



public interest
ADVOCACY CENTRE LTD

**Ten Years On: submission to the Productivity
Commission: Gambling Inquiry**

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on consumer protection and gambling

PIAC has a long history of promoting law reform and representing vulnerable consumers. PIAC is approached on a regular basis for advice by individuals about their gambling losses or treatment by gaming venues. To date, despite the harm that the individual believes they have suffered, there has not been any legal recourse for their dispute to be considered. The collation of inquiries made to PIAC indicates a lack of protection for consumers, avenues for their complaints and access to services that meet the needs of this group of consumers.

1.3 International Consumer Protection

On 9 April 1985, the United National General Assembly adopted the 'United Nations Guidelines for Consumer Protection'.¹ The guidelines acknowledge that consumers 'face imbalances in economic terms, educational levels and bargaining power', and sets out the rights of the consumer. The NSW Department of Fair Trading² summarises these rights as:

¹ Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection (as expanded in 1999)* (2003) United Nations <http://www.un.org/esa/sustdev/publications/consumption_en.pdf> at 16 April 2009.

² NSW Department of Fair Trading, *The consumer movement – 1960 to 1970* (2003), <http://www.fairtrading.nsw.gov.au/Youth/School_projects/Brief_history_of_consumer_protection_in_NSW/The_consumer_movement.html> at 16 April 2009.

- the right to safety;
- the right to be informed;
- the right to choose;
- the right to be heard;
- the right to satisfaction of basic needs;
- the right to redress;
- the right to consumer education;
- the right to a healthy environment.

Consumers have a right to expect that providers of gambling products and services, and that legislators will protect their rights under this code. The asymmetry of information that consumers experience about gambling products should be addressed through adequate funding of research and community education, and responsible service practices on the part of the provider underpinned by legislative reforms.

2. The Terms of Reference of the Inquiry

2.1 The current inquiry

PIAC welcomes the opportunity to make a submission to the Productivity Commission's Public Inquiry into Gambling. This inquiry provides an important opportunity for the Productivity Commission to review the impact of its previous work in this area and to recommend changes to the regulatory environment that are in the public interest.

2.2 An overall perspective on Electronic Gaming Machines

Gambling may be defined as an activity involving two parties in which money is transferred from one party (the loser) to another party (the winner) based on the outcome of an uncertain event. At core, it is a two-person zero-sum game. The motivation to participate is to win money. Historically, gambling exists because each party believes that through knowledge, experience, and luck the result is biased in favour of themselves. Each party expects to win. In fair gambling, objectively, each party has an equal chance of winning. The utility of the gamble is zero.

In practice, all commercial gambling opportunities involve unfair gambling biased in favour of the venue rather than the consumer. The motivation of the venue is clear: provided that customers will play, revenue is assured. The motivation of government is less clear. Through taxation and regulation, revenue is assured. However, governments have an obligation to govern for the welfare of all their constituents. Thus, their concern properly extends beyond the viability and profitability of the venues to the individuals who provide the revenue to the venues. The evidence overwhelmingly shows that a large proportion of venue revenue from gambling comes a relatively small proportion of individuals who participate in the gambling opportunities provided. This relatively small proportion of individuals—about one to two percent of the adult population—expends such large amounts of money on gambling that grave harm results for themselves, their families and the community.³

A core issue for government is the conflict of interest engendered by revenue from the taxation of venues and the harm caused by the excessive gambling of the gambling sector of the community.

The harm resulting from excessive gambling is caused primarily by the widespread provision of gaming machines in clubs, hotels and casinos. In NSW, approximately 80 percent of people who seek help in limiting their gambling through counselling cite gaming machines as the cause.⁴ While all excessive gambling is an issue for governments, the focus of concern falls most clearly on the harm caused by excessive gambling on gaming machines. In governing for the welfare of the people, governments have an obligation to reduce or eliminate the harm caused by the provision of commercial gaming opportunities involving gambling on gaming machines. The argument that government uses the funds raised by gaming taxation for the good of all the people is not a sufficient justification. Governments may raise the revenue needed for their programs from many sources that fall fairly across all members of the community. In the case of gambling taxation, the source of revenue is a minority group that suffers grave harm from government policy.

³ Productivity Commission, *Australia's Gambling Industries: Report No 10* (1999) Section 7.3.

⁴ NSW Office of Liquor, Gaming and Racing, *Responsible gambling Fund Client Data Set Annual Report 2006-07*, 33 <http://www.olgr.nsw.gov.au/pdfs/CDS_06_07.pdf> at 16 April 2009.

In other areas of recreation in everyday life, governments legislate to reduce or eliminate harm caused by the commercial activities of various groups and sectors of society. Examples include the classification of films, and the restriction of drinking. These recreation activities are regulated to protect consumers and to meet community standards. Cars are now also designed by car manufacturers to provide greater safety for the occupants when collisions occur.⁵ The frames of cars have been reinforced and air bags introduced so that in the event of a head-on collision the seating area is protected and the car occupants suffer massively less harm.

These examples of harm reduction give a direction to harm-minimisation strategies for gaming machines in society. The litmus test for an effective gaming machine harm-minimisation strategy is a significant reduction in the revenue raised by venues and governments from problem gamblers. An ideal outcome for harm-minimisation strategies is zero harm. Thus, harm-minimisation strategies should minimise or eliminate excessive gambling by individuals. What constitutes excessive gambling depends on the individual. However, Gambling Research Australia has defined problem gambling as the adverse consequences that follow from difficulties in limiting time and money spent on gambling.⁶ Since most of the adverse consequences of excessive gambling involve the loss of money⁷, harm minimisation implies changes to gaming machine gambling that reduce the opportunity to lose money. Harm-minimisation strategies necessarily imply a loss of revenue to venues and governments. Effective harm-minimisation strategies imply that the loss in revenue relates primarily to a reduction in gambling activity by problem gamblers.

2.3 The current submission

This Inquiry raises a number of very important issues and PIAC's submission will be directed to those areas in which it is able to make a useful contribution, with an important emphasis on the evaluation of the effectiveness of harm-minimisation measures for the consumer. The focus of this submission is the experience in NSW.

In 1999, PIAC made a submission to the Productivity Commission's previous inquiry into gambling (see Appendix 1) in which it identified a number of concerns that are to a large extent repeated in this submission. The fact that recurring issues are raised ten years on highlights a lack of effective action and commitment by government and industry to protecting the consumer in this area.

Currently, governments and the main industry players appear to be primarily concerned with attracting people to play at gaming venues by advertising them as a form of glamorous, safe and fun entertainment. The purpose of this is financial in that both governments and industry have vested interests in ensuring that people continue to spend money at gaming venues. There is a lack of any planned programs to assist the public to understand the damage caused by gaming practices, nor any strategies on effective ways of containing the sometimes-excessive behaviour of some consumers.

It is of great concern that only an average of \$11 million is made available each year to primarily fund treatment services in NSW. In comparison, Victoria has only a third the number of gaming machines as NSW, yet it provides more than double the amount of funds for the provision of treatment and support services. It is incredible that the amount of money available in NSW for treatment and related services has not changed in the last ten years, and total funding for treatment services comes from only one venue in NSW. Such a situation is embarrassing, against the public interest and creates an unfair burden on NSW consumers. The amount of money available should be at least that provided in Victoria, and should form

⁵ A Armes, 'National seat belt usage at record 82 percent' (2005) 172(6) *Safety & Health*, 16.

⁶ P Neal, P Delfabbro and M O'Neil, *Problem Gambling and Harm: Towards a National Definition* (2005), 125.

⁷ Productivity Commission, above n3, Section 6.2.

part of a strategic plan to address problem gambling and the harms flowing from it, including through dispensing the funds through an independent body.

The NSW Government has implemented some measures since the last inquiry with a view to 'protecting' problem gamblers and general consumers of gambling products. PIAC argues in this submission that there are serious gaps in coverage, particularly for those most at risk and in the continuum of care: prevention, intervention and treatment.

For harm-reduction strategies to be effective, they must minimise the financial losses of a problem gambler. This will necessarily reduce the revenue of both the NSW Government and the industry. Government will need to take a leadership role in implementing and monitoring harm-reduction measures that are effective to the consumer because it is not in the interests of industry to support processes that will reduce its income.

In this submission, PIAC focuses on regulatory structures, law reform, and practices and policies that can improve protection for consumers and the influence of the gambling industry on democratic processes in NSW. Situations in other jurisdictions are also used for comparison, and recommendations noted that require a national approach. PIAC also includes consideration of consumers who are problem gamblers, as well as those who may be at greater risk in the community, such as people with intellectual disability.

The following section deals with whether the profile of problem gamblers and those at risk of problem gambling identifies population groups that are considered vulnerable, and includes recommendations that improve equal access to appropriate services.

3. The participation profile and social impacts of gambling

3.1 Growth of problem gambling

There is continued debate⁸ about the rate of growth in problem gambling and how that influences the measures used to assess need. Calls to the G-line service from problem gamblers and their family members—a telephone referral service funded by the Responsible Gambling Fund—has decreased steadily, yet figures released by the fund on its website show an increase in the number of people receiving counselling⁹ and a change in pattern of referrals. More people report ‘family/friends’ or ‘other’ as the source of referral. This could be due to the lack of community-wide mass advertising for G-line. The greatest number of referrals to G-line date from the most recent extensive television campaign. The change in referral pattern could also be the result of a maturing effect of treatment services—they are all less than ten years old—as they become more established in their local communities, establish contacts and run their own local media campaigns, so referrals are likely to come directly from gamblers, their friends and family members.

The following sections look at sections of the community that are most vulnerable to problem gambling, and traditionally have the least access to prevention campaigns and treatment through health-related services.

3.2 Aboriginal communities

Relatively little is known about the experience of contemporary commercial gambling by Aboriginal gamblers and families. Available information is deficient in many respects and sometimes less than reliable. The majority of recent Australian gambling studies have used survey methodologies that have included only small samples of Aboriginal people, preventing meaningful conclusions about their gambling practices and preferences. Some state surveys provide no data on Aboriginal gambling participation, and qualitative studies have been based on small samples that are unrepresentative of the overall population.

The following study is highlighted as it was not made available to the public until recently, and was therefore not considered by the Productivity Commission during the course of its previous gambling inquiry (the 1999 Inquiry).

In 1996, a NSW random telephone survey (1,390 respondents) reported that Aboriginal gamblers had experienced problems at much higher levels than found in the general population. Using South Oaks Gambling Screen (SOGS), the study estimated problem-gambling prevalence among Indigenous residents was ‘11 percent of the adult population—some 20 times higher than that found for non-Indigenous respondents’.¹⁰ More Indigenous respondents (32 percent) also reported that family members experienced gambling problems, compared with the non-Indigenous sample (15 percent). Researchers argued that these high prevalence levels were a function of high gambling expenditure by younger, single men and women, as well as limited resources to cope with the negative impacts of gambling (low incomes, relatively few people in full-time employment).

⁸ A Clennell, ‘Net betting worse than pokies: clubs’, *Sydney Morning Herald* (Sydney) 10-12 April 2009, News, 5.

⁹ NSW Office of Liquor, Gaming and Racing, *Client Data Set Annual Reports 2005/06 and 2006/07* <http://www.olgr.nsw.gov.au/pdfs/CDS_05_06.pdf> and <http://www.olgr.nsw.gov.au/pdfs/CDS_06_07.pdf> at 23 April 2009.

¹⁰ M G Dickerson, C Allcock, A Blaszczyński, B Nicholls, J Williams and R Maddern, *Preliminary Exploration of the Positive and Negative Impacts of Gambling and Wagering on Aboriginal People in Australia* (1996) 3.

Results of subsequent interviews with 222 Indigenous people living in urban Sydney and three regional centres were then compared with the telephone survey.¹¹ Although limited by possible sampling bias, the study found the Indigenous respondents participated more frequently in gambling activities than those involved in the general population survey. More than 50 percent of the people interviewed reported weekly participation in some form of gambling activity; almost a quarter reported weekly gambling on electronic gaming machines ('pokies'). The study also found marked gender differences: the most popular forms of gambling activity among Aboriginal men were racing and gaming machines, while women preferred gaming machines and lottery, pools and bingo.

A statewide NSW prevalence study was conducted in 2006; however the sample was too small to provide useful information on gambling by Indigenous residents.¹²

In 2007, consultations with Aboriginal community members and service providers in NSW found that problems associated with gambling in Aboriginal communities were getting worse. One service provider reported:

Clients tell me that when they were young it used to be social. Money used to stay in the community and winnings were shared with cards. Now it's machines and the 'black hole'.¹³

One Aboriginal community member also noted that the new machines had credits that went through faster and that they now took notes, referring to them as 'fast gobbling machines'.

The funding available for treatment services for gamblers in Aboriginal communities in NSW is currently subsumed within the funding provided to mainstream treatment services. Given the high percentage of Aboriginal people with gambling problems from the limited studies available, it is recommended that funding should be provided for this vulnerable group to look into the extent of the problem, as well as preventative measures and appropriate treatment service delivery.

3.3 Young people

In the NSW prevalence study of gambling and problem gambling conducted in 2006¹⁴, it was reported that problem gamblers are significantly more likely than the total NSW adult population to be aged 18-24 years (40 percent of problem gamblers are aged 18-24 years compared with 10 percent of the total NSW adult population).

