ROYAL COMMISSION TO INQUIRE INTO AND REPORT ON THE AFFAIRS ON THE CROWN CASINO PERTH AND RELATED MATTERS

SUBMISSION

EMERITUS PROFESSOR ARIE FREIBERG AM

Background

Arie Freiberg is an Emeritus Professor at Monash University. He was Dean of the Faculty Law at Monash University between 2004 and 2012. Before this, he was Dean of the Faculty of Arts at the University of Melbourne in 2003. He was appointed to the Foundation Chair of Criminology at the University of Melbourne in January 1991 where he served as Head of the Department of Criminology between January 1992 and June 2002. In 2013 he was appointed an Emeritus Professor of the University.

He graduated from the University of Melbourne with an Honours degree in Law and a Diploma in Criminology in 1972 and holds a Master of Laws degree from Monash University. He was awarded the degree of Doctor of Laws by the University of Melbourne in 2001 and is a fellow of the Academy of Social Sciences in Australia, the Australian Academy of Law and holds an Adjunct Faculty appointment in the Australia and New Zealand School of Government. He is also an Adjunct Professor in the Zelman Cowen Centre, Victoria University.

Between 2017 and June 2018 was a member of the Interim Advisory Board of the Victorian Environment Protection Authority. In 2020 he was appointed to the Agency Management Committee of the Australian Health Practitioner Regulation Agency and in 2021 he was appointed as a member of the Future Trends Advisory Committee of Energy Safe Victoria. He has provided training and consultancy services to a number of regulatory agencies.

INTRODUCTION

The Royal Commission has been asked to inquire into and report on a number of matters including 'the adequacy of the existing regulatory framework in relation to casinos and casino gaming in Western Australia.'

Term of Reference 11 refers to 'matters which might enhance the regulatory framework and the Gaming and Wagering Commission's and Department's future capability and effectiveness in addressing any of the matters identified above, including any policy, legislative, administrative or structural reforms or changes, including additional regulatory controls.'

This submission addresses these matters in a general fashion. It responds to some of the issues raised in the PCRC Interim Report and refers to a number of observations and findings of the Bergin Report[1] and the Finkelstein Report.[2] It will not discuss specific issues relating to

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1 The report of the Inquiry by the Honourable PA Bergin SC under section 143 of the *Casino Control Act 1992* (NSW).

2 Royal Commission into the Casino Operator and Licence, Victoria, October 2021.

the appropriateness, capability and effectiveness of the Gaming and Wagering Commission of Western Australia.

THE REGULATORY FRAMEWORK

The PCRC Interim Report construes the relevant 'regulatory framework' to mean 'the collection of Acts and Regulations that together regulate casinos and casino gaming in Western Australia' (p. 21). In my view, the 'regulatory framework' needs to be understood as also encompassing the bodies that regulate gaming and wagering as the law cannot be understood separately from its administration. Although legislation provides the framework for regulation, effective regulation depends upon how the various legislative instruments are interpreted and applied. It seems clear from both the Bergin and Finkelstein reports that the major regulatory failures lay not in the inadequacy of the legislation,[3] though that was a factor in some instances, but in the manner in which it was enforced or, more accurately, not enforced.

The histories of the regulatory regimes in New South Wales, Victoria and Western Australia, as set out in the respective reports, reveal a preference over the years to move from specialised and focused regulators to more generic or hybrid models in the name of efficiency, reducing red tape and costs and ensuring consistency between gaming regulators (Bergin, Appendix, p 642).

The Interim Report notes that the original Western Australian model recommended by the 1984 Gaming Inquiry Committee was for an independent, autonomous regulator with the capacity to deal with gaming, a body with specialised skills and knowledge, though this was not fully adopted (PCRC Interim Report, pp 38-9).

Similarly, the Bergin Report noted that the original regulatory authority in New South Wales was intended as a standalone independent regulator which was independent from political and industry pressures and with a structure that maintained its organisational and personal integrity (Bergin p. 32). The Casino Control Authority was abolished in 2008.

In Victoria the long history of casino regulation which culminated in the merger of an independent regulator into the generalist regulator, the Victorian Commission for Gambling and Liquor Regulation is detailed in the Finkelstein Report (Chapter 2)

Following the tabling of the Finkelstein Report the Victorian government announced a review to 'to investigate the structural and governance issues relevant to casino regulation in that State and the role of the casino regulator'. This would appear to be an implicit criticism of the VCGLR, but I note that the Finkelstein Commission was not provided with a term of reference to inquire into the effectiveness of the VCGLR as a regulator.

