would be a 'gaming machine', as defined.
49. The import of that for the statutory meaning of a poker machine needs to be considered. When considered in the context of the above dictionary definitions, it may suggest that a poker machine within the meaning of the relevant legislation does not require money or a token to be inserted into the machine to play the game, as long as the player pays in some way to play.
50. The fact that in section 85(1)(a) authorised 'video machines' are excepted from the description of poker machines, fruit machines or roulette machines (or machines in the nature of or similar to machines of that kind) that are unlawful gaming machines may be relevant to the construction exercise.
51. The term 'video machine' is not defined in either the GWC Act or the CC Act.
52. One question that arises is whether section 85 was enacted on the premise that a video machine may also be a poker machine (or a fruit machine or roulette machine) or may otherwise also be 'in the nature of or similar to' a poker machine. If so, that would militate against the conclusion that the statutory meaning of poker machine is limited to mechanical machines.
53. When the GWC Act was first enacted (as the GC Act), the only video machines that had been authorised for use at the Perth Casino were different types of 'video blackjack', 'video keno' and 'video draw poker'.²⁷ These were all electronic versions of conventional table games

²⁷ Western Australia, Government Gazette, No 130 (20 December 1985) 4825 [PUB.0008.0006.0001].

already offered at the casino.²⁸ The PCRC understands that none of these video machines made use of physical or virtual spinning reels. Further, the PCRC understands that none of these video machines made use of symbols other than symbols found on playing cards.

54. Games such as video draw poker offer player interaction that can affect the outcome of the game after the playing of the game has commenced (that is, holding or discarding virtual cards).²⁹ This can be contrasted to games which do not allow for player interaction that can affect the outcome of a game once the playing of that game has commenced. The 1974 Report of the Royal Commission into Gambling (**1974 Report**), further discussed at [65] below, referred to poker machine playing as a 'mindless' and 'repetitive' activity that 'requires no thought'. Against that background, the distinction between a machine upon which games are played that require player interaction after the game has commenced, and machines upon which games are played that do not, may be relevant to the construction exercise.

55. With respect to subsection 85(1)(b) of the GWC Act, a 'slot machine' was (and remains) defined in section 84(1) as:

a machine that is constructed or adapted and used –

(a) for the playing of music or of games designed primarily for amusement, relaxation or education; or

(b) for the playing of games of skill; or

(c) so that although a game of chance may be played, section 39(2)(e) applies; or

(d) to yield with certainty previously ascertained goods of which the sale, or exposure for sale, is not prohibited by any written law; or

(e) to dispense tickets, having a previously ascertained face value, in a lottery conducted under and in accordance with the requirements of a written law,

without affording any other consideration, advantage or reward and not for the purposes of betting. (emphasis added)

56. Section 39(2)(e) of the GWC Act has not been amended since the Act was first passed. It provides:

a machine shall be taken not to be used for gaming if it is used in premises of a prescribed kind or class and if it is constructed or adapted or used in such a way that —

(i) a person playing it once and successfully receives nothing except an opportunity, afforded by the automatic action of the machine, to play again (once or more often) without paying; or

(ii) where a person plays it once and successfully, that which he receives is determined by the automatic action of the machine and is either a money prize

²⁸ This was subsequently confirmed in the course of an Estimates Committee meeting: Western Australia, Parliamentary Debates, Legislative Assembly, 23 May 1996 [PUB.0033.0001.0894] 367 – 368.

²⁹ GWC, Approved rules of the Authorised Game – Video Draw Poker (8 January 2018) [GWC.0001.0007.0113] [3.2]-[3.3].

not greater than the amount payable to play the machine once or a token which is, or tokens which in the aggregate are, exchangeable only for such a money prize.

57. The indication is that a 'slot machine' for the purposes of the GWC Act is not a poker machine. The statute here appears to depart from the ordinary meaning of the term slot machine which, according to the above dictionary definitions, is the same as poker machine. Under the Act, a slot machine that is used to play a game of chance appears to be distinguished from a poker machine by the feature that the player does not win money; a win or prize consists only of the opportunity to continue to play, or the return of the money spent to play the game.

