Perth Casino Royal Commission
Discussion Paper on the Regulation of Poker Machines and EGMs
24 December 2021

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10 January 2022

I welcome the opportunity to make a submission in response to the Perth Casino Royal Commission (PCRC) Discussion Paper on the Regulations of Poker Machines and EGMs (the DP). I am Professor of Private Law and Commercial Regulation at the University of Western Australia Law School. This submission draws upon and, in some places, expands upon relevant portions of my submission of 29 November 2021 (the 29 November Submission) to the PCRC in response to its DP on the Regulatory Framework, dated 12 November 2021. As for the 29 November Submission, I acknowledge my debt to the collaborative work with Professor Jeannie Marie Paterson of Melbourne Law School pursuant to Australia Research Council DP180100932 and DP140100767 on Developing a Rational Law of Misleading Conduct. However, the views I express in this submission are mine alone. I have also drawn on my work conducted pursuant to ARC Future Fellowship project FT190100475, which addresses the rules governing corporate responsibility for commercial fraud.

In what follows, I include brief answers to the DP questions, followed by commentary and an extract of the relevant sections of the 29 November submission, for convenience of reference.

1. BRIEF ANSWERS TO DP QUESTIONS.

1. WHAT IS THE ORDINARY MEANING OF THE TERM POKER MACHINE? As explained in the Discussion and 29 November Submission, this will and should evolve over time. However, the DP demonstrates that it is entirely possible to have a sensible and workable understanding of the term 'poker machine' derived from common usage, including be reference to understandings contained in dictionaries. It is unnecessary and deleterious to include a formal definition, as explained in the Discussion below and 29 November Submission.

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? See Discussion on the proper and very limited role of definitions and statutory meaning. Dictionaries may evidence common understandings of terms that may properly inform construction of statutory terms, in preference to use of statutory definitions.

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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? Yes, see Discussion and 29 November Submission.

4. DOES THE TERM 'POKER MACHINE' WHEN USED IN SECTION 22(1)(a) OF THE CC ACT INCLUDE FRUIT MACHINES AND ROULETTE MACHINES? Yes, see in particular 29 November Submission.

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? Yes, see Discussion and 29 November Submission.

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? A distinction based on the presence or absence of a spinning wheel (or indeed, distinction between mechanical and electronic devices) is nonsensical and an example of highly formalistic reasoning: see Discussion and 29 November Submission. A distinction based on the interactivity of the game appears more plausible, if it means that the game closely resembles natural play: again, see Discussion. But I emphasise that, come what may, any such factor should not be a bright-line (or tick a box) rule. A principled, purposive approach must be taken. Illustrative factors may be contained in soft-law guidelines supplemented by appropriate objects and purposes clauses that enable (indeed require) a substantive, purposive approach to this question to be adopted: see Discussion and 29 November submission.

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? Normal approaches to statutory interpretation should apply. But it is preferable to have the legislative framework articulate the values and protective purposes of the statutes to govern its evolving operation than have to resort to extrinsic materials: see Discussion and 29 November submission.

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? Although I prefer not to have to rely on extrinsic materials, for the reasons discussed, I think it is clear that the socially highly undesirable nature of 'pokies' is the mischief standing behind their prohibition – and that this remains a key and widely supported approach. So, yes.

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? No, see Discussion and 29 November Submission.

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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.

This is a plausible definition for current purposes but, for the reasons given, should only be included as *illustrative* in soft-law guidelines, not as an exhaustive definition: see, see Discussion and 29 November submission.

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? The rotating barrel is entirely irrelevant – construction clearly should not depend upon the arrangement of kind of symbols triggered by the game. This is a distinction without difference and entirely reflective of a formalistic approach to the construction of the term 'poker machine'. As to the second, in theory, the more control a player has over choices that can affect the outcome, the more similar the machine potentially becomes to free play. However, it seems in practice that the strategic choices made by players in existing EGMs are extremely limited and really mean that the player has a choice of a number of slightly different poker machine games. This, too, is a distinction without a difference. A better approach is to remove these criteria and replace them with an inclusive (not exhaustive) guide in soft law form, along the lines of the criteria identified in question 10 (expanded if necessary by reference to such discussion as contained in the DP), and underpinned by a purposive, protective approach informed by the objectives and values articulated in the 29 November Submission.

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? Yes, subject to caveat above re not using this as a definition, rather than as broader guidance.