I note that Recommendation 2 of the Bergin Inquiry is that an

> Independent Casino Commission (ICC) be established by separate legislation as an independent, dedicated, stand-alone, specialist casino regulator with the necessary framework to meet the extant and emerging risks for gaming and casinos.

[3] However, the Finkelstein Report did note that the regulator's powers in Victoria were not completely adequate.

In the light of evident failings of the current regulatory framework in Victoria and New South Wales, and subject to any findings of this Royal Commission, I generally endorse Model 3 in the PCRC Discussion Paper at p. 14, namely a Stand-alone casino regulator.

THE LEGISLATIVE FRAMEWORK

As the Interim Report and Discussion Paper note, the legislative framework for regulating casinos and casino gaming in Western Australia is complex, with a mix of primary and secondary legislation. Both the *Casino Control Act 1984* (CC Act) and the *Gaming and Wagering Commission Act 1987* (GWC Act) may no longer be fit for purpose and may require re-drafting, updating or consolidation.

As noted above, good legislation alone does not of itself, guarantee good regulation, and the best drafted laws will fail to achieve their objectives, whatever they be, if those charged with their administration, and those subject to those laws, fail to adequately enforce it or respect either the spirit or letter of the laws. Most legislation relating to casinos and gaming contain extensive powers to regulate activities, to enforce the law and impose sanctions, either administrative, civil or criminal.

The Discussion Paper focuses upon two major issues: the need for an objects clause and the regulatory approach that the legislation should adopt.

Objects clauses

The Interim Report (p 31) observes that the legislation does not contain an express statement of regulatory objectives and philosophy for casino regulation.

Carefully drafted objects clauses can contribute to better regulation through increased clarity, improved transparency and accountability to stakeholders. They are now commonly used in Australian legislation and can assist courts (and regulators) to interpret provisions in the Act in cases of ambiguity.

Both the NSW and Victoria Acts contain objects or purposes section. It appears that in neither case that the existence of these provisions assisted or influenced the regulators or the regulated.

Broadly stated objects sections often contain conflicting purposes. For example, Section 1 of the *Casino Control Act 1991* (Vic) states that the purposes are to establish a system for the licensing, supervision and control of casinos **and** to promote tourism, employment and economic development generally in the State. Concentration on the latter may conflict with the former where lax compliance and enforcement are condoned in the name of promoting visitors to the state through such means as junkets or other programs to increase visitations and gambling.

I note that s 4A of the Casino Control Act (NSW) does not mention tourism, employment and economic growth.

While an objects clause may be a useful, if possibly necessary, addition to the Act, it is not a sufficient condition to more effective legislation, as the Bergin Report noted (p. 621-2). There must be specific provisions in the Act which deal with the various risks that casinos are exposed to.

Regulatory approaches

It is generally true that in the regulatory context, recent years have seen changes in the forms of regulation from prescriptive regulation, to performance or outcome based, to process-based (or meta-regulation) to principle- based and general duties forms. The older forms of regulation, generally referred to as 'command and control' are seen to be too inflexible and inimical to innovation. More flexible forms such as performance-based or outcome-based regulation are premised on a degree of trust between the regulator and the duty holder. As Black has observed of principle-based regulation, it evoked 'images of outcome oriented, flexible regulators harbouring ethical standards in largely responsible corporations'[4], a situation that may not have pertained in NSW and Victoria.

The reality is that the most effective regulatory approaches require a combination of approaches and regulatory tools, including regulations, licences, registration, guidelines, codes of conduct[5] and others. The more general the requirement the greater the trust that is required in the duty holder by the regulator and where that trust has been eroded, more prescriptive requirements may be needed as well as more regulatory scrutiny and accountability.

The strengths and weaknesses of each of the approaches and their appropriateness for various industries have been discussed elsewhere[6] but the current fashion, or focus, is one of risk-based regulation together with elements of process-based or meta-regulation.

As the Bergin Report noted with regard to New South Wales, as a result of the Cohen report, there was 'a shift away from a prescriptive to a risk-based approach to regulation and a model of co-regulation between the Authority and the Department (p.40). The view was taken that a combination of internal controls and auditing of compliance was the preferred regulatory approach (p.43).