Further, those gambling on gaming machines are more likely to be younger adults (18-24 years (50 percent) or 25-34 years (32 percent)), male (33 percent), born in Australia (32 percent), and residing in the Central Coast (39 percent) or Hunter (36 percent) regions.¹⁵ Unfortunately, there are no treatment services in the Central Coast or Hunter regions that focus on younger adults who gamble.

These findings are comparable to the rates for youth problem gambling reported in North America, Canada and the United Kingdom that are said to range from 3.5 percent up to 8 percent.¹⁶

¹¹ Ibid 13-18.

¹² ACNielsen, *Prevalence of Gambling and Problem Gambling in NSW – A Community Survey* (2007) 70.

¹³ Aboriginal Health and Medical Research Council of NSW, *Pressing Problems – Gambling Issues and Responses for NSW Aboriginal Communities* (2007) 37.

¹⁴ ACNielsen, above n12, 67.

¹⁵ ACNielsen, above n12, 78.

¹⁶ South Australian Centre for Economic Studies, *Evaluation of Self-Exclusion Programs and Harm Minimisation Measures* (2003) 22-23.

The funding available for young people in NSW with a gambling problem is currently subsumed within the funding provided to mainstream treatment services. Given the high percentage of younger adults gambling on gaming machines, it is recommended that funding should be provided for this vulnerable group to look into preventative measures as well as appropriate treatment services.

3.4 People with co-morbidities

In the NSW prevalence study of gambling and problem gambling conducted in 2006¹⁷, it was reported that the co-morbidities of stress, depression and suicide show a tendency for stronger association with higher-risk gambling behaviour, and in particular for problem gamblers. It was found that problem gamblers have higher rates of depression (53 percent), stress (29 percent) and suicide ideation/attempts (8 percent) compared with low-risk gamblers (22 percent, 10 percent and 0 percent respectively).

Most significantly, over half (53 percent) of problem gamblers reported having felt seriously depressed in the previous twelve months, compared to both moderate-risk gamblers (27 percent) and low-risk gamblers (22 percent). Three in every ten (29 percent) problem gamblers reported having been under the care of a doctor or other professional because of physical or emotional problems brought on by stress, compared to lower levels for all other gamblers. In terms of seriously thinking about or attempting suicide as a result of gambling, only problem gamblers (8 percent) or moderate-risk gamblers (3 percent) considered this action in the previous twelve months.¹⁸ These findings emphasise the fact that there are some high 'at-risk' groups that require special attention.

Current best practice in mental health is that individuals should be treated holistically and collaboratively (mental health workers working in cooperation with gambling counsellors). People presenting to gambling counsellors should be assessed for other issues (mental health, substance misuse, trauma, cognitive impairment). Gambling counsellors should be appropriately trained to undertake such assessments. Health workers who come into contact with people who have (undisclosed) problems with gambling in other settings (GPs, workers in community mental health centres, etc) should also be encouraged to routinely screen for that issue as part of the intake and consultation process.¹⁹

3.5 People with intellectual or psychiatric disabilities

There do not appear to have been any surveys on problem gambling conducted in Australia within the last ten years that have included people with intellectual or psychiatric disabilities. Yet, there is evidence that a number of people with disabilities affecting their intellectual capacity or mental health also have a gambling problem.²⁰

One such case presented to PIAC was 'John' whose main source of income is a disability support pension, and who began attending Star City Casino in 2005. John has a severe mental illness involving delusional thoughts, and found himself unable to gamble responsibly. In 2006, John lost \$3,000 in one session at the Casino and became very distressed. Subsequently, John's doctor wrote a letter on his behalf, explaining his mental health issues and requesting that the Casino ban him. The Casino responded by issuing a non-voluntary exclusion order against John, which stated, 'The order was issued out of concern for your well-being'. Arguably this meant the Casino was aware of John's inability to gamble responsibly and voluntarily.

¹⁷ ACNielsen, above n12, 11.

¹⁸ ACNielsen, above n12, 58.

¹⁹ Jeffrey J Marotta, *Problem Gambling Solutions* (PhD, Spring Training Institute, Osage Beach, Missouri, 2008).

²⁰ Disability Studies and Research Institute, *Review of the Problem Gambling Treatment and Support Service provided by Life Activities Inc.* Report prepared for the NSW Office of Liquor, Gaming and Racing (2006) 4-6.

However, John continued to visit Star City Casino on a regular basis. He was never denied entry, nor asked for identification, nor prevented from gambling. On several occasions John asked staff members refuse him entry, but he continued to be able to visit the Casino.

John estimates that he has lost over \$40,000 since the exclusion order was issued in 2006.

John has no recourse in the legal system, as it would be difficult to satisfactorily prove his losses. Yet the Casino was clearly negligent in failing to remove John from its premises pursuant to the exclusion order. The Government is also responsible for failing to provide adequate measures to ensure the safety of John. There are some people, like John, who cannot gamble responsibly and the current self-exclusion measures introduced by the Government do not operate effectively for people who, because of mental illness or other conditions beyond their control, may gamble excessively. If the legal system and harm-minimisation measures cannot protect an individual in John's situation, there is little expectation that the current legislative framework can assist other problem gamblers.

A review in 2006 of a specialist program for individuals with intellectual disability by the Disability Studies and Research Institute (DSRI) found that people with cognitive disability are more likely to be referred to a gambling counselling service by family, friends, and support workers than are people without disability.²¹ They are also more likely to be actively involved in the implementation of strategies to resolve gambling problems. It is therefore important to develop and implement support services for families and carers of problem gamblers who have cognitive disability. Resources and referral information should also be developed and made available to this secondary support group.

It is important that the NSW Government and the Productivity Commission take the findings of these reviews into account to ensure that measures to reduce gambling-related harm in the community are also applicable to vulnerable groups such as problem gamblers with cognitive disabilities.

Again, the funding available for gamblers with cognitive disabilities in NSW is currently subsumed within the funding provided to mainstream treatment services. It is recommended that additional funding be provided for this vulnerable group to look into the extent of the problem, as well as preventative measures and appropriate treatment service delivery. This should include an examination of the responsibilities of venue operators who have a reasonable basis for forming the view that a patron has limited decision-making capacity.

3.6 Low-income groups

In the NSW prevalence study of gambling and problem gambling conducted in 2006²², it was reported that one in five problem gamblers earn less than an annual income (pre-tax) of \$10,000, and two in five earn an annual income of up to \$29,999. The study goes on to claim that this is relatively consistent with the total NSW adult population who gamble.

The report also identified that there are significantly more problem gamblers in the Western Sydney region (31 percent) and the Riverina-Murray region (11 percent) than the total NSW adult population within each of these two regions (17 percent and 4 percent, respectively).

The funding available for problem gamblers in NSW is based on a population model. It is recommended that this model be revised to include information on current socio-economic status and gaming machine density per adult to ensure that access to treatment services is freely available to low-income groups with

²¹ Ibid 24.

²² ACNielsen, above n12, 73.

gambling problems. It is also recommended that funding should be provided for this vulnerable group to look into the extent of the problem, as well as preventative measures.

Recommendations – Section 3 – Participation profile and social impacts of gambling

The example of NSW provides several opportunities for national co-ordination of research, development and promotion of harm-minimisation measures. Co-ordination, through Federal-State agreements, could ensure funding for harm-minimisation campaigns was directed towards evidence-based policies and services, avoid unnecessary duplication and create consistency for consumers.

PIAC recommends that the Productivity Commission consider and recommend that all jurisdictions co-ordinate:

- 1. Funding of services for problem gamblers that are based on a population model. Such a model would include information on current socio-economic status, gaming machine density per adult, areas with aboriginal communities, areas with high numbers of individuals with a cognitive disability, areas with high numbers of young adults (18-24 years), and location of gaming machine density per adult to ensure that access to treatment services is freely available to low-income groups with gambling problems.*
- 2. Funding and conduct of research into and design of specific services for Aboriginal people in communities with a very high percentage of gambling problems. Studies available are limited; a national approach would allow further examination of the extent of the problem, as well as preventative measures and appropriate treatment service delivery.*
- 3. Funding and conduct of research into and design of specific services to address the high percentage of younger adults gambling on gaming machines. Evidence on the extent of problem gambling demonstrates a need for preventative measures as well as appropriate treatment services.*
- 4. Funding and conduct of research into and design of specific services for gamblers with cognitive disabilities to understand the extent of the problem, as well as to develop preventative measures and appropriate treatment service delivery. This should include an examination of the responsibilities of venue operators to patrons who have diminished decision-making capacity.*
- 5. Funding and design of screening tools for health workers (GPs, workers in community mental health centres, etc) to help them determine when a client should be screened for problem gambling, and what referral is appropriate.*
- 6. The funding and implementation of population-wide promotions for information and referral services (such as G-line in NSW), applying lessons learnt from health (promotion) community education in other areas (smoking cessation and depression detection) to advertising campaigns. The campaign should be core to a whole community approach that encourages people to recognise that their gambling behaviours might be harmful and that gaining support/intervention early is the best way to go.*

4. The effects of the regulatory structures

4.1 Previous inquiry

The stated intent of most gambling regulation by governments in Australia has been to protect consumers or to uphold community norms, such as harm-minimisation measures, restrictions on access to gaming machines and probity requirements.

In its 1999 report, the Productivity Commission set out a blueprint for the regulatory governance of gambling.²³ Components included:

- separating policy making from regulatory and enforcement functions;
- establishing an independent gambling authority with the primary objectives of furthering the public interest and consumer protection;
- establishing an independent board with responsibility for administering a community benefit fund, funding counselling and harm minimisation programs, and gathering and disseminating research.

It has now been ten years since that report and NSW has failed to implement any of the three recommendations set out for the regulatory governance of gambling.

4.2 Role of the regulatory body

As stated in PIAC's submission to the 1999 Inquiry (see Appendix 1), there is a lack of separation between the organisation that promotes gambling and the organisation with responsibility for regulating gambling.

It is clear that any organisation with duties to both promote and regulate an industry would find itself in a position of conflict. Nonetheless, this is the position in which the NSW Office of Liquor, Gaming and Racing (OLGR) is placed. The legislative responsibility to not only regulate the industry in terms of licensing, advertising and management, but also in terms of complaints and litigation, falls on the OLGR. This does not sit well with a duty to promote the industry and encourage its growth and development.

It was PIAC's submission in 1999, and it is PIAC's submission now that unless and until the step of setting up an independent regulatory body is taken, the conflicting roles of the OLGR will cause internal confusion and a lack of transparency of process and of due process that should include community input and independent assessment.

4.3 Cashing of cheques

There have been various provisions designed to protect problem gamblers that fall directly within the OLGR's responsibility, such as subsection 9A(5A) of the *Registered Clubs Act 1976* (NSW) (the Act). This Act, which was subsequently repealed, provided that:

It is a condition of the certificate of registration of a club that the secretary of the club is not to provide a cash advance on the club premises, or permit or suffer a cash advance to be provided on the club premises on behalf of the club, otherwise than as a prize won as a direct or indirect consequence of operating a poker machine in accordance with this Act and the other conditions to which the registration of the club is subject.²⁴

²³ Productivity Commission, above n3, 4.

²⁴ *Registered Clubs Act 1976* (NSW) sub-s 9A(5A).

The Government of NSW has now made it lawful for a club or hotelier with gaming machines to cash cheques to the value of \$400 a day.²⁵ Such a provision is in direct contrast to the previous provision of the Act, and would raise serious concerns about the Government's fulfilment of its duty of care, as money is more easily made available to spend on gaming machines.

4.4 Gaming advertising

Advertising of gaming forms such as keno, lotteries and the TAB are not subject to the advertising prohibitions imposed on gaming-machine advertising. For example, a recent advertisement in a Sydney newspaper stated:

Hit the BIG time today with a \$400,000 BIG6 Jackpot at Royal Randwick plus a big \$20,000 BIG6 Jackpot on tonight's fabulous Golden Easter Egg meeting at Wentworth Park Greyhounds.²⁶

This text was presented with pictures of attractive and prominent sparkling dollar signs and a fist clutching a handful of money highlighted in a red and yellow star burst. Such advertising is considered an inducement, and it is PIAC's view that restrictions on advertising should be consistent and not dependent on the venue or type of commercial gaming. All gaming advertising should be responsible advertising, and all regulatory measures in NSW should be applicable to all forms of gambling and not just gaming machines.

4.5 Gaming machine advertising

Until recently, gaming laws prohibited a club or hotelier from publishing any gaming machine advertising.²⁷ This included dissemination by oral, visual, written or other means such as cinema, video, radio, Internet, television and promotional material such as club journals, brochures and flyers.

These laws however, exempted any advertising (including signage) that was inside a club or hotel and could not be seen or heard from outside the venue. For the consumer who enters a venue for the purposes of dining or listening to entertainment, they would still be exposed to gaming inducements via advertising promoting gaming within the venue. It is PIAC's view that all advertising, which includes gaming-machine advertising and signage within a venue, should be responsible advertising, and the relevant regulatory measures should be applicable to advertising both outside and within a venue.

New gaming laws were introduced on 31 January 2009 as a result of changes to the *Gaming Machines Act 2001* (NSW) and *Gaming Machines Regulation 2002* (NSW).²⁸ These new laws now allow a registered club to send promotional material that contains gaming-machine advertising to its members without their initial consent, with the responsibility then falling to the patron to advise the club that they don't wish to receive any further promotional material.