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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?
As explained, I suggest the use of the Question 10 approach (and, indeed, the PCRC DP itself more broadly) as part of soft-law guidelines rather than as a definition. Here, it must be recalled from the Bergin, RCCOL and PCRC hearings and inquiries that 'poker machines' are very well understood in common parlance and clearly embrace EGMs. The failure to date on the part of the GWC to apply that understanding reflects regulatory capture, rather than any uncertainty or conceptual ambiguity. What requires work is the overall regulatory regime, including the use of supporting legislative mechanisms, in particular objects and purposes clauses, to ensure that the casino operator, gaming industry more broadly, and crucially the regulator understand the values and hierarchy of considerations that should govern the interpretive and regulatory exercise. See Discussion and 29 November Submission.

14. SHOULD THE TERM 'POKER MACHINE' BE EXPRESSLY DEFINED IN THE CC ACT? IF SO, HOW? No: see Discussion and 29 November Submission.

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?

No, see Discussion and 29 November Submission.

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?

As observed in the Discussion and the 29 November Submission, there has been no serious question throughout all Bergin, RCCOL and PCRC inquiries that Crown's EGMs are, in substance, poker machines. Discussion of rolling barrels and the like before the PCRC cannot seriously be entertained as relevant and substantive distinctive features. In that context, the problem is not that the GWC lacks guidance. It can be given a copy of the PCRC's DP on the topic if it remains in doubt. The problem has been one of regulatory capture and corresponding (lack of) will to enforce the longstanding prohibition on poker machines. This problem must be addressed through the regulatory reforms the subject of the PCRC's earlier Discussion Paper. Here, the role of object and purpose clauses, a direction to the GWC to adopt a purposive approach to support and promote the protective purposes of the regime and a clear delineation of the hierarchy of values that it must observe should all assist.

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2. Discussion: Definition of 'poker machine'.

For the reasons articulated in the 29 November Submission (extracted below), I would urge that there be ***no*** attempt to provide a definition of poker machines in the relevant legislation. As there explained, definitions frequently are unhelpful and can be a source of significant difficulty: they can quickly become outdated, become subject to strategic 'literalist' interpretation in order to 'game' and avoid legal regulation, and may restrict without justification purposive approaches by courts and regulators that would enable the Act to evolve appropriately with advances in technology and (for example) medical and other specialist advice about the nature of harms produced from analogous or similar devices.

Further, as the DP itself well demonstrates, it is entirely possible and appropriate to develop nuanced understandings of the machines that are properly considered to be poker machines by reference to ordinary, everyday understandings (such as those evidenced in dictionaries). The DP could be relatively easily adapted for use in soft law guidelines for the benefit of the Casino operator and regulator alike.

On whether there is a need for a definition of 'poker machine', there is much to be said for the proposed 'leading principle' on the use of definitions in legislation recently proposed by the Australian Law Reform Commission in its Financial Services Regulation Interim Report A (Report 137, November 2021)('FSR Report') page 161, which states:

> **Principle:** In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.

Further, and second only in importance, is the following (FSR Report, page 172):

> **Principle:** To the extent practicable, words and phrases with an ordinary meaning ***should not be defined***. (Emphasis added.)

Throughout this discussion, the point to keep steadfastly in view is that there has been little – and probably no genuine – doubt on the part of any witness before the PCRC, or in any other inquiry into the Crown Casino group, that most if not all EGMs approved by the GWC over the years were clearly 'pokies'. The problem historically has not been one of conceptual or definitional uncertainty, but regulatory capture, leading not solely to a corresponding want of enforcement appetite, but positive desire to facilitate the expansion of EGM activity to promote Crown's financial position (and perhaps, incidentally, State taxation revenues).

It is possible and appropriate for there to be soft law guidelines that give non-exhaustive and non-binding illustrations of different varieties of pokies/EGM. It would be possible and appropriate to include in soft-law guidelines a version of Question 10's formulation as part of that guidance, as indicative factors that may be helpful in determining the nature of machines the subject of review. Frankly, the PCRC DP the subject of this submission gives excellent guidance, I would have thought, and

could easily be transferred into appropriate (non-exhaustive) format. The role of soft-law guidelines is discussed in my 29 November Submissions.