QUESTIONS

4. DOES THE TERM 'POKER MACHINE' WHEN USED IN SECTION 22(1)(a) OF THE CC ACT INCLUDE FRUIT MACHINES AND ROULETTE MACHINES?
5. DOES THE STATUTORY INTERPLAY BETWEEN THE GWC ACT AND THE CC ACT SUGGEST THAT THE LEGISLATIVE MEANING OF 'POKER MACHINE' EXTENDS TO MACHINES THAT ARE FULLY ELECTRONIC?
6. DOES THE STATUTORY INTERPLAY BETWEEN THE GWC ACT AND THE CC ACT SUGGEST THAT THE LEGISLATIVE MEANING OF 'POKER MACHINE' IS LIMITED TO MACHINES THAT MAKE USE OF SPINNING REELS, OR THAT DO NOT ALLOW FOR PLAYER INTERACTION THAT MAY AFFECT THE OUTCOME OF A GAME AFTER IT HAS BEEN COMMENCED?

The protective purpose of section 22(1) of the CC Act

58. The CC Act does not have an express objects clause. Like most legislation, it pursues a variety of objectives. However, a number of provisions in the Act appear to be protective in nature, such as section 27 which prohibits a casino licensee and any other person concerned in the organisation or management of the gaming operations of a licensed casino from permitting a person under the age of 18 to enter or remain in the casino or participate in gaming in the casino.
59. It is open to the PCRC to regard section 22(1) of the CC Act as imposing an absolute prohibition on the GWC's capacity to declare as an authorised game any game played with poker machines and, consequentially, an absolute prohibition on the capacity of persons to play games on poker machines within a licensed casino or anywhere else in the State.
60. It is open to the PCRC to conclude that the prohibition was imposed for *some* protective purpose. However, it is not apparent from the statute itself whether the *specific* protective purpose was to remove the risk of problem gambling or social harm from playing games

on poker machines, or some other protective purpose, such as to remove the risk that the games played on such machines would be unfair to the player.

Extrinsic materials

61. In the course of the second reading debate for the Casino Control Bill 1984 a number of members made reference to poker machines, also variously described as one-armed bandits and pokies,³⁰ and expressed concern that in the absence of an express prohibition against poker machines they might ultimately be installed in the casino.³¹
62. These concerns were raised notwithstanding repeated references to a bipartisan consensus that poker machines should not be introduced into Western Australia.³² In the course of the debate, the basis of that bipartisan consensus was explained by reference to a concern that 'Eastern States experience had shown they could become addictive'.³³ The debate also suggested that members understood that poker machines were designed to guarantee losses over time, with reference being made to prior reports which had concluded there was no doubt that poker machines would provide substantial revenues.³⁴
63. As mentioned earlier, the prohibition on the approval of poker machines did not appear in the Casino Control Bill 1984 or section 22(1)(a) of the CC Act as enacted. An attempt to amend the Bill, to require that rules or directions relating to machines 'commonly known as poker machines' be laid before each house of Parliament, failed.³⁵ Amending legislation introduced a few months later and which included the prohibition of poker machines, was passed without any substantive debate as to the nature of poker machines, or why it was appropriate that they be prohibited.
64. The 1974 Report noted submissions that poker machines, through the sophisticated use of 'intermittent reinforcement' (offering rewards or wins in such a way as to most effectively encourage a player to continue trying to win even when they were suffering considerable loss), were claimed to be addictive to certain individuals and that treatment of such addiction was generally unsuccessful.³⁶ There was also a general recognition that losses while playing poker machines were inevitable. This was the basis on which it was suggested

³⁰ Western Australia, Parliamentary Debates, Legislative Council, 9 May 1984, 8091 (Hon HW Gayfer, Member for Central), 8105 (Hon N Oliver, Member for West), 8108 (Hon GC MacKinnon, Member for South-West) [PUB.0016.0013.0277].

³¹ Western Australia, Parliamentary Debates, Legislative Council, 9 May 1984, 8091 – 8092 (Hon HW Gayfer, Member for Central), 8094, 8097 (Hon GE Masters, Member for West), 8105 (Hon N Oliver, Member for West) [PUB.0016.0013.0277]; Western Australia, Parliamentary Debates, Legislative Council, 15 May 1984, 8364 (Hon GC MacKinnon, Member for South-West) [PUB.0016.0013.0258]; Western Australia, Parliamentary Debates, Legislative Assembly, 29 May 1984, 8603, 8606 – 8608, 8636 (Mr Hassell, Leader of the Opposition), 8623 (Mr Watt, Member for Albany) [PUB.0016.0014.0001].