This promotional material is apparently not considered to be 'gaming-machine advertising', but PIAC fails to see how this can be the case as gaming-machine advertising is defined as:

... any advertising that gives publicity to, or otherwise promotes or is intended to promote, participation in gambling activities involving gaming machines.²⁹

²⁵ NSW Office of Liquor, Gaming and Racing, *Gaming Machine Harm Minimisation Factsheet* (2008) <http://www.olgr.nsw.gov.au/pdfs/G_FS_HM.pdf> at 16 April 2009.

²⁶ *Sydney Morning Herald*, 11 April 2009, Form Special, 2.

²⁷ NSW Office of Liquor, Gaming and Racing, *Gaming Machine Harm Minimisation Factsheet* (2008) <http://www.olgr.nsw.gov.au/pdfs/G_FS_HM.pdf> at 16 April 2009.

²⁸ *Gaming Machines Act 2001* (NSW).

²⁹ NSW Office of Liquor, Gaming and Racing, above n25.

4.6 Player reward scheme

Promotional material to members, which avoids the exemption from general advertising of gaming machine advertising, encourages patrons to visit the venue to receive a reward that involves the patron in a system in which the players of gaming machines accumulate bonus or reward points from playing the machines. This then allows prizes to be offered to these patrons for playing a gaming machine. PIAC fails to see how the offering of prizes under such a scheme does not constitute 'gaming-machine advertising'. Such a scheme is intended to promote, and would encourage patrons to use the gaming machines. This exemption from the advertising prohibition fails to provide a safe environment and protect at-risk consumers.

4.7 Forfeiture of gaming machine entitlements

The NSW Government claims that the new laws introduced on 31 January 2009 will reduce gaming machine numbers by 5,000 by encouraging gaming machine forfeitures at a rate of one transfer entitlement for every two machines forfeited. In isolation, such a law would be seen in a positive light. However, there are several exemptions to this rule.

Firstly, no forfeitures are required when gaming-machine entitlements are transferred within a Local Government Area (LGA). (This means machines can be sold or satellite clubs can be set up within the LGA without reducing machine numbers.) More importantly, the Government has also introduced a new regulation that allows the conversion of approved amusement devices (arcade games) into gaming machines.³⁰ Furthermore, all venues will have three years until 31 January 2012 to exchange approved amusement devices for gaming-machine entitlements. This measure is likely to wipe out any reduction in gaming machine numbers under the forfeiture scheme, and is also an easy way for venues to increase the number of gaming machines without going through a Local Impact Assessment process.

The purpose of these new laws is financial in that both government and industry have vested interests in ensuring that people continue to spend money at gaming venues. PIAC submits that until and unless the step of setting up an independent regulatory body is taken, any laws introduced by the Government will be only 'token' laws with the intent of maintaining the current flow of revenue from gaming machines.

4.8 Community development fund

Another new Government initiative is the Community Development Fund, which was established by the Department of the Arts, Sport and Recreation (DASR) in 2008. This Fund is made up of unclaimed gaming machine prizes and all monies relating to unclaimed gaming machine tickets. The Fund is administered by the Director-General of the Department of the Arts, Sport and Recreation, and can be used for sporting and other community benefits, and any other activities deemed 'appropriate'.

Such a fund was considered by the Productivity Commission in its previous Inquiry to be a 'slush' fund when under the banner of the (then) Casino Community Benefit Fund nearly ten years ago. The 2004 report of the NSW Independent Pricing and Regulatory Tribunal recommended the community project fund should not be used for non-gambling projects and would be better spent on community education.³¹ It seems that the fund has reappeared under another guise with even fewer controls as one person only administers the new Fund: the Director-General of the DASR. Such funds are an appropriate source of funding for preventative campaigns, and should be allocated with appropriate consultation that seeks community and expert knowledge.

³⁰ *Gaming Machines Regulation 2002* (NSW).

³¹ Independent Pricing and Regulatory Tribunal. *Gambling: Promoting a Culture of Responsibility* (2004) 169.

Recommendations – Section 4 – The effects of the regulatory structures

The regulatory environment described in this submission may be unique to NSW, but a general principle applies to all jurisdictions, that:

- 7. The gambling industry regulatory body should be independent, in order to ensure a separation between policy making and regulatory and enforcement functions.*
- 8. All gaming advertising should be responsible advertising, and all regulatory measures should be applicable to all forms of gambling and not just one form of gambling such as gaming machines.*
- 9. Responsible advertising should include gaming machine advertising and signage within a venue, and the relevant regulatory measures should be applicable to advertising both outside and within a venue.*
- 10. Responsible advertising should include promotional material is sent to members of a club or association.*
- 11. Funding for services and related community projects should be administered by an independent body, which has as its benchmarks due process, transparency of process and consumer consultation. Grants from this fund should be allocated with appropriate consultation that seeks community and expert knowledge. This applies particularly to the NSW Community Development Fund.*

5. The impact of gambling on commonwealth, state and territory budgets

5.1 Conflict of interest: monitoring and growth of industry

The NSW Office of Liquor, Gaming and Racing sets out its objectives in its Annual Report. A key role includes 'Industry Sustainability' of the gaming industry with the objective of supporting gaming 'Industries that are in balance with community interests'. A measure of the OLGR's success is the amount of revenue generated by gambling. The process described on how 'balance' is achieved is centred on the well being of the industry, so that only stakeholders from industry are consulted and are the subject of information campaigns about responsibilities. The balance is not achieved by consulting with the community or consumer representatives about the impacts on communities and consumers of the gaming industry. The balance, resources and focus of the OLGR from this account seem firmly placed on the side of the gaming industry.³²

5.2 Influence of the industry

The growth of the gaming industry has led to industry groups holding unprecedented influence over state and territory governments. In contrast, there are no supported and viable consumer interest groups focusing on gaming issues, or health peak bodies representing services that provide assistance to problem gamblers. Organisations such as PIAC, which could provide a consumer perspective, are not invited to the table in negotiations and are not resourced to effectively represent consumers in this specialist area, nor is advice sought from resourced consumer bodies on how legislative changes would affect at-risk consumers.

One of the most active interest groups in NSW has been Clubs NSW. In its own words³³, its campaigning at the time of an election has been successful in: reducing the rate of proposed taxation, allowing clubs to defer the payment of taxes, achieving restrictions on several changes that result in clubs maintaining or increasing the number of gaming machines, reducing club reporting requirements, increasing their ability to advertise gaming, gaining changes to planning regulations, including no new restrictions on gaming machines or poker games, prizes below \$2,000 able to be paid in cash (previously \$1,000), and having the longest phase-out of indoor smoking in Australia. The Clubs NSW CEO, David Costello, also promised its members that:

The New South Wales club industry was prepared to stand and fight to achieve a partial tax resolution last time, and the mood at the moment suggests they're ready to do it again.³⁴

Parliamentary democracy is based on the principle of ensuring that elected members of parliament are free to work in the public interest, unencumbered by undue influence or conflict of interest. Any arrangements that compromise this principle must be regarded as serious threats to the public interest and representative democracy.

5.3 Taxation arrangements

The NSW Government received over \$1,188 million in assessed tax for the period ended 30 June 2007 from venues earning profits from gaming machines.³⁵ The total number of venues earning profit was 3,083. It is

³² Department of the Arts, Sport and Recreation, *Annual Report 05-06* (2006) 32.

³³ Clubs NSW, *Annual Report 2008* (2008) 8.

³⁴ *Ibid* 8.

difficult to understand why only one venue in —Star City Casino— from that total of 3,083 venues in NSW provides all of the funds for gambling counselling services, education and prevention strategies and research into gambling. A mere \$11.6 million (or 1% of assessed tax) was paid into the Responsible Gambling Fund, which represents the sum total of the NSW Government's total contribution towards minimising harm in NSW.

If the NSW Government is serious about reducing harm caused by gambling, it should increase the funds available for counselling and support services paid into the Responsible Gambling Fund by including a taxation component from all venues with gaming machines.

Another important issue is the fact that problem gamblers contribute 33 percent of the revenue from gambling.³⁶ With such a significant proportion of funds from gambling contributing to state revenue, it is difficult to see how any significant or effective harm minimisation measures will be introduced by the government in NSW.

If the NSW government is reluctant to reduce taxation of gambling profits, it should allocate a larger proportion of tax collected to harm minimisation measures, as is the case in Victoria.

Recommendation – Section 5 - The impact of gambling on commonwealth, state and territory budgets

12. State and Territory Governments should meet a national funding benchmark for prevention campaigns, counselling and support services. The Productivity Commission's annual report on Government Services could monitor expenditure in this area so that jurisdictions can measure their progress. In the case of NSW, funding should be paid into the Responsible Gambling Fund from a taxation component from all venues in NSW with gaming machines.

³⁵ NSW Office of Liquor, Gaming and Racing, *Industry Statistics at a Glance Information Factsheet* (2007) <http://www.olgr.nsw.gov.au/pdfs/industry_stats_07.pdf> at 16 April 2009.

³⁶ Productivity Commission, above n3, Chapter 7

6. The effectiveness of harm-minimisation measures on problem gambling and those at risk

6.1 Self-exclusion

Self-exclusion is an arrangement whereby the patron of a gambling venue gives the right and responsibility to the venue to exclude the patron from access to the gambling options available in the venue. Self-exclusion was introduced based on the assumption that an individual who gambles excessively and who has difficulty in limiting his or her involvement in the activity should have the option to abstain from gambling by eliminating the opportunity to gamble. These programs are in widespread use throughout Australia and are endorsed by the gambling industry and legislated by governments.

Self-exclusion programs are characterised by:

- the patron seeking exclusion may request self-exclusion and complete an application to this effect;
- the patron then signs a deed of self exclusion
 - the deed specifies a period of time for continuous self-exclusion;
 - the deed specifies a list of undertakings by the patron;
 - the deed acknowledges that there is no legal obligation on the venue;
- The venue may then remove the patron from the venue if the patron is detected attempting to enter the premises (some deeds) or enter the gaming area (other deeds).

In New South Wales, the State Government has legislated that all casinos, clubs and hotels shall offer self-exclusion programs to patrons.³⁷ It does not include the TAB (unless an agency is within a hotel or club). The legislation is limited to these venues because it targets patrons who gamble excessively on gaming machines. Gaming machines account for approximately 85 percent of problem gambling in New South Wales.³⁸

The 2004 report released in NSW by the Independent Pricing and Regulatory Tribunal (IPART) made six recommendations about self-exclusion schemes that would assist consumers to access schemes and increase the responsibilities of the industry to participate in the schemes.³⁹ There is no evidence that the NSW Office of Liquor, Gaming and Racing has taken any steps to implement these recommendations.

6.2 The distinction between responsible gambling and harm minimisation

Problem gambling is characterized by difficulties in limiting money and/or time spent on gambling which leads to adverse consequences for the gambler, others, or for the community.⁴⁰

This definition of problem gambling provided by Neal, Delfabbro and O'Neil has been officially recognised by Gambling Research Australia as a guide for research and policy in Australia. The definition has merit in making clear that there are two components to problem gambling: (1) excessive gambling caused by difficulties in limiting time and money spent; and (2) harm to the gambler and others that are consequences of excessive gambling.

³⁷ *Gaming Machines Act 2001* (NSW) s 49.

³⁸ M Walker, A Blaszczyński, L Sharpe, and K Shannon. *Problem Gamblers Receiving Counselling and Treatment in New South Wales: Ninth Survey* (2005) Report prepared for the Office of Liquor, Gaming and Racing.

³⁹ Independent Pricing and Regulatory Tribunal, above n31, 164-165.

⁴⁰ Neal *et al*, above n6, 125.

There are two distinct and separate policies that governments may adopt to provide protection against excessive gambling for patrons of gaming venues: *responsible gambling* and *harm minimisation*.

Responsible gambling refers both to the ability of the patron to limit his or her gambling involvement and to the provision of gambling by the venue in a way that encourages the patron to limit his or her gambling involvement. Clocks on the screens, signage in venues and ready availability of brochures that accurately specify the risks of gambling are examples of ways in which venues may seek to promote responsible gambling. At its core, responsible gambling refers to a patron limiting the time and money spent on the activity to levels that will not cause problems for the individual, his or her family, and the community in which he or she lives. A government policy of responsible gambling is one in which legislation supports and enhances the individual's ability to limit gambling to levels that can be afforded in time and money. Educational programs in schools and community education through the media are core aspects of a responsible gambling strategy. At the venue, signs providing accurate information about gambling, information provided on the gaming machine screen concerning money lost and time spent, clocks, and attentive staff can all become part of a responsible gambling framework. Nevertheless, whether or not excessive gambling takes place remains fully determined by the actions of the individual patron.

Harm minimisation refers to external limits on the ability of the individual to gamble excessively. A government policy of harm minimisation will involve legislation that regulates gambling opportunities in such a manner that excessive gambling is less likely to occur or unlikely to occur at all. Changes to the configuration of gaming machines can reduce the opportunity to lose excessive amounts of money. For example, a reduction in the maximum bet on a gaming machine reduces the expected rate of loss. Cashless gaming makes it possible to impose credit limits. A fee to play a fair machine would remove the uncertainty about the cost of playing the machine. However, most harm minimisation mechanisms have not been implemented.

An effective harm minimisation strategy will necessarily lead to reduced gaming machine income to venues and government, whereas a responsible gambling strategy may (or may not) change gaming machine income at the venue and government level (because it depends on implementation by the gaming machine gambler).