However, in my view, it is unnecessary and potentially unhelpful to provide an *exhaustive* definition such as that contained in Question 10. The one thing we know if that technology is advancing quickly and we may expect significant changes in the technological mechanisms contained in EGMs. For example, it is not fanciful to imagine that artificial intelligence and algorithmic advances may generate a new form of poker machine that 'remembers' clients (players) and adjusts the game to ensure maximum engagement with the machine, and to encourage clients to try related (more expensive or more addictive) games. That machine learning may be used to generate new games with new features that fall outside the letter, if not spirit, of the definition. Advanced machines may not be housed in stand-alone machines at which the customer stands or sits (as currently anticipated in Question 10), but through other devices, such as watches or glasses which the customer wears. The point is that we probably cannot fully anticipate how these machines or devices will evolve but what we do know is that they will continue to have the same innate capacity to cause very significant harm, including through addiction. It is important to leave enough wriggle room for a properly motivated and resourced regulator to draw on advances in medical understandings, sociological understandings and technical advice to reach devices that are within the spirit, if not the letter, of the law's prohibition.

In my view, the best defence against the unknown is to leave the definition out and focus, instead, on the legislative and other conditions (eg resourcing of the regulator) that will ensure that the casino operator understands what is demanded of a 'suitable' person in relation to gambling 'products' that are known to be particularly problematic, and an appropriately substantive and purposive approach is taken by the regulator to administering its responsibilities to police these forms of machine.

On these points, and as expressed in my 29 November Submissions, it would be highly appropriate to support clear understandings of the nature of the machines that are the subject of the prohibition by including appropriate purpose and objects clauses in the legislative frameworks as a whole. For example, it is possible to develop a clear statement of legislative purpose and expectations of good character required by the casino operator (here, I have suggested and explained the concepts of integrity, honesty, fairness, good judgement and prudence). The expectation should be that the Casino will not lobby (as it has done) the regulator to approve devices that are clearly poker machines to promote its financial position, at the expense of its customers. The expectation should be that these machines are not permitted unless they can be demonstrated, through appropriate, independent, rigorous and specialist evidence, to fall outside the concept of a poker machine (for example, by being an electronic machine that replicates interactive free gaming play and is properly vetted for bias, predatory machine learning practices and so on).

These values demanded of the casino operator should be supported, as mentioned above and discussed in the 29 November Submission, by making it clear to the regulator (through its enabling statute) that it should adopt a purposive and

substantive (not literalist or formalistic) approach to interpreting that core provision. I have also suggested in the 29 November Submission that there can and should legitimately be a hierarchy of values within the gaming industry itself, promoted through the regulatory regime, in which customer wellbeing (for example) is prioritised over profit. This is, of course, highly relevant to the question of what constitutes a poker machine, given past instances of the regulator approving the deployment of pokies to assist Crown's financial position.

In summary, if the view continues to be held that poker machines should be banned in Western Australia (a position that commands widespread and longstanding public support and has never formally been abandoned), then the solution is relative simple. Do not define 'poker machine' and combine the prohibition with a clear statement of the protective purpose of the prohibition throughout all relevant regulatory regimes. To the extent that other legislation or subsidiary instruments create potential exceptions to that prohibition, or otherwise conflict with or introduce ambiguity to the core prohibition (for example by allowing for taxation of revenue derived from poker machines), the legislation should be amended accordingly. The regulator should be given clear (and ranked) criteria through objects and principles clauses that enable – and require – it to apply a purposive approach to achieve the protective and other regulatory purposes of the legislative regime. Of course, the regulator must also be properly funded and independent, to ensure that it brings a proactive and rigorous enforcement culture to its role, which prioritises public and customer safety and wellbeing over Casino profit and State taxation revenue.

If, contrary to my submission, some poker machines are to be permitted, then the basis for any exception must be very clearly stated and justified, by reference to cogent and independent evidence. Currently, the major basis on which EGMs have been rolled out in numbers in the Perth Casino, with the approval of the regulator, has been financial (both for the benefit of the Casino and, potentially and incidentally, in terms of State taxation revenue). Very minor adjustments or conditions to that process of approval, to protect the vulnerable through speed or timing limitations and so-called responsible gambling procedures, have been notoriously unsuccessful in reducing related harms.