³² Western Australia, Parliamentary Debates, Legislative Assembly, 8 May 1984, 8016 – 8017 (Mr Parker) [PUB.0016.0013.0237]; Western Australia, Parliamentary Debates, Legislative Council, 10 May 1984, 8243 (Hon DK Dans, Leader of the House) [PUB.0016.0013.0243]; Western Australia, Parliamentary Debates, Legislative Assembly, 29 May 1984, 8606, 8607 (Mr Hassell, Leader of the Opposition), 8606, 8636 (Mr Parker, Minister for Minerals and Energy) [PUB.0016.0014.0001].

³³ Western Australia, Parliamentary Debates, Legislative Assembly, 29 May 1984, 8608 (Mr Hassell, Leader of the Opposition), 8620 (Mr Coyne, Member for Murchison-Eyre), 8623 (Mr Watt, Member for Albany), 8636 (Mr Parker, Minister for Minerals and Energy) [PUB.0016.0014.0001].

³⁴ Western Australia, Parliamentary Debates, Legislative Council, 9 May 1984, 8091, 8092 (Hon HW Gayfer, Member for Central) [PUB.0016.0013.0277].

³⁵ Western Australia, Parliamentary Debates, Legislative Council, 10 May 1984, 8240 [PUB.0016.0013.0243].

³⁶ Western Australia, Royal Commission into Gambling, report (1974) [PUB.0004.0002.0320] 28.

that poker machines might provide fundraising for clubs in which they were installed, or State revenue by way of taxes.³⁷

65. The 1974 Report recommended against the legalisation of poker machines in Western Australia. The authors explained the basis of that recommendation by reference to the addictive and anti-social features of poker machines:³⁸

[P]oker machine playing is a mindless, repetitive and insidious form of gambling which has many undesirable features. It requires no thought, no skill or social contact. The odds are never about winning. Watching people playing the machines over long periods of time, the impressionistic evidence at least is that they are addictive to many people. Historically poker machines have been banned from Western Australia and we consider that, in the public interest, they should stay banned.

66. The Gaming Inquiry Committee made the same recommendation in 1983.³⁹ The Chair's individual report referred in detail to the reasoning of a 1974 Report as explaining this recommendation.⁴⁰ The Chair also noted that there was 'no doubt' that the revenue benefits from poker machines were substantial,⁴¹ thus apparently recognising that losses were inevitable over time when playing on poker machines.

QUESTIONS

- 7. IS THERE ANY NEED OR ABILITY TO RESORT TO EXTRINSIC MATERIALS TO CONSTRUE THE MEANING OF 'POKER MACHINE' FOR THE PURPOSES OF THE CC ACT?**
- 8. IF SO, DO THE EXTRINSIC MATERIALS AND LEGISLATIVE HISTORY INDICATE THAT THE MISCHIEF TOWARDS WHICH THE PROHIBITION IN SECTION 22(1) OF THE CC ACT IS DIRECTED IS GAMING MACHINES WITH FEATURES THAT ARE SOCIALLY UNDESIRABLE, INCLUDING THAT THEY POSE A REAL RISK OF ADDICTION AND THAT THEY MAY RESULT IN SIGNIFICANT LOSSES OVER TIME?**

Consideration

67. Modern dictionary definitions of the term poker machine that include a feature of a combination of symbols displayed on reels or wheels and the use of levers (i.e. the Macquarie and Oxford English definitions) would appear to reference machines that were common before the introduction of electromechanical and video gaming machines. Exclusive reliance upon those dictionary definitions may not be appropriate where

³⁷ Western Australia, Royal Commission into Gambling report (1974) [PUB.0004.0002.0320] 44, 72 – 73, 75 – 76, 121.

³⁸ Western Australia, Royal Commission into Gambling, report (1974) [PUB.0004.0002.0320] 76 – 77.

³⁹ Government Casino Advisory Committee, Reports of Chairman and Members to the Cabinet Sub Committee (1983) [PUB.0004.0002.0010] 6.

⁴⁰ Government Casino Advisory Committee, Reports of Chairman and Members to the Cabinet Sub Committee (1983) [PUB.0004.0002.0010] 31.