Self-exclusion resembles a strategy of harm minimisation by removing gambling opportunities from the individual. However, self-exclusion is only effective when the individual foregoes all opportunities to gamble. For example, an individual who seeks self-exclusion from a casino to avoid excessive gambling on gaming machines may subsequently gamble on gaming machines in a club or hotel from which they are not excluded. It is clear that self-exclusion is a support for responsible gambling rather than an example of harm minimisation.

6.3 Evaluation of self-exclusion schemes

Both the NSW Government and the gaming industry, represented by the Star City Casino, Clubs New South Wales, and the Australian Hotels Association (AHA), support the practice of self-exclusion. Self-exclusion schemes are clearly effective for a venue since the excluded patrons cannot access the gaming machines, and therefore cannot gamble to excess. However, supporters of self-exclusion programs assume that patrons are compliant with the terms of their contracts. Furthermore, it is assumed that venues can detect excluded patrons who attempt to enter and then take action to exclude them. These assumptions are open to challenge through effective evaluation based on empirical evidence. Further information on the evaluation of self-exclusion schemes is at Appendix 2.

The gambling industry and the State Government in NSW both express positive views concerning self-exclusion. GameCare, the self-exclusion program for hotels in NSW, is evaluated on the AHA (NSW) website as follows:

Since the official launch of the GameCare Hotel Self-Exclusion program, many thousands of people have used this confidential, cost-free service. Many participants have contacted the AHA (NSW) to offer positive feedback on the value of self-exclusion as a tool of recovery.⁴¹

Similarly, the NSW Office of Liquor, Gaming and Racing (OLGR) on its website, states that:

The Productivity Commission affirmed the use of self-exclusion as an important responsible gambling and harm minimisation measure in its report on Australia's Gambling Industries.⁴²

Croucher and Croucher report that 'it is the mandatory program of self-exclusion in NSW that is one of the most rapidly growing in the country'.⁴³

IPART recommended in its report, *Gambling: Promoting a Culture of Responsibility and Consequential Report on Governance Structures*, that there should be offence provisions to deal with venues that fail to make arrangements for problem-gambling counselling services and self-exclusion schemes, and that a working party should be initiated to review self-exclusion from gaming venues.⁴⁴ Whilst the former measure has been implemented, the review of self-exclusion from different types of gaming venues is still ongoing, with no reported outcomes since it was initiated three years ago.

This is not a good outcome for the consumer who wants to self-exclude from a number of venues, such as a club, a hotel and a TAB. Each type of venue has its own self-exclusion process, which ultimately means that the process of comprehensive self-exclusion is likely to be too hard to implement by the consumer. It is recommended that a mechanism be established with the objective of developing one simple, streamlined self-exclusion process that consumers can use for all types of gaming venues.

6.4 Harm-minimisation strategies trialed by governments

The Victorian Government appears to have taken the lead in both the introduction of harm minimisation measures and their evaluation. A summary of harm reduction legislation in Victoria since the 1999 Productivity Commission report follows.⁴⁵ This summary highlights the fact that Victoria has introduced more reform than NSW, and the reform goes further in introducing harm reduction mechanisms.

2000-2004	Gaming venues open for a maximum of 20 hours rather than 24 hours.
2001	Advertisements for gaming machines to include a warning about problem gambling.
2001	Regional limits placed on the numbers of gaming machines in five regions.
2001	Clocks to be placed on all gaming machines.
2002	Smoking banned in all gaming rooms.

⁴¹ AHA (NSW), *GameCare/Self Exclusion Program* <<http://www.ahansw.com.au/default.asp?sid=225&pids=%2C>> at 16 April 2009.

⁴² NSW Office of Liquor, Gaming and Racing website <http://www.olgr.nsw.gov.au/gaming_hfpg_self_exclusion.asp> at 16 April 2009.

⁴³ R F Croucher and J S Croucher, 'Self-exclusion programs for problem gamblers in Australia' (2005) 5(1) *Journal of the Academy of Business and Economics* 61.

⁴⁴ Independent Pricing and Regulatory Tribunal, above n31, 82.

⁴⁵ Department of Justice, Victoria, *Gambling Legislation* (2009) <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Gambling+and+Racing/Gambling+Legislation/>> at 16 April 2009.

2002	Maximum bet on a gaming machine set at \$10.
2002	Note acceptors on gaming machines limited to \$50 notes.
2002	The autoplay feature on gaming machines removed.
2002	ATMs in gaming facilities limited to \$200 cash out per transaction.
2002	Obtaining cash from credit cards at gaming venues banned.
2002	Winning amounts of more than \$2,000 to be paid by cheque.
2002	Improved lighting in gaming rooms.
2003	All new gaming machines to display the amount of money spent by the player.
2003	All gaming machine advertising is banned.
2005	Gambling advertising within venues further restricted.
2006	Regional limits on numbers of gaming machines extended to 19 regions.
2006	Winning amounts of more than \$1,000 to be paid by cheque.
2007	Automatic teller machines (ATMs) in venues to be limited to cash out of \$400 per day per person.
2008	All gaming venues to provide self-exclusion programs.
2008	Maximum bet reduced from \$10 to \$5 on all new machines.

Further responsible gambling and harm minimisation strategies have been announced and are planned for implementation in the near future.⁴⁶ These include:

2010	All new gaming machines must have a facility to allow the player to pre-set time and money limits before play commences.
2010	The maximum money that can be entered into a gaming machine is reduced from \$10,000 to \$1,000.
2010	Gaming machine numbers to be limited to no more than ten machines per 1,000 adults in each Local Government Area.
2012	All ATMs to be removed from gaming venues.

The NSW Government, in contrast introduced a number of gaming regulations that were recently updated in January 2009⁴⁷, and are outlined below for comparison with the Victorian measures.

- (1) Gaming venues must make available self-exclusion schemes for problem gamblers.
- (2) Maximum bet size on gaming machines set at \$10 per spin.
- (3) The maximum number of gaming machines in NSW is capped at 104,000 machines. As at June 2007, there were 73,421 gaming machines in clubs, 23,942 gaming machines in hotels, and 1,500 gaming machines in the Star City Casino; a total of 98,863 gaming machines (this represents 1 machine for every 69 people in NSW, with the maximum number of machines permitted representing 1 gaming machine for every 66 people⁴⁸). The transfer of machines between venues is both regulated by mandated local impact studies and by a buy-back scheme whereby one in every two machine licenses for sale must be returned to the NSW Office of Liquor, Gaming and Racing. However, the forfeiture of licences does not apply to the

⁴⁶ Ibid.

⁴⁷ NSW Office of Liquor, Gaming and Racing, *Changes – harm minimisation measures* (2009)

<http://www.olgr.nsw.gov.au/pdfs/G_FS_CHMM.pdf> at 16 April 2009; *Gaming Machines Act 2001* (NSW).

⁴⁸ These ratios are based on total (including children) population figures for NSW for 2007 published by the NSW Department of Planning on its website at <<http://www.planning.nsw.gov.au/programs/services/population.asp>> at 22 April 2009. If calculated on the basis of number of gaming machines per adult population, the total of 98,863 gaming machines in June 2007 represents a ratio of one gaming machine for every 53 adults, and the maximum of 104,000 represents a ratio of one gaming machine for every 50 adults.

transfer of licences within the same LGA. Gaming machine licences can be increased by converting amusement machine licenses to gaming machine licences until 2012.

- (4) Signs that must be displayed in hotels and clubs include:
- a counselling notice at the main entrance of the venue advertising the G-Line helpline.
 - 'Chance of winning' notice. This sign must be displayed in every area where gaming machines are located and on the front of all gaming machine. Signs must state that your chance of winning the maximum prize on a gaming machine is generally no better than 1 in 1,000,000.
 - Gaming machine notices. Two notices must be displayed on gaming machines. The first notice (gambling warning notice) must include at least one of six prescribed statements concerning the harm caused by excessive gambling. The second notice (problem gambling notice) must give the G-Line NSW telephone number for problem gambling.
 - ATM and cash back sign: The problem gambling notice must also be displayed on venue ATMs and gaming room cash back machines.
- (5) Player information brochures concerning the odds on gaming machines and self-exclusion schemes must be made available.
- (6) Clocks to be placed in each part of the gaming venue.
- (7) Advertising: venues are not permitted to advertise gaming machines externally to the venue. Advertising and promotion within venues are exempt from the ban.
- (8) Cheques and cash back: hotels and clubs are allowed to cash no more than one cheque (max \$400) per day for patrons. If requested, winnings exceeding \$2000 must be paid by cheque or EFT.
- (9) ATMs and EFTPOS facilities are banned from areas containing gaming machines.

One of the most significant differences is the positive stance taken by Victoria to reduce winning amounts paid by cheque from \$2,000 to \$1,000, while NSW recently increased the winning amount threshold to be paid by cheque from \$1,000 to \$2,000 with no transparent or due process to support such a retrograde measure. Such a measure primarily benefits the industry as greater amounts of cash can now be given to the patron as winnings, which in turn can be more readily fed back into the gaming machine immediately.

Another significant difference is the additional reforms to be introduced in Victoria from 2010 to 2012, which includes pre-setting limits, reducing the maximum amount of money that can be entered into a gaming machine by 90 percent, limiting gaming machine numbers to no more than 10 machines per 1000 in each Local Government Area, and removing all ATMs from gaming venues. Such reforms are positive actions taken by the Victorian Government to reduce the harmful characteristics of the gaming machines, whereas the NSW Government continues to place emphasis on informed choice and implementing reforms that potentially increase the losses of the problem gambler.

6.5 Evaluation of responsible-gambling strategies

The regulations concerning gaming machines focus on responsible gambling as a means of achieving harm minimisation and not on harm minimisation that can be achieved by changing the structural characteristics of the games offered on machines or the limitation of losses to individual players. There is very little consumer protection and much is left to the self-control of players. Unfortunately, the absence of self-control is a hallmark of problem gambling as defined in Australia.⁴⁹ Thus, an initial assessment of many of the regulations that have been introduced is that their impact will be small for problem gambling and marginal for recreational gambling (defined as non-problem gambling).

The following responsible gambling strategies rely on the self-control of individual players:

⁴⁹ Neal *et al*, above n6, 125.

- information about gaming machines and warnings of the dangers associated with extended gaming machine play;
- clocks, signs and pop-up messages describing losses and the passage of time;
- the provision of self-exclusion programs;
- educational programs in schools or for the general public;
- advertising the harm associated with problem gambling;
- provision of player feedback on games and losses after the gambling session.

Some of these strategies have been evaluated. Differences of opinion exist about the value of educational programs.⁵⁰ Large numbers of patrons do not recall brochures in clubs and hotels and, although patrons recall the signage, it is not rated as likely to deter problem gambling.⁵¹ Pop-up signs have not been shown to be effective although they are recalled more often and accurately.⁵² Self-exclusion is used by only a small minority of problem gamblers and used effectively by even less (see section on self-exclusion in this submission).

Protection of the public from dangerous practices often requires something more than an emphasis on personal responsibility. It is unthinkable that a government would leave the practice of other recreation activities, such as alcohol sales to children, tobacco smoking, safety of motor vehicles, children's toys and amusement rides. Like most other recreation activities that can be dangerous or have adverse effects for some people or that impact on community sensitivities or standards, there needs to be a balance of freedom to access and protection for at-risk individuals and the community as a whole. Alcohol, for example, is comparable with gambling because it is legally available and is a significant part of our society. Nevertheless, laws prevent some of the major harms that result from excessive alcohol consumption. Venues may not sell alcohol to intoxicated consumers. Driving under the influence of alcohol is banned. Thus, in other areas of society, laws are enacted to prevent high levels of harm from dangerous activities.

Excessive gambling causes high levels of harm.⁵³ The harm is primarily associated with excessive losses of money causing adverse consequences.⁵⁴ Thus, strategies that prevent excessive loss of money playing gaming machines are strategies that will reduce, minimise, or eliminate the harm caused. These strategies are discussed in greater details in the sections that follow.

6.6 Evaluation of harm minimisation strategies

Strategies that seek to reduce harm by modification of the gambling product and context are considered here rather than strategies that rely on the decision of the individual. The harm associated with prolonged gaming machine play has been linked with the loss of excessive amounts of money.⁵⁵ Thus, modifications to the gaming machines and their playing conditions that decrease the amounts of money lost are likely candidates for harm reduction, harm minimisation and harm elimination. A summary evaluating the following modifications is set out in Appendix 3.

⁵⁰ M Dickerson and J O'Connor (2006) *Gambling as an addictive behavior* 146; K Benhsain, A Taillefer, and R Ladouceur, 'Awareness of independence of events and erroneous perceptions while gambling' (2004) 29 *Addictive Behaviors* 399.

⁵¹ N Hing, 'The Efficacy of Responsible Gambling Measures in NSW Clubs: The Gamblers' Perspective' (2004) 16 *Gambling Research* 32.

⁵² S Monaghan and A Blaszczyński, 'Recall of Electronic Gaming Machine Signs: A Static versus a Dynamic mode of Presentation' (2007) 20 *Journal of Gambling Issues (online access only – no page numbers)*

⁵³ Productivity Commission, above n3, Section 7.3.

⁵⁴ Neal *et al*, above n6, 125.

⁵⁵ Productivity Commission, above n3, Section 7.1.

- mandatory shut-down of gaming machine venues for a period of hours each day;
- mandatory breaks in play after set periods of continuous play;
- removal of note acceptors from gaming machines and of ATMs from venues;
- slowing down of the games, so that fewer games are played in a given period of time;
- reducing the maximum amount of money that can be entered into a gaming machine;
- removing the 'gamble' feature from gaming machines;
- removing the 'bonus' features from gaming machines;
- reducing the maximum bet that can be made on each game;
- introducing cashless gaming, pre-commitment, and card-based controls.