It would be possible, for example, to introduce bright-line time limitation periods along the lines suggested by the RCCOL by Commissioner Finkelstein. But Crown to date has shown little appetite or capacity to monitor and enforce limitations through its RSG policies (see 29 November Submission). Further, those RCCOL recommendations were, of course, made in the context of a longstanding tolerance and public acceptance of these machines, evidenced by their widespread deployment through pubs and clubs in Victoria. That public acceptance is not the case in Western Australia. It is unclear to me that arguments (made before the PCRC) that some limited tolerance of poker machines for use in the Perth Casino is better than a complete prohibition, on the grounds that it keeps vulnerable persons from gambling harms available through online outlets, is supported by appropriate evidence. For example, it is unclear to me that busloads of pensioners historically brought to Perth Crown to engage in bingo and EGM 'play,' would be equally able

and likely to find and engage in equivalent online gambling activities. If that is the case, it must be proven.

It is, by contrast, uncontested that the formal ban on poker machines is very widely supported Western Australians. The onus, surely, lies on Crown to demonstrate why that ban should be removed or restricted, on the basis of detailed and cogent expertise evidence and with the support of the Western Australian community.

Finally, if (as one suspects) the real reason for the vigorous attempts by Crown to retain its EGMs is that Crown's current business model is unstainable without revenue derived from poker machines, then one option is that it should revise its business model. As stated in my 29 November Submission, the economic case has not been made for overall community benefit from Crown's EGM activities, even taking into account correct payment of taxation revenue. The economic cost of longstanding and widespread harms to vulnerable customers, their families and communities is undoubtedly very significant. The social costs are great. It is up to Crown to demonstrate why those broader and significant harms should be permitted, to support its business model.

3. Extract from Bant's 29 November Submission:

…

1. Legislative design: rules- and principles-based regulation and the role of soft law guidelines

Professor Paterson and I have strongly advocated, in a series of publications relating to misleading conduct, that rules-based legislative design presents a number of risks for efficient and just regulation: see in particular E Bant and JM Paterson, 'Misleading Conduct before the Federal Court of Australia: Achievements and Challenges' in P Ridge and J Stellios (eds) *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, Leichhardt 2018) 165; J M Paterson and E Bant, 'Misrepresentation, Misleading Conduct and Statute through the Lens of Form and Substance' in A Robertson and J Goudkamp (eds) *Form and Substance in Private Law* (Hart Publishing, Oxford 2019) 401; E Bant and JM Paterson, 'Developing a Rational Law of Misleading Conduct' in J Eldridge, M Douglas and C Carr (eds), *Economic Torts and Economic Wrongs* (Hart Publishing, Oxford 2021) 275.

In my submission, these concerns operate to equal effect in the casino and broader gaming context. At its best, rules-based drafting is highly dependent upon excellent definitional and structural drafting choices (including, where appropriate, omitting definitions), undertaken with a clear sense of the targeted purpose of each specific provision and its bearing on related provisions, statutory schemes and frameworks, and broader regulatory factors. Once in place, these parameters are resistant to change and may, consequently, readily become outdated, inefficient and unjust. Rules-based regulation can leave courts (and regulators) with little interpretive wriggle-room to ameliorate any deficiencies in the statutory formulation, or to develop statutory jurisprudence and interpretations that allow the legislative scheme to evolve to meet changing circumstances (including legal and technological changes) within the spirit, but not necessarily the letter, of the specific law.

Nor does rules-based regulation necessarily promote greater certainty, compared to principles-based regulation. Much will depend on the clarity of drafting and interpretive approach taken to its application (a matter to which I return below). As a general observation, principles-based regulation encourages engagement with the substantive purpose of the law's intervention and enables those principles to connect to, inform and be informed by related norms and doctrines. By contrast, rules-based regulation can encourage formalistic reasoning on the part of not only those administering and enforcing the law, but those subject to its operation.

This not only can contribute to rigidity and uncertainty in the law. It can also encourage unhelpful forms of strategic behaviours, which rest on plausible, literal distinctions that ignore the substance of the law's concern. As Commissioner Finkelstein noted in the Victorian Report into Casino Operator and Licence (the Victorian Report) in Chapter 18, 62 [49]-[59], there are already too many examples of cases where legal advice relating to Crown's casino activities has focused on what may be arguable, rather than what is required in substance for honest, ethical, lawful and prudent conduct. Such strategic, legalistic reasoning is encouraged by rules-based formulations.