⁴¹ Government Casino Advisory Committee, Reports of Chairman and Members to the Cabinet Sub Committee (1983) [PUB.0004.0002.0010] 30.

section 85(1)(a) of the GWC Act appears to expressly contemplate that a video machine may be a gaming machine that is a poker machine or in the nature of or similar to a poker machine.

68. Professor Rockloff gave evidence to the PCRC about the structural characteristics of electronic gaming machines that are relatively more harmful than other characteristics. He does not identify the use of a mechanical or simulated reel or wheel to display a combination of symbols as a relatively more harmful characteristic.⁴²

QUESTIONS

9. IF A PURPOSE OF THE PROHIBITION OF POKER MACHINES IS TO PREVENT HARMS THAT MIGHT RESULT FROM THEIR USE, SUCH AS ADDICTION AND SIGNIFICANT LOSSES, WOULD LIMITING THE MEANING TO MACHINES THAT USE MECHANICAL OR SIMULATED REELS OR WHEELS BE A SUFFICIENTLY BENEFICIAL CONSTRUCTION TO ACHIEVE THAT PURPOSE?

10. IS A POSSIBLE CONSTRUCTION OF THE TERM 'POKER MACHINE' FOR THE PURPOSES OF SECTION 22(1)(A) OF THE CC ACT THAT A POKER MACHINE IS:

A FREE-STANDING DEVICE AT WHICH A PLAYER STANDS OR SITS, WHICH IS USED EXCLUSIVELY FOR THE PLAYING OF GAMES OF CHANCE AND WHICH HAS THESE FEATURES:

- a. **A PLAYER PAYS (EXCEPT WHERE THEY HAVE AN OPPORTUNITY TO PLAY WITHOUT PAYMENT AS THE RESULT OF HAVING PREVIOUSLY PLAYED SUCCESSFULLY) TO PLAY;**
 - i. **BY INSERTING MONEY, OR MONEY'S WORTH IN THE FORM OF A TOKEN; OR**
 - ii. **IN SOME OTHER WAY;**
- b. **THERE IS NO PLAYER INTERACTION THAT CAN AFFECT THE OUTCOME OF A GAME ONCE THE GAME HAS COMMENCED;**
- c. **A SCORE OR WIN IN RESPECT OF THE GAME IS DERIVED FROM A COMBINATION OF SYMBOLS DISPLAYED BY THE MACHINE; AND**
- d. **THE MACHINE PAYS OUT MONEY, OR MONEY'S WORTH IN THE FORM OF A TOKEN, OR IN SOME OTHER FORM, POTENTIALLY IN EXCESS OF THE AMOUNT PAID TO COMMENCE A GAME, FOR A 'WIN' I.E. IF A PARTICULAR COMBINATION OF SYMBOLS IS DISPLAYED BY THE MACHINE.**

⁴² M Rockloff, N Hing, M Browne, A Russell, H Thorne, P Newall, T Vistin, 'Gambling Harm and Harm Minimisation in Western Australia', expert report (October 2021) [PCRC.0100.0001.0001] 20.

EGMs at the Perth Casino

69. The GWC has adopted the Australian/New Zealand Gaming Machine National Standard 2016 (**Standard**)⁴³ and requires that EGMs at the Perth Casino be compliant with that standard.
70. Additionally, the GWC has promulgated a WA Appendix to the Standard (**WA Appendix**),⁴⁴ and an EGM policy (**EGM Policy**),⁴⁵ to assist it in distinguishing between those EGMs which are poker machines and those which are not. Matters to which the WA Appendix and EGM Policy have regard include whether an EGM makes use of a spinning reel display; its speed of play; whether the player must choose a play strategy and whether the EGM has a separate start button to commence game play.
71. Read as a whole, the Standard may indicate that an electronic gaming machine that is subject to the Standard shares the same features relevant to the possible construction of the term 'poker machine' (for the purposes of section 22(1)(a) of the CC Act) identified for consideration at question 10 above. In particular, a score or win in respect of a game played on an electronic gaming machine is derived from the combination of symbols displayed by the machine,⁴⁶ and a game may, but need not, simulate or involve spinning reels or wheels.⁴⁷
72. It does not appear to be disputed by the Perth Casino that, at least since the GWC's 2019 amendments to the WA Appendix, and EGM policy, the Perth Casino can and does offer EGMs with the same internal operation and functionality as poker machines in the Eastern States.⁴⁸ Both rely on random number generators to determine game outcomes.
73. Even before the 2019 amendments, the operation of EGMs at the Perth Casino was similar to the operation of poker machines in other jurisdictions: all such machines conform to the Standard.⁴⁹ Clause 8.5 of the Standard requires that game outcomes be generated by the use of a random number generator.