6.7 Summary of harm minimisation measures in NSW

Self-exclusion schemes provide an opportunity for individuals, who gamble excessively and are unable (on their own) to curb their gambling, to abstain from gambling. For every individual who successfully uses such a scheme the harm associated with excessive gambling will decrease. For this reason, self-exclusion programs have a role both in the responsible gambling policies and harm minimisation strategies of governments.

However, the role and effectiveness of self-exclusion programs should not be overstated. On their own they provide a temporary relief from problem gambling for some people. Unfortunately, the small amount of evidence available indicates that self-exclusion is not widely used by those who would benefit and that individuals find it difficult to comply with the provisions of their self-exclusion deed.⁵⁶ In the hierarchy of methods that might be used effectively to reduce or eliminate problem gambling, self-exclusion schemes rank relatively low. Nevertheless, self-exclusion schemes have a place in the policies of governments that permit and regulate gambling opportunities. However, for consumer protection to be effective stronger methods of harm minimisation are recommended.

The increasing gambling revenue suggests that responsible gambling strategies are ineffective in markedly reducing problem gambling.⁵⁷ The implication of this conclusion is that problem gambling will continue unabated on gaming machines until the structural characteristics of gaming machines are changed to limit the losses incurred by individuals, that is, to make gaming machines a safer (less harmful) product to use. The harm from excessive gaming machine play would be eliminated if gaming machines were no longer publicly available. However, given that gaming machines occupy a significant role in community entertainment, removal of gaming machines may not be popular or warranted.

However, the harm from gaming machines through damaging loss of money may be reduced through changes to the design of the machines. In this submission (see Appendix 3), the case is considered for a reduction in the maximum bet. It is argued that a reduction in the maximum bet from \$10 to \$1 would have an impact on problem gambling. The larger the reduction in the maximum bet size, the larger the reduction in harm caused. Harm minimisation may be achieved by finding the maximum bet size that has least impact on recreational gambling but most impact on problem gambling. A search for this configuration of gaming machines is advocated.

⁵⁶ Independent Pricing and Regulatory Tribunal, above n31, 74-81.

⁵⁷ Productivity Commission, above n3, 9.

Recommendations – Section 6 - The effectiveness of harm-minimisation measures on problem gambling and those at risk

13. *There should be consistency in the provision of consumer information about electronic gaming machine features such as the return to player percentage and protection be provided to consumers from harmful design features such as the maximum bet size. Harm minimisation may be achieved by finding the maximum bet size that has least impact on recreational gambling but most impact on problem gambling. National co-ordination of further research to find this configuration would assist all jurisdictions.*
14. *Research should include the introduction of cashless gaming and how it could best be implemented.*
15. *A national guide to evidence-based practice for self-exclusions schemes would be of benefit to states such as NSW. This should not prevent NSW ensuring that such schemes are more accessible to consumers. In NSW, it is currently difficult to self-exclude from a number of different types of venues such as a club, a hotel or a TAB. Each type of venue has its own self-exclusion process, which ultimately means that such a product or service is too difficult to use by the consumer and can therefore act as a deterrent to using the scheme. NSW should form a working party, which includes consumer representation, to develop a streamlined self-exclusion process that consumers can use for all types of gaming venues.*

7. The limits of legal action as a compliance tool

There has been very little litigation in Australia in which the plaintiff was a problem gambler bringing action against a gambling venue or service. One of these is a case in which PIAC represented the plaintiff, Mr Reynolds, in his action against the Katoomba RSL All Services Club, *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 (the *Reynolds case*)

All but one of the other cases are more recent, with the last case dealt with in this section being a claim against a financial institution rather than a gambling venue:

Preston v Star City (1999) NSWSC 1273 and *Preston v Star City Pty Limited (No 3)* [2005] NSWSC 1223 (the *Preston cases*);
Foroughi v Star City Pty Limited [2007] FCA 1503 (the *Foroughi case*);
Kakavas v Crown Limited & Anor [2007] VSC 526 (13 December 2007) (the *Kakavas case*);
Politarhis v Westpac Banking Corporation; Politarhis v Australian Central Credit Union Ltd [2008] SASC 296.

These cases are all dealt with briefly below. What they clearly demonstrate is that, in its current state, the common law does not clearly recognise a duty of care imposed on the gambling venue in respect of problem gamblers and there may not be a cause of action available to an individual for a breach of a statutory duty. This highlights the need for effective regulatory mechanisms and raises the question of whether there should be some form of remedy available to problem gamblers if they suffer loss as a result of a failure by a venue to comply with its legislative obligations, particularly in relation to mechanisms designed to ensure responsible gambling and/or harm minimisation in relation to gambling.

Of the cases against gambling venues, the *Reynolds case* is the only one in which the substantive issues have been determined by the court. The others are all interlocutory decisions dealing with whether or not a case could proceed against the venue.

7.1 The *Reynolds case*

Mr Reynolds was a member of Katoomba RSL Club between 1992 and 1994. During that time he gambled in excess of \$250,000 at the Club. The Club knew that Mr Reynolds was a problem gambler but continued to facilitate this by cashing his personal cheques, business cheques and third party cheques despite having been requested by both the patron and his family to desist from doing so.

PIAC, representing Mr Reynolds, contended in the NSW District Court that the Club breached its duty of care to Mr Reynolds and acted unconscionably in its dealings with him. Mr Reynolds was unsuccessful. In an unreported decision Acting Judge Hogan found that although he accepted Mr Reynolds was a compulsive gambler and the club was aware of that fact, and despite the requests to stop providing him funds for gambling, in the end it was a question of free will.

Mr Reynolds appealed to the New South Wales Court of Appeal and subsequently after the Court of Appeal upheld the decision, sought special leave to appeal to the High Court. The leave application was rejected.

In its decision, the Court of Appeal held that the Club owed no duty of care to Mr Reynolds. In the decision, His Honour Chief Justice Spigelman found that, '[s]ave in an extraordinary case, economic loss occasioned by gambling will not be accepted to be a form of loss for which the law permits recovery'⁵⁸, observing also

⁵⁸ *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 at [9] per Spigelman CJ.

that 'loss of money by way of gambling is an inherent risk in the activity and cannot be avoided'.⁵⁹ The court was unable to provide any examples of such an extraordinary case, with the Chief Justice stating, 'I make allowance for an extraordinary case, without at the present time being able to conceive of any such case'.⁶⁰ It appears from the decision, however, that in order to achieve this status the plaintiff would have to establish that the gambling venue had in some way detrimentally interfered in the gambler's capacity to exercise control over their own actions.

Spigelman CJ reflected on the autonomy of the individual and the circumstances of Mr Reynolds:

It may well be that the appellant found it difficult, even impossible, to control his urge to continue gambling beyond the point of prudence. However, there was nothing which prevented him staying away from the club. The suggested duty on the club to advise him to resign his membership emphasises the point. He could have resigned at any time. The requests to refuse to cash cheques when asked, did not shift his personal responsibility for his own actions to the club. There was no reason for the club to honour one request rather than the other.⁶¹

This knowledge of vulnerability must be placed in a context that the duty is to prevent the self-infliction of harm by an individual whose autonomy the common law respects. It is also to be placed in the context where the appellant had available to him other means of obtaining cash, perhaps not as immediate or convenient, but other means did exist. Furthermore, other clubs and forms of gambling were available to him.⁶²

In order to understand what might be involved in finding a case that showed sufficient vulnerability to control being overthrown by the conduct of the gambling venue, Giles JA stated [141]:

Vulnerability and control are related, and are important in determining whether a duty of care is recognised, for their absence as well as for their presence. If a defendant has no control or but remote control over the conduct of or affecting the plaintiff, a duty of care as regards that conduct can hardly be imposed on the defendant – see *Agar v Hyde*. Where a plaintiff wishes to conduct himself in a particular way even one involving possible harm, the importance attached to individual autonomy restrains the imposition of a duty of care requiring that he be prevented or hindered from so conducting himself (*Perre v Apand, Agar v Hyde*). Vulnerability connotes that the plaintiff is unable to look after his own interests and is open to the control of the defendant ...⁶³

The gambler's vulnerability comes from the extent to which his control over the exercise of his rights is compromised. The club has the indication that the gambler's control over the exercise of his rights, that is his ability to prevent his gambling and suffering loss, is compromised. That directs attention to the nature of the gambler's condition and whether recognition of a duty of care is an appropriate response to the condition.

The condition is ordinarily neither permanent nor constant in its effect. The evidence of the consultant psychiatrist spoke of a gambling problem in terms of difficulty stopping gambling, but did not suggest total absence of control or inability to regain control. As the course of the appellant's gambling shows, at some time a gambler can with assistance or by his own will cease to be a problem gambler, and when a problem gambler there is a range from relatively harmless, albeit undesirable, indulgence to harmful over indulgence. The law pays regard to physical and mental disabilities, and for example to impulsiveness and less than rational conduct of the very young, in fashioning duties of care, but the

⁵⁹ Ibid at [27] per Spigelman CJ.

⁶⁰ Ibid at [9] per Spigelman CJ.

⁶¹ Ibid at [48] per Spigelman CJ.

⁶² Ibid at [49] per Spigelman CJ.

⁶³ Ibid at [141] per Giles JA.

gambler's disability is of a different character. Control ultimately rests with the gambler, and society encourages the problem gambler to regain control. In the present case, with the benefit of the evidence of the consultant psychiatrist, the trial judge did not accept that the appellant "did not have a free will to exercise", and the appellant's counsel expressly said that the case was not put as one in which the appellant "had lost the capacity to make choices for himself" or "had been deprived of all choice of action in every respect".⁶⁴

7.2 The *Preston* cases

The first of the *Preston* cases was determined by the NSW Supreme Court in 1999. In that case, the plaintiff alleged negligence and a breach of statutory duty by the defendant, Star City. The plaintiff suffered losses of approximately \$3 million dollars and he alleged that Star City had offered him inducements to gamble such as the provision of a cheque-cashing facility, the supply of complimentary products, services and privileges (including alcoholic beverages), and (if he remained a 'high roller') preferential treatment in respect of business contracts for procurements of marketing materials, etc.

Star City sought to have the statement of claim struck out on the basis that there was no reasonable cause of action arguing that no duty of care could exist because the offering of inducements was an 'ordinary part of commercial activity'. At first instance, this argument was rejected, with Master Harrison determining that the argument made by Star City failed to 'take into account the duty of care a casino operator may owe to a person who is intoxicated and induced to gamble'⁶⁵, and concluding that a defendant 'may owe a greater duty of care where the patron is heavily intoxicated, his reasoning is impaired and he does not appreciate the consequences of offering inducements'.⁶⁶

Star City also argued that its operations were tightly regulated under the *Casino Control Act 1992* (NSW), which provided for action to be taken against it by the Casino Control Authority but did not provide for a private right of action for a breach of any of its statutory duties. The Master rejected this argument, determining that 'the argument that a breach of [a statutory provision] may give rise to a private right should be permitted to go to trial'.⁶⁷

On appeal, the Court upheld the Master's decision that the matter ought to go to trial.⁶⁸

In 2005, the Supreme Court was again asked to strike out Mr Preston's pleadings as set out in his fifth statement of claim, this time in reliance on the decision in the *Reynolds* case among other things. The plaintiff asserted that the circumstances of his case brought it into the 'extraordinary' class of circumstances referred to in the *Reynolds* case. The Court agreed that this may be so and, as such, held that the plaintiff ought to be given the opportunity to make the case.⁶⁹ The court also held that 'the combination of an addiction to gambling and alcoholic intoxication' was an arguable case for vulnerability and inability to protect against the defendant's conduct.⁷⁰

The court, however, struck out those aspects of the pleadings that alleged negligence but allowed the plaintiff to replead these elements in respect of the defendant's response (or lack thereof) to the conduct of its employees and agents.

⁶⁴ Ibid at [149]-[149] per Giles JA.

⁶⁵ *Preston v Star City Pty Limited* [1999] NSWSC 459 at [38].

⁶⁶ Ibid.

⁶⁷ Ibid at [28].

⁶⁸ *Preston v Star City Pty Limited* [1999] NSWSC 1273.

⁶⁹ *Preston v Star City Pty Limited (No 3)* [2005] NSWSC 1223 at [26].

⁷⁰ Ibid at [27].

To date, this matter had not been reported as concluded, with further interlocutory decisions in 2005 and 2007.

7.3 The *Foroughi* case

More recently, in the case of *Foroughi v Star City Pty Limited* [2007] FCA 1503, the plaintiff sued the Casino alleging negligence, breach of statutory duty and misleading and deceptive conduct pursuant to the *Trade Practices Act 1974* (Cth). Jacobson J followed the decision of the NSW Court of Appeal in *Reynolds v Katoomba RSL*, and dismissed the claim.

Mr Foroughi was a problem gambler and the subject of a 'voluntary exclusion order' under sub-section 79(3) of the *Casino Control Act 1992* (NSW) in respect of Star City following substantial losses at both the Melbourne and Sydney casinos. Mr Foroughi alleged that, in spite of the order, he entered Star City on 65 occasions between June 2004 and January 2006 and sustained losses in the order of hundreds of thousands of dollars.