Of course, this tendency may be fortified when formalistic reasoning aligns with a corporate culture on the part of the regulated, which favours profit over compliance (see Victorian Report chapter 3, 99 [199], or a 'profit at any cost' culture (Victorian Report chapter 4, 142 [54]). This tendency may be further exacerbated by regulatory capture, which adopts, promotes or endorses aligned, formalistic reasoning. An example arguably is the proliferation of Electronic Gaming Machines (EGMs) in Western Australia, notwithstanding this state's ban on poker machines, or 'pokies'. This proliferation has proceeded on the formalistic interpretation that pokies are mechanical devices, whereas EGMs are electronic. No witness for Crown, nor for the WA regulator, the Gaming and Wagering Commission (GWC), could identify for the PCRC any difference in substance or function between pokies and EGMs. Many witnesses resorted to simplistic and meaningless distinctions, such as that pokies involve a rolling barrel (or 'spinning reel') of symbols, whereas EGMs involve flashing lights that use different symbols (see, eg, the evidence of Mr Sullivan, and Mr Ord). Of course, functionally and in terms of the harms they produce, pokies and EGMs are identical. Yet, these have been routinely approved for play by the WA regulator.

The truth is that EGMs are highly profitable to Crown and this profitability has come over a very long period and in plain sight of the consequences to vulnerable consumers of these products. That revenue stream has become even more important with the advent of the pandemic, which has restricted other sources of international and interstate patronage, and with the cessation of junket activities. It is telling that, when faced with the hypothetical scenarios that EGM should be banned as (in truth) pokies, or significantly limited, because of their innately harmful nature, senior Crown executive Lonnie Bossi stated that such a decision would lead to very significant job losses and reduction in community or charitable support activities, such as Telethon (transcript, 22 October 4.30pm). Consistently, there was also evidence that the GWC approved quicker (and thus more harmful) play on EGMs to assist Crown's bottom line (transcript of GWC chair Duncan Ord, 6 September 2021, 2.21 pm). This evidence illustrates the harmful convergence of formalistic and strategic approaches, in the pursuit of increased profit, coupled with regulatory capture, to undermine the effective and just regulation of gaming activities.

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Principles-based regulation can usefully be coupled with 'soft law' guidelines that show how these principles operate in different contexts. This combination may well provide a better means of satisfying demands certainty on the part of industry stakeholders than incorporating this sort of particularised guidance within the legislation itself, through highly articulated rules. For discussion and examples, see Bant E and JM Paterson, 'Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia' in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU epress 2017) 301, available for download at

https://protect-au.mimecast.com/s/2mpEBkUrXVMLfb?domain=press.anu.edu.au

and *Misleading Conduct before the Federal Court*, 181-85.

Finally, rules-based regulation sits alongside statutory carve-outs to general principles, and exceptionalism, as forms of legislative design that give rise to a serious risk of gaps in regulation, increased complexity and incoherence. This may foster regulatory arbitrage: see Royal Commission into Misconduct in the Banking, Insurance and Financial Services Industry' (Final Report, Commonwealth of Australia, 2019) 50-51 (FSRC Final Report); Bant and Paterson, *Developing a Rational Law of Misleading Conduct*. In the casino context, there is a risk, for example, that regulation of specific fields of nominated gaming activity will push unlawful or predatory behaviours into analogous but unnamed activity areas. These considerations may also be (albeit incidentally) relevant to whether a revised legislative framework should be solely focussed on casino activities, excluding wagering. Such a reform risks losing opportunities for coherent regulation of related activities, and fostering regulatory arbitrage.

In conclusion, the purpose of this part of the submission is not to say that there is not a place for bright-line rules in some instances. In the fields of consumer law, for example, some products, or trade practices, may simply be banned as unacceptably unsafe or harmful. A similar approach could (and has been) adopted for unsafe gambling products. 'Pokies' spring to mind. However, as the foregoing discussion hopefully demonstrates, the certainty promised by bright-line rules may prove illusory unless they are well-targeted and designed to meet the particular challenges of the statutory, broader legal and industry environment to which they will apply. It is also possible that even rules-based regulations can be interpreted and applied purposefully, with an eye to the substantive concerns of the law. This substantive (over formalistic) approach may be assisted by adoption of clear objects and principles clauses, which make clear the intended overall purpose of the legislative scheme and, hence, more specific provisions. I now turn to consider these next.

Objects and principles clauses.