⁴³ Australian/New Zealand Gaming Machine National Standard 2016 [GWC.0001.0007.0185]. The latest version of the standard appears to be Revision 11.1, which on its face is scheduled to come into force in February 2022: Queensland Government, 'A/NZ Gaming Machine National Standards' [PUB.0033.0002.0001]. However, the PCRC is not aware of the GWC having adopted that version. By contrast, the GWC adopted the 2016 version of the Standard in September 2016: GWC, agenda papers (27 September 2016 meeting) [GWC.0002.0016.0186] 49; GWC, minutes (27 September 2021 meeting) ([GWC.0002.0016.0191] 3).

⁴⁴ Western Australian Appendix to the Australian/New Zealand Gaming Machine National Standard (2019) [GWC.0001.0013.0066].

⁴⁵ GWC, Policy: Electronic Gaming Machines (2019) [DLG.8001.0051.5278].

⁴⁶ See, for example, Australian/New Zealand Gaming Machine National Standard 2016 cl 5.36 – 5.37 [GWC.0001.0007.0185]

⁴⁷ See, for example, Australian/New Zealand Gaming Machine National Standard 2016 cl 4.40 [GWC.0001.0007.0185].

⁴⁸ Sullivan, transcript [TRA.0001.0001.0001] 2303.

⁴⁹ Other States and Territories require compliance with the National Standard, generally as modified by a local Appendix: Victorian Commission for Gambling and Liquor Regulation, Victorian Appendix to the Australian/New Zealand Gaming Machine National Standard [PUB.0018.0002.0001]; NSW, New South Wales Appendix to the Australian/New Zealand Gaming Machine National Standard 2016 [PUB.0018.0002.0021]; Queensland Government, Gaming technical services [PUB.0018.0002.0033]; Tasmanian Liquor and Gaming Commission, Australian and New Zealand Gaming Machine National Standard - Tasmanian Appendix [PUB.0018.0002.0038]; South Australia, South Australian Appendix to the Australian/New Zealand Gaming Machine National Standard 2016 [PUB.0018.0002.0046]; Northern Territory Government, Northern Territory Gaming Equipment Approval Process & Appendix to the Australian/New Zealand Gaming Machine National Standards [PUB.0018.0002.0057].

74. Because the EGMs at the Perth Casino have the same or similar functionality as compared to poker machines it is open to the PCRC to infer they also make use of the same intermittent reinforcement of variable ratio reinforcement schedules.⁵⁰ Accordingly, it might be that EGM games at the Perth Casino could be expected to be equally as compelling to players, and therefore potentially addictive, as games played with poker machines.
75. Rockloff indicates that there appears to be ‘no difference between WA and the rest of Australia in terms of the relationship between playing EGMs and problems *amongst those who play them*. That is, there appears to be no evidence that the EGMs in WA are safer based on the machines themselves’.⁵¹
76. In effect, it may be that the only operative difference between these EGMs and poker machines in the Eastern States is that the latter display game results via a representation of spinning reels and the former do not. While the WA Appendix and EGM Policy require that the players must interact to choose a strategy and then press a separate start button to commence a game,⁵² games in the Eastern States also require the selection of a strategy and then striking a button to commence all subsequent games.⁵³ While EGMs could not make use of multi-line and multi-directional betting in Western Australia prior to 2019, those features are now permitted. On the basis of the consideration of the statutory meaning of the term ‘poker machine’ above, the absence of virtual reels may not determine whether or not an EGM that complies with the WA Appendix and the EGM Policy is a poker machine.
77. If the construction of the term poker machine identified in question 10 above is the proper construction, it is open for the PCRC to find that an EGM that meets the requirements of the WA Appendix is a ‘poker machine’ within the meaning of section 22(1)(a) of the CC Act.
78. On the basis of this discussion there may be a tension between the WA Appendix and EGM Policy on the one hand, and the concept of a poker machine understood in accordance with dictionary definitions and ordinary usage as discussed in [24]-[25] and [29]-[32], or the possible statutory construction identified in question 10, on the other. The tension should be addressed.