Mr Foroughi alleged that Star City was under a duty 'to take reasonable steps to prevent him from entering the gaming areas of the casino and/or remove him from the casino'.⁷¹ He alleged that the Casino's existing methods for detecting excluded persons were inadequate. The Federal Court rejected this argument.⁷²

Mr Foroughi's evidence appears to indicate that he initially breached the exclusion order to test whether or not it would be effective. His evidence was that, even after he had commenced proceedings and the Casino had put his name and photograph onto a 'persons of interest' board, he was able to enter the casino and gamble.⁷³

While noting that the issue of whether or not an individual could bring an action for damages for a breach of a statutory duty under the *Casino Control Act* was not argued, the Court stated its view that:

... the legislative history and the case law indicate that the intention of the *Casino Control Act* was not to confer a private right of action for damages on problem gamblers who may enter a casino in breach of an exclusion order.⁷⁴

Even if such a private right of action did exist, the Court cited *Rixon v Star City Pty Ltd* [2001] NSWCA 265 as authority for the proposition that, for the matter to proceed there are:

... two prerequisites of knowledge on the part of the casino operator ... first, knowledge that a particular person is in the casino, and, second, knowledge that the person is the subject of an exclusion order: see *Rixon* at [33].⁷⁵

Despite Mr Foroughi's uncontested evidence that on at least one occasion on which he had entered the casino this was known to the casino, the Court held that there was no evidence that the casino 'knew that [he] was gambling in the casino in breach of the terms of his voluntary exclusion order'.⁷⁶

In considering evidence on problem and pathological gambling, the Court held that even pathological gamblers 'can exercise control and limit or cease gambling if they choose to do so'.

⁷¹ *Foroughi v Star City* [2007] FCA at [6].

⁷² *Ibid* at [56]-[59] per Jacobson J.

⁷³ *Ibid* at [20]-[21].

⁷⁴ *Ibid* at [95].

⁷⁵ *Ibid* at [100]-[101].

⁷⁶ *Ibid* at [104].

The Court went on to find that the plaintiff's situation was indistinguishable from that in the *Reynolds case* in respect of duty of care and dismissed this element of his claim. The Court distinguished the case from the *Preston cases* on the basis that there was no claim made that the respondent 'knew of the plaintiff's problem and actively encouraged and exploited it'.⁷⁷

Even had a duty existed, the Court considered the mechanisms in place to detect excluded persons and found they were adequate. The Court noted that the Casino Control Authority had been, in its 2003 report, 'critical of limitations of a system that relies on human beings to detect excluded persons', but made no recommendations for changes to the system.⁷⁸

It is difficult to see, in light of the finding in respect of control, how anyone could establish the extraordinary circumstances referred to in the *Reynolds case*.

7.4 The Kakavas case

The plaintiff, Mr Kakavas, brought a claim against Crown Casino alleging that he has lost approximately \$30 million through gambling at the casino caused by Crown's unconscionable conduct towards him, its negligence, misleading and deceptive conduct. The defendant casino sought to have the matter permanently stayed on the basis that the pleadings were insufficient to make out the causes of action.

Having begun gambling at the Casino in about 1994, Mr Kakavas had, that year and in the following year, a number of meetings with Casino employees in which he disclosed that he had 'an uncontrollable and compulsive urge to gamble and that unless he was prevented from so doing, he would continue to gamble at the casino in a reckless manner'.⁷⁹

These meetings resulted in a voluntary exclusion order that was subsequently revoked by the Casino in 1998. Similar orders were also implemented in respect of a number of other casinos across Australia and an order was issued by the NSW police to exclude Mr Kakavas from the Star City Casino.

The plaintiff claimed that from July 2004 he suffered from a psychiatric condition known as 'pathological gambling ... characterised by a continuous or periodic impairment of his ability to control the frequency with which he gambled and the amount of money that he wagered'.⁸⁰

At this time, Mr Kakavas gambled excessively in Las Vegas and alleged that the Crown Casino sought to entice him back to its premises to gamble there instead. The enticements included permitting him to bet up to \$3 million per hand, offering a 20% rebate on his losses, promoting gaming at the casino to him, providing him with complimentary tickets to the Australian Open tennis, accommodation at the Casino hotel, limousine transport in Melbourne, food and drinks, complimentary flights from Melbourne to a range of other locations and, in breach of section 68 of the *Casino Control Act*, provided him with a line of credit totalling almost \$4 million. It was also alleged that the pilot on various of the flights handed the plaintiff boxes of cash.

In considering the matter the Court stated:

⁷⁷ Ibid at [129].

⁷⁸ Ibid at [137]-[138].

⁷⁹ *Kakavas v Crown Limited & Anor* [2007] VSC 526 (13 December 2007) at 2.

⁸⁰ Ibid at 4.

Looked at in the light of ordinary concepts of fair and just dealing, it is at least arguably wrong, morally and ethically, for a casino operator by conscious and deliberate policy to prey upon a patron known by the operator to be a compulsive gambler ...

The moral and ethical position may be judged against the provisions of the CCA. It forbids the operators of casinos from, among other things, promoting gaming.

But to say that is to say no more than *perhaps* the law should align itself with the moral and ethical position, and in doing so provide the gambler with a private remedy in the form of recovery of his or her losses, in whole or in part. It is not of itself a reason to conclude that the law *necessarily* should, still less that it does, provide such a remedy. It is, after all, also arguable that people should be responsible for their actions. Most gamblers lose most of the time. Why should some be favoured with the pleasure without the pain?⁸¹

On the basis that the matter was an interlocutory proceeding for strike out of the claim, the Court held that the claim alleging unconscionable conduct was not so untenable that it should not proceed to a hearing.

In considering Mr Kakavas's claim of negligence, the Court referred both to the *Reynolds case* and the *Preston cases*, including a further interlocutory decision in 2003. The Court stated:

... Hoeben J in *Preston (No.3)* held that a duty of care might be breached so as to give rise to a cause of action in negligence, where the defendant operator of a gambling establishment, knowing that a patron was a 'problem gambler', carelessly failed to ensure that its employees did not exploit that patron's weakness. His Honour was of the opinion, which I respectfully share, that such a case falls outside the general principle expounded by the Chief Justice in *Reynolds*. Similarly, a duty might be breached where the operator, again with the relevant knowledge, carelessly (and therefore by definition not deliberately or recklessly) failed to have that knowledge in mind when taking steps that amounted to unwitting exploitation of the patron.⁸²

The Court noted that a claim of negligence pleaded on the same facts was somewhat incompatible with a claim of unconscionable conduct, which has an element of deliberateness. However, it observed that there were two elements of Mr Kakavas's claim that could be argued to involve 'mere carelessness' and, as such, were more properly considered within the context of negligence. The Court considered, however, that this element of Mr Kakavas's claim could not be made out on the facts and should not proceed.

Similarly, the Court held that the facts pleaded in support of the allegations of misleading and deceptive conduct were more appropriately supportive of the claim of unconscionable conduct. As a result, Mr Kakavas's claim was allowed to proceed as a claim alleging unconscionable conduct only.

7.5 The *Politarhis case*

Mr Politarhis and his wife, who were the plaintiffs in this case, were, at different times, members of the Australian Central Credit Union (ACCU) and customers of Westpac Banking Corporation (Westpac). Following mistakes by ACCU and Westpac, Mr Politarhis was twice able to access funds on credit to which he was not entitled; funds that were predominantly used, and lost by him through gambling.

Mr Politarhis's primary claim was that his access to the credit caused him both financial loss and various psychological and psychiatric conditions including pathological gambling, drug addiction, depression and paranoia. He also alleged that ACCU failed to enforce its policies that would have limited his access to the

⁸¹ Ibid at 7.

⁸² Ibid at 13.

credit. Mr Politarhis also alleged that ACCU acted either negligently or unconscionably by reporting the plaintiffs' overdue loan to a credit-reporting agency.

Westpac cross-claimed, seeking an order for possession of the plaintiffs' property, which was mortgaged to secure a loan. Mrs Politarhis brought a cross-claim against Westpac for the financial loss and damage to her own physical and mental health she alleged had been caused by the plaintiff's use of the credit.

The defendants argued that much of the claim was out of time.

The Court accepted that Mr Politarhis was a problem gambler and that he had, because of mistakes by the defendants, twice been given access to funds on credit that he should not have had.

The mistake in respect of ACCU was the continuation of a line of credit of \$55,000 despite Mr and Mrs Politarhis transferring their debt to another entity. (They had applied for extension of the credit, which was refused by ACCU, which suspected that Mr Politarhis had a gambling problem having been asked by Mrs Politarhis to strictly enforce their withdrawal policies due to her husband's gambling.) It was intended that the line of credit with ACCU would be terminated at the time of that transfer, but it mistakenly was not and Mr Politarhis realizing this, in the first half of 2000 accessed \$50,000 of the credit to fund his gambling unbeknown to his wife. Mr Politarhis, around the same time, sought assistance from a financial counsellor and was subsequently admitted for treatment following incidents of self-harm. The financial counselor was then authorized by the plaintiffs to advise ACCU of the mistake and, as a result, the line of credit was frozen.

In 2003, the plaintiffs again decided to consolidated their borrowings and applied for a loan (in the form of a line of credit) for \$180,000 from Westpac. The plaintiffs discharged their mortgage with the other provider and the loan with Westpac was secured with a mortgage against their home. Later that same year, the plaintiffs applied to extend the loan to \$198,000 and this was done by Westpac through the establishment of a new loan facility. Unfortunately, in doing so Westpac failed to terminate the previous line of credit. Mr Politarhis became aware of the mistake and, rather than inform either his wife or Westpac, used \$150,000 of the additional credit for gambling. When Mrs Politarhis became aware of this, she did not report the mistake to Westpac on the basis that her husband threatened to kill himself and their children if he did so. Mr Politarhis accessed a further small amount of the credit then reported the mistake to Westpac.

During the same period, Mr Politarhis made a total and permanent disablement claim in respect of a work-related neck injury, alleging the injury had caused his depression, drug abuse and pathological gambling.

The court dismissed the plaintiffs' claims finding:

- ACCU did not have a policy of daily withdrawal limits at the relevant times and had no duty in the absence of such a policy to impose a daily withdrawal limit.
- Had there been a daily withdrawal limit that the ACCU failed to enforce, it would have been unlikely to find that ACCU could be held responsible for Mr Politarhis's financial losses as he could have relatively easily circumvented it.
- Mr Politarhis had a gambling problem, was at risk of self-harm and had depression and a history of drug use that pre-dated the earlier mistake by ACCU, this was evidenced by reports from 1995 relating to his workplace injury and others.
- In partial reliance on the reasoning in the *Reynolds case*, ACCU did not owe a duty to Mr Politarhis to take reasonable care to prevent his financial losses and that Mr Politarhis was not in a position of vulnerability in respect of the ACCU.
- ACCU's reporting of the plaintiffs' loan default gave rise to no cause of action as ACCU was under no duty not to make the report and there was no basis for finding it was unconscionable.

- Westpac was under no duty to Mr Politarhis not to cause him psychiatric injury or financial loss and, in any event, any exacerbation of the Mr Politarhis's pre-existing conditions was not attributable to conduct of Westpac.

Recommendations – section 7 - The limits of legal action as a compliance tool

16. *That the Productivity Commission propose amendments to the various regulatory regimes to provide for a separate cause of action for individual problem gamblers affected by a failure by a gambling venue to comply with its statutory obligations.*
17. *That the Productivity Commission consider mechanisms to encourage gambling venues to more actively and effectively police voluntary exclusion schemes, such as penalties in the form all venue earnings from excluded gamblers being forfeited.*

Summary of recommendations

Recommendations – Section 3 – Participation profile and social impacts of gambling

The example of NSW provides several opportunities for national co-ordination of research, development and promotion of harm-minimisation measures. Co-ordination, through Federal-State agreements, could ensure funding for harm-minimisation campaigns was directed towards evidence-based policies and services, avoid unnecessary duplication and create consistency for consumers.