One of the questions raised in the DP is whether the regulatory legislation should contain an objects clause and/or a principles clause. In considering these questions, and in addition to those examples given in the DP, I note that the financial services space again offers potentially valuable insights. Thus the objects clause for Chapter 7 of the *Corporations Act* includes objectives of 'fairness, honesty and professionalism by those

who provide financial services' (s760A(b)). This ties in to the financial services licensing obligation under s912 A to provide services 'efficiently, honestly and fairly'. While these address financial service providers, further objectives under s760A(d) relate to 'fair, orderly and transparent markets for financial products'. That is, there are objects clauses for both regulated actors, and for the industry in which they operate. The ASIC Act then provides purpose clauses for the regulator:

> (2) In performing its functions and exercising its powers, ASIC must strive to:
>
> (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
>
> (b) promote the confident and informed participation of investors and consumers in the financial system; and
>
> (d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
>
> (e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
>
> (f) ensure that information is available as soon as practicable for access by the public; and
>
> (g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

One may question how well these objects align one with the other. However, for the purposes of considering the PCRC DP, they suggest it may be helpful, similarly, to consider object and principle clauses for each of (1) the casino licensee; (2) the gaming and wagering sector(s) and (3) the regulator.

In considering what kinds of objects and principles might be incorporated, relating to the casino licensee, into a new regulatory scheme, Commissioner Hayne's six basic principles of commercial law (FSRC Final Report, 9) bear repetition:

1. Obey the law;
2. Do not mislead or deceive;
3. Act fairly;
4. Provide services that are fit for purpose;
5. Deliver services with reasonable care and skill; and
6. When acting for another, act in the best interests of that other.

I observe that these reflect norms found across common law, equity and statute. Thus, as explained by Professor Paterson and I in a range of publications (see above and generally at https://unravellingcorporatefraud.com/publications-drlmc/ , in particular Chapter 1 of our edited collection on *Misleading Silence* (Hart Publishing, 2021)) the norm against misleading conduct underpins the common law torts of deceit, negligent misrepresentation, injurious falsehood, passing off, defamation and rescission for fraudulent misrepresentation, while in equity, the doctrines of estoppel, rescission for misrepresentation, unilateral mistake and breach of fiduciary duty also respond to circumstances of misleading conduct. Beyond the many and various statutory proscriptions of misleading conduct, there lie long-standing statutory regimes concerned

with protecting intellectual property rights, such as copyright and trademarks, which routinely operate in circumstances involving misleading conduct.

Commissioner Hayne's enumerated principle of 'fairness' might be considered unduly broad. However, more particular instantiations of it include the longstanding and important equitable doctrine of unconscionable conduct, as well as the widespread statutory prohibitions on unconscionable conduct. These sorts of prohibitions can and should be just as pertinent to Crown's operations, as obligations not to mislead or deceive and to obey the law. Indeed, casino operations might justly be considered to be a primary area in which predatory practices might develop: see, for example, Victorian Report, Chapter 8, 42, [212]-[218].

In the Victorian Report, Commissioner Finkelstein appears to have drawn on the Hayne principles in formulating a helpful outline of what constitutes a good corporate culture in the casino context, which may be relevant to the PCRC's deliberations. In Chapter 4, p125 [65], the Commission states:

> A good culture aims to create an environment that:
>
> • ensures adherence to basic norms of behaviour, including a requirement to obey the law, not to mislead or deceive, and to act fairly
>
> • reinforces judicious decision making that takes into account the interests of multiplestakeholders.

Consistently with the analysis of 'fairness' above, Commissioner Finkelstein further adumbrated (Chapter 4, 127 [84]) the features of a good corporate culture for Crown as including to:

- not exploit people who come to the casino to gamble
- take active measures to minimise the harm caused by gambling.

Taken together with Hayne's core principles, and with the broader spead of core norms found at common law, in equity and under statute (see again, *Misleading Silence* Chapter 1), these usefully suggest what might characterise positive indicia of a 'suitable person' to hold a casino licence: namely integrity, honesty, fairness, good judgement and prudence. What these mean need not be set out in the legislation itself, but could be the subject of (non-binding) discussion in guidance issued by the regulator, and developed further by courts in due course. I note that the standards of honesty and unconscionability (the latter relevant to 'fairness') insofar as they related to corporate systems of conduct, policies and practices, are examined at length in Bant and Paterson, 'Modelling Corporate States of Mind through Systems Intentionality' in Elise Bant (ed), The Culpable Corporate Mind (Hart Publishing, 2022/2023 (forthcoming)), a copy of which has been provided earlier to the PCRC.

Addressing these indicial in turn, in my submission, 'Integrity' would encompass the principle to 'obey the law', but could also capture the concept of acting ethically and in accordance with the operator's social licence. These have been accepted in all casino inquiries to date as core to Crown's suitability to hold its licence.