Most modern regulators describe themselves as 'risk-based', meaning that they have adopted an approach that involves the use of risk identification, assessment, measurement, mitigation and monitoring and the allocation of resources according to the assessment of risk. However, as the Victorian Auditor-General and the Productivity Commission have found, many regulators who claim to adopt such an approach did not use structured or formalised methods to implement it.[7]

The Bergin Report, referring to the evidence of Professor Rose, an expert in gaming regulation, noted his view that the casino industry should not be treated like any other industry: rather it was 'morally suspect', susceptible to put profit above the public interest and prone to non-compliance. Professor Rose was of the opinion that too much trust should not be placed in casino operators to share in the regulatory task (Bergin p 607).

Risk-based regulation in this context refers not only to the regulator's approach but that of the regulated party, in this case, the casino operators. Both inquiries found significant

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4 J. Black, *The Rise, Fall and Fate of Principles Based Regulation* <http://eprints.lse.ac.uk/32892/1/WPS2020-17 Black.pdf>

5 There is often extensive reliance on codes of conduct as regulatory tools in the modern regulatory environment, however, the Finkelstein Review of Crown noted the lack of effectiveness of the Code in relation to responsible gambling, a problematic concept in itself, see Chapter 2.

6 A. Freiberg, *Regulation in Australia*, pp 234-246.

7 Victorian Auditor-General's Office, (2015) Managing Regulator Performance in the Health Portfolio, p 13; Productivity Commission, (2013) *Regulator Engagement with Small Business*, p 277.

problems with Crown's risk management systems. The NSW failures are summarised in the Finkelstein Report at p 134.

In relation to Crown in Victoria, the Finkelstein Report noted the use of consultants to provide them advice on its risk management framework and the limitations of contracting out the assessment of risk management (p. 142). It noted that the documents 'comprising Crown's risk management framework remain replete with management speak' (p. 142), implying that there was only an ostensible commitment to risk management. The use of external consultants, by both regulators and the regulated suggests that both parties lacked the capacity to fulfil their obligations under the relevant legislation, which supports the argument that a 'an independent, autonomous regulator with the capacity to deal with gaming, a body with specialised skills and knowledge' is required. Professor Glyn Davis recently commented that there had been an erosion of skills and expertise within government departments and agencies and an over-reliance on consultants. He argued that the outsourcing of government work to private organisations has come at the expense of policy capability and coherence.[8]

Accordingly, in the light of the NSW and Victorian inquiries, one should be very cautious about adopting a pure risk-based approach which relies on external advice regarding risk management.

A NEW APPROACH

Western Australia's solution will lie in a new overarching Act and a new regulator using the full range of regulatory tools that are need to ensure that it can fulfil whatever objectives are articulated the legislation.

The approach recommended by the Bergin review has much to commend it, namely (pp 622-26):

- A specialist casino regulator established by 'separate legislation as an independent, dedicated, stand-alone, specialist casino regulator with the necessary framework to meet the extant and emerging risks for gaming and casinos';
- The regulator must 'have the powers of a standing Royal Commission comprised of Members who are suitably qualified to meet the complexities of casino regulation in the modern environment';
- The regulator 'must be independent from Government and all political influence and the perception thereof in exercising its powers and in its structure and funding. It must be able to make decisions that are always guided by the objects of the …. Act which might include decisions that are politically unpopular but essential for the protection of casinos from criminal infiltration';
- The regulator 'must … employ its own staff, and have the ability to terminate their employment when it is proper and necessary to do so'.

If this structure is adopted it is less likely that the regulator will be susceptible to regulatory capture, as discussed in the Interim Report (pp 73 & 89).

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[8] Glyn Davis, *APS Suffers from Command and Control' Dynamic and Outsourcing, Expert Says*, The Mandarin, 10 May 2021.

The Commission has sufficient information about best practice in gambling regulation. Leaving aside the question of the type and role of the regulator, I believe that it is important that new, consolidated legislation which provides extensive and comprehensive enforcement powers and sanctions on the regulator is the key to effective regulation, provided that the regulator has the staff, resources, skills and determination to meet its stated objectives, whatever they may be as a result of this inquiry. And until the regulator can trust the regulatee to comply with the law,[9] prescriptive rather than principle-based or risk-based regulation may be the required approach if the public interest is to be preserved.

[9] It is noteworthy that one of the most important recommendations of the Finkelstein review was the appointment of a Special Manager to oversee the affairs of the casino operator – a significant statement of lack of trust in Crown and its future operation.