PIAC recommends that the Productivity Commission consider and recommend that all jurisdictions co-ordinate:

- 1. Funding of services for problem gamblers that are based on a population model. Such a model would include information on current socio-economic status, gaming machine density per adult, areas with aboriginal communities, areas with high numbers of individuals with a cognitive disability, areas with high numbers of young adults (18-24 years), and location of gaming machine density per adult to ensure that access to treatment services is freely available to low-income groups with gambling problems.*
- 2. Funding and conduct of research into and design of specific services for Aboriginal people in communities with a very high percentage of gambling problems. Studies available are limited; a national approach would allow further examination of the extent of the problem, as well as preventative measures and appropriate treatment service delivery.*
- 3. Funding and conduct of research into and design of specific services to address the high percentage of younger adults gambling on gaming machines. Evidence on the extent of problem gambling demonstrates a need for preventative measures as well as appropriate treatment services.*
- 4. Funding and conduct of research into and design of specific services for gamblers with cognitive disabilities to understand the extent of the problem, as well as to develop preventative measures and appropriate treatment service delivery. This should include an examination of the responsibilities of venue operators to patrons who have diminished decision-making capacity.*
- 5. Funding and design of screening tools for health workers (GPs, workers in community mental health centres, etc) to help them determine when a client should be screened for problem gambling, and what referral is appropriate.*
- 6. The funding and implementation of population-wide promotions for information and referral services (such as G-line in NSW), applying lessons learnt from health (promotion) community education in other areas (smoking cessation and depression detection) to advertising campaigns. The campaign should be core to a whole community approach that encourages people to recognise that their gambling behaviours might be harmful and that gaining support/intervention early is the best way to go.*

Recommendations – Section 4 – The effects of the regulatory structures

The regulatory environment described in this submission may be unique to NSW, but a general principle applies to all jurisdictions, that:

- 7. The gambling industry regulatory body should be independent, in order to ensure a separation between policy making and regulatory and enforcement functions.*

8. *All gaming advertising should be responsible advertising, and all regulatory measures should be applicable to all forms of gambling and not just one form of gambling such as gaming machines.*
9. *Responsible advertising should include gaming machine advertising and signage within a venue, and the relevant regulatory measures should be applicable to advertising both outside and within a venue.*
10. *Responsible advertising should include promotional material is sent to members of a club or association.*
11. *Funding for services and related community projects should be administered by an independent body, which has as its benchmarks due process, transparency of process and consumer consultation. Grants from this fund should be allocated with appropriate consultation that seeks community and expert knowledge. This applies particularly to the NSW Community Development Fund.*

Recommendation – Section 5 - The impact of gambling on commonwealth, state and territory budgets

12. *State and Territory Governments should meet a national funding benchmark for prevention campaigns, counselling and support services. The Productivity Commission’s annual report on Government Services could monitor expenditure in this area so that jurisdictions can measure their progress. In the case of NSW, funding should be paid into the Responsible Gambling Fund from a taxation component from all venues in NSW with gaming machines.*

Recommendations – Section 6 - The effectiveness of harm-minimisation measures on problem gambling and those at risk

13. *There should be consistency in the provision of consumer information about electronic gaming machine features such as the return to player percentage and protection be provided to consumers from harmful design features such as the maximum bet size. Harm minimisation may be achieved by finding the maximum bet size that has least impact on recreational gambling but most impact on problem gambling. National co-ordination of further research to find this configuration would assist all jurisdictions.*
14. *Research should include the introduction of cashless gaming and how it could best be implemented.*
15. *A national guide to evidence-based practice for self-exclusions schemes would be of benefit to states such as NSW. This should not prevent NSW ensuring that such schemes are more accessible to consumers. In NSW, it is currently difficult to self-exclude from a number of different types of venues such as a club, a hotel or a TAB. Each type of venue has its own self-exclusion process, which ultimately means that such a product or service is too difficult to use by the consumer and can therefore act as a deterrent to using the scheme. NSW should form a working party, which includes consumer representation, to develop a streamlined self-exclusion process that consumers can use for all types of gaming venues.*

Recommendations – section 7 - The limits of legal action as a compliance tool

16. *That the Productivity Commission propose amendments to the various regulatory regimes to provide for a separate cause of action for individual problem gamblers affected by a failure by a gambling venue to comply with its statutory obligations.*
17. *That the Productivity Commission consider mechanisms to encourage gambling venues to more actively and effectively police voluntary exclusion schemes, such as penalties in the form all venue earnings from excluded gamblers being forfeited.*

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Appendix 1: PIAC submission to the 1999 Productivity Commission Inquiry into Australia's Gambling Industries

Inquiry into Australia's Gambling Industries

PIAC SUBMISSION

1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to make submissions to this Inquiry and commends the Commonwealth Government for appointing The Productivity Commission as the Commissioners of this Inquiry.

The terms of reference of the Inquiry raise a myriad of important issues, many of which are connected and interrelate. Due to PIAC's limited role in the area of gambling, our submission will be directed to those areas in which we are able to make a useful contribution.

Our main concern has been to extend the debate about 'responsible gambling' to encompass a discussion of the consumer protection issues involved. Currently, governments and the main industry players appear to be primarily concerned with attracting people to play at gaming venues by advertising them as a form of glamorous, safe and fun entertainment. The purpose of this is financial in that both governments and the industry have vested interests in ensuring that people continue to spend money at gaming venues. There is little or no public focus on the damage caused by gaming practices nor on effective ways of containing the sometimes excessive behaviour of some consumers.

Along with other organisations within the community sector, PIAC is concerned at the lack of attention which has been paid to the harm suffered by individuals, groups and the community in general, due to the irresponsible provision of gaming services. The corollary of a focus on promotion rather than protection is a lack of funding and resource support for an independent regulatory body. Such a body could provide substantial regulation of and direction to the ever-increasing gaming industry.

Whilst positive changes are emanating from some individual gaming service providers, this appears to be limited to those which are larger and more reputable. An industry driven approach to regulation can only work if the industry is united. The evidence is the opposite. Whilst there are constructive initiatives occurring in some areas, there is no change elsewhere. PIAC therefore sees it as the role of government to improve regulation across the whole industry.

To date, PIAC's main involvement in the area of gambling has been largely limited to the NSW jurisdiction, through our experience in individual litigation, and also as a participant in the reference group established to guide the policy and program development of the NSW Responsible Management of Gambling Project. While much of the material we have gathered is anecdotal in nature, the strength of the concerns and validity of the issues it raises remain.

PIAC's submission is limited to discussing the effects of the regulatory structures governing the gambling industry in NSW. We are confident, however, that the issues raised are relevant, to differing degrees, for all States and Territories.

2. Lack of Appropriate Action by Current Regulators

It is PIAC's submission that in NSW, the main Government body which is supposed to provide some discipline to the gambling industry is failing in its duties. It appears that, in addition to possible shortfalls in the laws regulating gambling, there is a gap in the regulatory monitoring and enforcement of the law. The focus of the NSW Department of Gaming & Racing ("the Department") appears to be limited to licensing matters and to ensuring appropriate accounting

and record keeping. There are some serious matters which the Department apparently does not deal with, despite the fact that the relevant legislation makes provision for them.¹ From anecdotal evidence and our own research, there do not appear to be any cases where the Department has brought proceedings against a registered Club for its actions in relation to individual consumers.

Further, it appears that the Department does not address the social issues raised by gambling in a substantial and considered way. Although there is information about gambling counselling services in the brochures and publications produced by the Department, it is not a primary aim of the Department to focus its work on reducing the number of problem gamblers and assisting those who have already developed a problem. The Department apparently does not handle individual consumer complaints, nor does it monitor compliance with, or even appear to be aware of, relevant consumer protection laws.

2.1 Section 9A(5A)

Provisions designed to protect gamblers which fall directly within the Department's responsibility, such as s 9A(5A) of the *Registered Clubs Act* ("the Act"), do not appear to receive appropriate attention from the Department. Section 9A(5A) provides that:

It is a condition of the certificate of registration of a club that the secretary of the club is not to provide a cash advance on the club premises, or permit or suffer a cash advance to be provided on the club premises on behalf of the club, otherwise than as a prize won as a direct or indirect consequence of operating a poker machine in accordance with this Act and the other conditions to which the registration of the club is subject.

It is apparent from matters that PIAC has been involved with, and matters which have been referred to gambling and financial counselling services, that there are systemic breaches of this provision. Despite this, the Department appears to have no complaint handling process in relation to it. Even those complainants who overcome the barriers involved in getting to the Department and making a complaint do not appear to have their problems dealt with in any adequate way. It appears that the Department approaches such complaints as raising licensing issues which then become a matter between the Department and the club. The result of this is that there is generally little or no information about the progress of the complaint relayed back to the complainant, and the interests of the individual are neglected if not ignored.

An explanation for the approach taken by the Department in relation to s 9A(5A) may be that there is still some uncertainty about the exact meaning of the provision within the Department. In fact, it appears that the Department takes a very narrow view of what activities it is able to restrict. While such confusion may raise difficulties in the correct application of the law, the continued existence of uncertainty in relation to the legislation is symptomatic of the Department's failure to address the issues involved, or to seek to take any serious action against a club, including prosecution. Where the Department adopts a hands-off regulatory approach, with the most significant action being a letter to club managers asking them to improve their performance, such uncertainty about the meaning of the provisions of the Act is inevitable.

2.2 Consumer Protection Legislation

There are a number of pieces of legislation which provide relevant consumer protection measures to the provision of gambling services. They relate generally to the provision of goods and services, of which the provision of gambling services clearly form a part. They include the *Trade Practices Act*, the *Fair Trading Act*, the *Contracts Review Act* and the *Credit Act*. Such

¹ Section 9A(5A) of the *Registered Clubs Act*, for example.

legislation makes reference to prohibitions on misleading and deceptive conduct, unconscionable conduct, false representations, the offering of gifts and prizes and restricting the circumstances and manner in which credit can be offered and provided. In addition, where there are circumstances such as knowledge of a patron's vulnerability or a request to be banned, and possibly more generally, there is a common law duty of care on service providers in relation to patrons.

From PIAC's cases and from the experience of gambling and financial counsellors, it is apparent that a number of providers of gambling services, including registered clubs and hotels, breach these laws on a regular basis. The regulator charged with the responsibility of administering the relevant NSW consumer protection legislation is the Department of Fair Trading. Nevertheless this Department appears, either for resource reasons or as a matter of demarcation, to regard the principle responsibility to lie with the Department of Gaming & Racing. Such might be acceptable if the Department actually accepted that responsibility and was aware of the legislation and sought to ensure compliance with it. However at present it appears that that is not the case.

If the Department were to take a more pro-active approach to consumer protection legislation, it would provide a good starting point for the better management of consumer complaints, as well as a more co-ordinated approach to monitoring the activities of gambling service providers. However, whilst regulatory responsibility remains unclear and resources inadequate, gambling consumers do not benefit from the existence of relevant consumer protection measures. At present consumers of gambling services with a complaint or dispute have nowhere to go. A central agency with responsibility must be established and its existence and role must be advertised to consumers.

2.3 *Role of the Regulatory Body*

There are two other related problems which arise in relation to the role of the Department. The first is the use of voluntary codes of practice, as opposed to mandatory codes, to regulate the gambling industry. The other is the lack of separation between an organisation whose job it is to promote gambling and an organisation whose job it is to regulate gambling.

Looking at the second problem initially, it is clear that any organisation whose duties are both to promote and regulate an industry would find itself in a position of conflict. Nonetheless, this is the position in which the Department is placed. The legislative responsibility to not only regulate the industry in terms of licensing, advertising and management, but also in terms of complaints and possibly litigation, falls on the Department. This does not sit well with a duty to promote the industry and encourage its growth and development.

It is PIAC's submission that unless and until the step of setting up an independent regulatory body is taken, the conflicting roles of the Department will cause internal confusion and a lack of respect for the Department's practices externally.

This conflict in roles contributes to the first problem mentioned above. At present, a voluntary code of practice is being trialed in NSW. The success of any such code is entirely dependent on the continued goodwill of all gambling venues operators and owners. Due to the voluntary nature of the code, the only thing a particular venue has to lose from not abiding by the code is their reputation amongst gambling counsellors and associated organisations. The Department has little or no power to enforce the code, which reduces the effectiveness of the Department as a possible tool in the protection of both the industry and individual consumers.

In addition, whilst mainstream gambling outlets may be happy to set and meet reasonable standards, the quality of a voluntary code is set by the more reluctant members of the industry.

The result is a product of the lowest common denominator. The gambling sector is characterised by an enormous range in the size, professionalism and ethical commitment of the service providers. They range from the large, well resourced mainstream providers to many smaller ones which exist on the margins and in which standards are low. It is not an industry where all providers have a commitment to developing best practice. Nor are all providers amenable to positive influence from industry associations. It is therefore unsuited to voluntary regulation. Those who would comply with a voluntary code are not the main source of problems. Those who are the source of the problems would not comply with a voluntary code.

If a mandatory code were to be introduced, it would not only increase the protection available to people who choose to gamble, but also improve the image and public perception of the industry. This would however require a commitment of Government funds beyond that in the current budget. It is our submission that if the Government is serious about taking steps to minimise the harm caused by gambling, it must establish an independent regulatory body which has the power to enforce a mandatory code of practice. Otherwise, the money spent on producing a voluntary code of practice and carrying out this inquiry will be wasted.

We would further recommend that any independent regulatory body have the power to deal with the several issues noted below. We mention these topics in brief as a means of bringing them to the Commission's attention.

3. Role of Independent Gaming Commission

Appropriate Charter

A new Commission must have a charter which clearly states, amongst other things, that one of its primary responsibilities is to ensure that gambling services in NSW are to be provided without exploiting consumers. The Commission would need to develop principles of operation around that Charter.

Monitoring of Industry and Enforcement of Consumer Protection Provisions

The Charter would also set out the duty of the Commission to monitor the gambling industry and enforce relevant consumer protection provisions. To this end, the Commission should be given the power to discipline clubs which breach these provisions.

Development and Enforcement of Codes of Practice

At this stage in the industry's development, a mandatory code of practice is required for compliance and consistency purposes. An independent Commission should be given the responsibility of developing this code, in consultation with the industry, community groups, gambling and financial counselling services, and consumer organisations.

Research on Social and Economic Impacts

An integral part of maintaining the viability and health of the industry without causing undue harm to individuals and the community is the collection of statistical and other information about the effect of the gambling industry on the community.

Complaint Handling / Dispute Resolution

The Commission should also have a complaint handling/dispute resolution role which is charged with dealing with individual complaints and to address systemic problems they reveal.

Independent Relevant Community Representation

An independent Gaming Commission should have representatives who come not only from the industry but also from relevant community and consumer organisations which deal with problem gamblers at first hand. The Commission should play an important role in creating and maintaining links between the different sectors so that there is a healthy flow of information.

Role in Education

The Commission should be funded to develop and disseminate information about the negative effects of gambling to schools, universities, legal centres and other community centres.