QUESTIONS

11. ARE THE MATTERS TO WHICH THE WA APPENDIX AND EGM POLICY HAVE REGARD RELEVANT TO THE CONSTRUCTION OF THE TERM ‘POKER MACHINE’ IN SECTION 22(1)(A) OF THE CC ACT?

⁵⁰ Sullivan, transcript [TRA.0001.0001.0001] 2220.

⁵¹ M Rockloff, N Hing, M Browne, A Russell, H Thorne, P Newall, T Vistin, ‘Gambling Harm and Harm Minimisation in Western Australia’, expert report (October 2021) [PCRC.0100.0001.0001] 12, 35.

⁵² Western Australian Appendix to the Australian/New Zealand Gaming Machine National Standard (2019) [GWC.0001.0013.0066] 6.

⁵³ Sullivan, transcript [TRA.0001.0001.0001] 2272.

- 12. IF THE CONSTRUCTION OF THE TERM POKER MACHINE IDENTIFIED IN QUESTION 10 ABOVE IS THE PROPER CONSTRUCTION, IS AN EGM THAT MEETS THE REQUIREMENTS OF THE WA APPENDIX A 'POKER MACHINE' WITHIN THE MEANING OF SECTION 22(1)(A) OF THE CC ACT?**
- 13. IF SO, COULD THE WA APPENDIX AND THE EGM POLICY BE AMENDED TO ACCOMMODATE THAT CONSTRUCTION, SO AS TO ENSURE THAT EGMS APPROVED FOR USE AT THE PERTH CASINO ARE NOT POKER MACHINES? IF SO, HOW?**

Consequential issues

79. One issue that arises from the observations set out in this paper is whether the meaning of poker machine in the CC Act is sufficiently clear and certain.
80. It may be accepted that a legislative prohibition must be expressed with clarity so that those to whom the legislation applies may understand readily what they may and may not do. In that context, it may be relevant to consider whether the term poker machine should be expressly defined in the CC Act. Alternatively, there may be a question as to whether that term retains linguistic currency or has become outmoded as a matter of ordinary usage, such that the intended scope and content of the statutory prohibition would be better expressed by reference to different criteria.
81. If the PCRC were to ultimately conclude that some or all of the EGMs at Perth Casino meet the description of a 'poker machine' under the CC Act, then a corollary to that conclusion would be that the WA Appendix and the EGM Policy have not been effective in allowing the regulator and licensee to distinguish EGMs at Perth Casino from poker machines within the meaning of the CC Act.
82. If the EGMs at Perth Casino are not 'poker machines' under the CC Act, there is nevertheless a question about the clarity of the guidance given to the GWC as to the criteria to be applied in the regulation of those EGMs and the adequacy of the GWC's regulation of the machines to minimise the risk of gambling-related harm. In this regard, it may be appropriate for consideration to be given to regulation of structural features of EGMs which have been identified as potentially causative of gambling-related harm.

QUESTIONS

- 14. SHOULD THE TERM 'POKER MACHINE' BE EXPRESSLY DEFINED IN THE CC ACT? IF SO, HOW?**
- 15. ALTERNATIVELY, SHOULD THE MACHINES OR GAMES PRESENTLY INTENDED TO BE PROHIBITED BY REFERENCE TO THE TERM 'POKER MACHINE' IN THE CC ACT BE IDENTIFIED IN THAT STATUTE BY REFERENCE TO DIFFERENT CRITERIA? IF SO, WHAT?**
- 16. FURTHER, SHOULD THE CC ACT OR GWC ACT SEEK TO REGULATE STRUCTURAL FEATURES OF EGMS IN ORDER TO SEEK TO MINIMISE GAMBLING-RELATED HARM? ALTERNATIVELY, SHOULD SUCH**

**FEATURES BE SUBJECT TO REGULATION OR GUIDANCE VIA THE WA APPENDIX AND EGM POLICY?
IF SO, WHAT SUCH FEATURES MIGHT APPROPRIATELY BE THE SUBJECT OF REGULATION?**