Honesty would include the principle not to mislead or deceive, but also the expectation of candour in dealing with the regulator for example – again, a point reiterated many times in the PCRC hearings and in the Bergin and Victorian inquiries.

In my view, in the casino context, 'fairness' may properly go beyond not acting unconscionably (exploiting people), or taking active measures to minimise harm. It could

properly encompass taking active measures to provide safe services and products, or, indeed, to promote the overall wellbeing of users of its products and services. Casting the norm in positive terms would require Crown to substantiate, 'live' and be adjudged by its professed corporate values to 'provide exceptional experiences with respect and care for our communities'. This broader expectation could be reinforced through appropriate sector- and regulator- orientated objectives (discussed very briefly below).

On the last two positive indicia of a 'suitable person', I consider good judgement, (Commissioner Finkelstein's judicious decision-making), should embrace evidence-based decision-making that incorporates relevant expert research, appropriate to promote responsible behaviour. I observe that some of Crown's reform agenda displays the antithesis of good judgement understood in this way. An example is Crown's responsible service of gaming policies and systems, relating to the proposed 12-hour limit, discussed (for example) in the transcript of Mr Steve Blackburn, 17 November 2021, 2.58 pm. It seems that these were predicated on no more than gut feel, with a careful eye to ongoing profit and a wholly inadequate assessment (or investigation) of the risk to vulnerable patrons. This want of good judgement is striking in a casino giant with longstanding experience.

In terms of 'prudence', I suggest this should be considered as identifying a more appropriate and demanding standard of skill and care for a casino setting, consistent with the precautionary principle, than a standard of 'reasonable' skill and care. As Crown's executives have repeatedly acknowledged, the position of (sole) casino operator in Western Australia is one of particular privilege and responsibility. Given the manifest benefits to Crown, and manifest harms to vulnerable patrons, that may be generated through its activities, a standard of 'prudent' skill and care seems apposite.

The suitable person would then be expected to embed and manifest these values throughout its adopted and operated systems of conduct, policies and practices, for reasons that I explained in my earlier submissions, and consistently with Commissioner Finkelstein's observations on culture in Chapter 4, 124 [62] and Chapter 18, 58-59 [18]-[25].

Turning to possible objectives for the gaming and wagering sector(s), I do not have specific suggestions here as (unlike the financial services sector) I largely consider the lasting harms derived from (in particular) casino activities to outweigh any claimed benefits. For the reasons explained above, I would hope, however, that providing a safe environment for users of relevant products and services, or adopting policies, systems and practices that are apt to promote users' overall wellbeing, would be fundamental. It cannot be enough to demand that casino act to reduce the risk of harm. And the financial stability of the sector cannot be a chief consideration. Nor should we accept that loss of the casino in Western Australia would inevitably be economically disadvantageous to the state or its communities. While there may (and have been) serious concerns expressed about loss of employment and taxation revenue from casino activities, should Crown lose its licence completely, there has been no sustained or forensic accounting to my knowledge of the cost borne through the public purse through the harms resulting from its activities, nor the impossibility of developing other employment opportunities for Crown's existing staff. It does not seem, for example, that Western Australians were noticeably unhappier, or poorer, or more unemployed prior to the introduction of the casino than after it.

Finally, so far as the regulator is concerned, although this falls outside my fields of research, one would think that its objects would need to align with and support the other two. It may be helpful to consider in this respect the desired regulatory culture that should be adopted. In the FSRC Final Report, this was encapsulated by Commissioner Hayne's

directions regarding enforcement attitudes (such as 'why not litigate', discussed at 425-428). For the reasons given earlier, and in the context of casino oversight, one would think that the financial wellbeing or stability of the casino operator (or gaming sector(s)) cannot be a chief consideration. Community safety and wellbeing, as well as compliance with the substance of the law, must be paramount. A hierarchy of objects and principles, connected to guidelines on enforcement strategies (similar to Commissioner Hayne's guidance on the varied roles of litigation, enforceable undertaking and the like, the subject of Recommendation 6.2 in the FSRC Final Report) may be useful. Finally, a direction to engage purposively with its legislative remit may encourage the regulator to avoid formalistic approaches to enforcement, that accept activities and remediation approaches that meet the form but not the substance of the law.

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4. Concluding Statement

I would welcome the opportunity to discuss further with the PCRC any aspect of this Submission or related matter that would assist it in its deliberations.

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10 January 2022

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