Provision of Training to Staff

A standardised program about the problems associated with gambling should be developed which can then be made a mandatory part of any staff training program.

Banning Orders and Signage

The Commission should have the power to enforce compliance with banning orders and signage restrictions, with the power to penalise those clubs which breach the provisions.

4. Social Impact Assessment

The Inquiry's terms of reference indicate that the social impacts of gambling are to be considered in this Inquiry. It is our submission that it is not possible within the context of the current short Inquiry to conduct anything like an adequate social impact assessment of the current level of use of gambling services in Australia. Such an assessment would require extensive and ongoing research over a period of time.

In addition, because of the often hidden nature of problem gambling, it would be important to establish strong links with the relevant community and other organisations which provide services to problem gamblers and their families. This would be an essential element in establishing trust and confidence in the consultation process, as well as developing a network through which information could be provided. If more funding were provided for specialised gambling services then it is likely more data could be collected, and then both the industry and community would benefit from this added information.

Public Interest Advocacy Centre

11 May 1999

Appendix 2: The effectiveness of self-exclusion

Research findings on self-exclusion schemes

Unfortunately, there is not a large amount of data supporting a positive view of self-exclusion schemes.

Victoria

The South Australian Centre for Economic Studies¹ (SACES) investigated compliance with self-exclusion provisions from both the venue perspective and the patron's perspective in clubs and hotels in Victoria.

In the venue survey, the hotel owner or club manager was asked 'to what extent the self-exclusion program had helped to control or restrict problematic gambling behaviours' and was given five answer boxes to tick, ranging from 'completely eliminated' to had 'no effect'. The majority view was that the self-exclusion program had reduced problem gambling in the venue. Respondents indicated that they believed only a small number of problem gamblers in the venue had investigated the self-exclusion option. Among Clubs Victoria respondents, 35 percent expressed the view that self-excluded patrons rarely breached the requirements of the self-exclusion Deed.

Patrons, however, gave a different account. Self-excluded patrons attending Gambler's Help for counselling in relation to problem gambling were interviewed concerning their experiences with self-exclusion. The SACES team reported that breaches were common and undetected. Self-excluded patrons felt let down by the failure of venues to detect them entering or to enforce self-exclusion.

The conclusions reached by the SACES study are supported by research conducted in Canada (see following section on Canada). These results point to both difficulties in venues identifying self-excluded patrons and also frequent attempts by patrons to circumvent the provisions of self-exclusion. In the SACES study, the Crown casino in Victoria reported on detected breaches among the patrons who were self-excluded. Only 137 breaches (15 percent of excluded patrons) were detected suggesting that a much larger number were undetected.

Unfortunately, there have been few other studies reporting the levels of non-compliance with self-exclusion deeds. However, there have been recent attempts to improve the quality of the self-exclusion process.

New Zealand

The Problem Gambling Foundation of New Zealand recommended that venues avoid having too many self-excluded patrons so that detection could be more reliable and accurate.² The view of this Foundation is that self-exclusion should be a last resort reserved for use with gamblers for whom counselling and treatment have been ineffective. Presumably, detection of problem gamblers in the venue would be a prior option for the venue and counselling and treatment would be provided for the individual before self-banning was advocated.

¹ South Australian Centre for Economic Studies, above n16 of submission, 72.

² Problem Gambling Foundation of New Zealand, *Self-exclusion/banning for problem gamblers* (2007) <http://www.pgfnz.co.nz/files/self_exclusion_notices.pdf> at 16 April 2009.

Canada

Ladouceur, Jacques, Giroux, Ferland and Leblond obtained information from 220 patrons who had self-excluded from a Canadian casino.³ Surprisingly, only 30% reported that they had not gambled during the self-exclusion period. Fully 70% had breached the deed of self-exclusion.

A more recent study by Tremblay, Boutin and Ladouceur investigated an improved self-exclusion program at the Montreal Casino.⁴ This program included a voluntary meeting with a counsellor prior to self-exclusion and a mandatory session with a counsellor following the completion of the self-exclusion period. For this reason, the program resembles more closely self-exclusion programs operating in NSW. Nevertheless, 18 out of 39 participants (42 percent) who attended both the pre- and post-exclusion meetings with a counsellor reported that they had breached the self-exclusion deed during the period of operation.

New South Wales

In NSW, the latest estimate of the prevalence of problem gambling⁵ is 0.8 percent and appears to indicate a large reduction on the estimate of 2.55 percent made by the Productivity Commission in 1999.⁶ However, many people have pointed out the fact that these estimates are not directly comparable and great caution should be taken in drawing the inference that problem gambling has reduced in NSW as a result of responsible gambling and harm minimisation strategies. Nevertheless, even if the differences between the estimates and the methods used are ignored, a 0.8 percent prevalence yields a population figure for problem gambling in NSW in excess of 41,000 (based on an adult population at the relevant time of 5.27 million⁷).

Level of self-exclusions

Available research implies that the incidence of new problem gambling each year is extensive.⁸ Thus, the number of self-exclusions can be compared with the estimated prevalence for any given year whereas the number of self-exclusions across many years (for example, the lifetime of the self-exclusion program) should not be compared with estimates of prevalence estimated over a shorter timeframe (such as one year). While lifetime self-exclusions may run to many thousands based on the claims of gaming machine venues, the yearly numbers of self-exclusions are likely to be much smaller. Numbers of patrons self-excluded in any one year across all programs in NSW is likely to run to hundreds, but not thousands. Unfortunately, the data on self-exclusions is recorded by those who run the programs and is not easily accessible. However, if the claim that the number of self-exclusions in each year (hundreds) is small compared to the number of problem gamblers in each year (tens of thousands), the implication is that if self-exclusion is an act of responsible gambling then it is not widely used by the individuals afflicted by problem gambling. Furthermore, if self-excluders frequently gamble in breach of their self-exclusion deed or gamble in other venues from which they are not excluded, then the impact of self-exclusion programs is likely to be minimal in relation to the income of venues from gaming machines and NSW Government taxation revenues from the venues' gaming machine profits.

³ R Ladouceur, C Jacques, I Giroux, F Ferland and J Leblond, 'Analysis of a casino's self-exclusion program' (2000) 16 *Journal of Gambling Studies* 453-460.

⁴ N Tremblay, C Boutin, and R Ladouceur, 'Improved self-exclusion program: Preliminary results' (2008) 24 *Journal of Gambling Studies* 505-518.

⁵ ACNielsen, above n12 of submission, 29.

⁶ Productivity Commission, above n3 of submission, 21.

⁷ Again, this estimate is based on NSW Planning Department population figures, see above n54

⁸ M W Abbott, M W Williams and R A Volberg, 'A prospective study of problem and regular nonproblem gamblers living in the community' (2004) 39 *Substance Use and Misuse* 855.

Appendix 3: Effective harm minimisation strategies

Introduction

If gaming machines cause harm primarily through the excessive loss of money involved in extended play, then harm may be reduced by limiting the rate at which gaming machines can take the players money or by limiting the amount of money that can be taken.

The rate at which a gaming machine takes money from the player depends on the way in which the machine is played. In NSW, machines typically offer matrix games on which the player can play variable numbers of lines for variable numbers of credits. A typical machine allows the player to bet on 1, 5, 10, 15, or 20 lines and to place a bet of 1, 5, 10, 15, 20 or 50 credits per line. Denominations of machines range from 1 credit = 1 cent through to 1 credit = \$2. Most machines are 1 cent, 2 cent, and 5 cent denomination machines. In NSW, the maximum bet is limited to \$10 per game. However, on most machines the maximum bet can be played independently of the machine denomination. For example, a bet of 20 lines and 50 credits per line on a 1-cent denomination machine is a bet costing \$10 (20 x 50 x 0.01).

Machines, on average, have a return to player percentage (RPP) of 90 percent (approximately). The RPP is required by law to be 85 percent or higher and typically ranges from 86 percent to 94 percent. Many players do not understand the implications of the RPP. The RPP is most easily conceptualised as a levy on play. Rather than think of a machine that will pay out 90 percent of the cash-in in the long run, it is easier to think of a machine that pays out 100 percent in the long run (a fair machine) but with a 10 percent levy to the venue on each bet made. This enables the player to calculate the expected loss for a session of play and to understand that more bets and larger bets are associated with larger losses. The following describes three examples of player loss when betting with different bet sizes.

Example 1: Player loss when betting with maximum bets

A player bets maximum lines and maximum credits per line. Playing at maximum speed, the player can approach 20 bets per minute. However, actual rates will be less over the long term because of breaks for bonus features, cash out, ATM visits and breaks in play for other reasons. Assuming an average play rate of 10 games (or bets) per minute with a maximum bet of \$10 per game, then the loss is \$1 per game (which is 10% of \$10) or \$10 per minute (\$600 per hour). In a five-hour playing period, a player can expect to lose approximately \$3,000.

Example 2: Player loss when betting with minimum bets

A player bets one line per game and one credit per line on a 1-cent denomination machine. The expected loss is 1 cent per minute for 60 cents per hour and an expected loss of \$3 over a playing period of five hours. Thus, depending on how the machine is played, players can expect to lose between \$3 and \$3,000 in five hours.

Example 3: Player loss when betting on maximum lines with minimum credits per line

A player plays a 1-cent denomination machine using the strategy of betting on 20 lines at one credit per line. The expected loss is 2 cents per game or 20 cents per minute. In an hour of play, the expected loss is \$12 (or \$60 in five hours of play). On a 2-cent denomination machine, the loss would be \$120 in five hours. This style of play has been referred to as 'maximin'.¹

¹ A Williamson and M Walker 'Strategies for solving the insoluble: Playing to win on Queen of the Nile' (2000) *Lessons of the Past* 218-226.

In summary, examples 1 and 2 show that depending on how the machine is played, players can expect to lose between \$3 and \$3,000 in five hours.

Limiting harm through setting a lower maximum bet size

Sharpe *et al* found that problem gamblers are three times more likely than non-problem gamblers to use a bet size larger than \$1 per game.² This indicates that a restriction on maximum bet size would have relatively more impact on problem gambling than on recreational gambling. The core question remains about where is the maximum benefit in reducing problem gambling while leaving recreational gambling relatively undisturbed. Based on Sharpe's work, a maximum bet size of \$1 per game would be expected to have an impact on problem gambling. This reduces the impact by reducing game costs to \$60 per hour. The data is not available in NSW on the distribution of bet size across games. However, the data is central to a consideration of the impact of reducing maximum bet size.

A distinction is made between recreational gamblers and problem gamblers because this is a simplifying concept as all reduction measures apply to people who are harmed by gambling. The simplified concept is that people who are harmed by gambling are problem gamblers, and people who are not harmed by gambling are not problem gamblers.

If the maximum bet on a gaming machine were to be limited to 20 cents per game, then problem gambling would be largely eliminated. The Productivity Commission estimated an average loss per year of \$12,000 for a problem gambler.³ A loss of \$240 per week could be maintained by playing 20 hours on average. Thus, problem gambling would remain theoretically possible for a committed gambler. However, it would be expected that the motivation to play for long periods would be reduced because the large payouts obtained with a \$10 maximum bet per game would be no longer possible.

If the guidelines for strategies of reducing problem gambling through harm reduction include the use of strategies that have relatively small effects on recreational gamblers, then the question of an optimal maximum bet size becomes an empirical question. If the data was available from player loyalty cards to evaluate this question, then it may be possible to choose a maximum bet size per game that markedly reduces problem gambling while leaving relatively untouched the play of recreational gamblers. Such a solution would be consistent with government implementing policies that maximise benefit across all segments of society. Importantly, the at-risk consumer would be afforded much greater protection from the grave harms that are currently associated with excessive gaming machine play.

Limiting harm through cashless gaming

Cashless gaming implies that special gaming machine cards would be necessary to operate gaming machines. Machines that no longer require cash-in or cash-out mechanisms would undoubtedly reduce costs for venues. The note-acceptor issue would vanish and accurate records of losses could be made available. Importantly, cashless gaming would make available a means of limiting expenditure. In the same way that a credit card ceases to be operational when the credit limit is exceeded, a gaming machine card could cease to operate gaming machines when a certain level of loss is reached. Thus, gaming machine cards might operate in limiting harm in much the same way that seat belts limit harm in car crashes and helmets in bicycle accidents. Although harm might still occur, the gaming machine card would act to prevent the more serious harm caused by out-of-control gambling.

² L Sharpe, M Walker, M J Coughlan, K Enersen and A Blaszczyński, 'Structural changes to electronic gaming machines as effective harm minimization strategies for non-problem and problem gamblers' (2005) 21(4) *Journal of Gambling Studies* 503.

³ Productivity Commission, above n3 of submission, 21.

Pre-commitment schemes have similar goals. However, pre-commitment typically refers to limits set by the player for expenditure of time and money. What happens when those limits are reached is an important difference. In pre-commitment, the player has the right to waive the initial limits or to establish new limits. The responsibility rests with the player to keep to their pre-set limits. If the player is motivated to continue gambling, pre-commitment constitutes no barrier. The player is in a similar circumstance to self-exclusion: the mechanism is only effective if the player elects to abide by the provisions.

Cashless gaming is neither good nor bad, but depends on how it is used. Cards that operate on the credit card principle have the potential to eliminate harm. Thus, with due consideration to a client's financial capacity, financial institutions may issue gaming machine cards that can only be used to play machines to a maximum amount and then must be paid off at the end of the monthly cycle. An important area of research would be to consider cashless gaming and how it could best be implemented.