Perth Casino Royal Commission
Discussion Paper on the Regulatory Framework
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I welcome the opportunity to make a submission in response to the Perth Casino Royal Commission (PCRC) Discussion Paper on the Regulatory Framework (the DP). I am Professor of Private Law and Commercial Regulation at the University of Western Australia Law School. My submission focuses on two main areas of the DP on which I can comment with some expertise: the comparative merits of principled-based regulation; and the ways in which extant norms within the broader general law and statutory contexts may inform how objects, principles and licensing standards may be framed. I note that I have had particular reference in considering these issues to my work with Professor Jeannie Marie Paterson of Melbourne Law School pursuant to Australia Research Council DP180100932 and DP140100767 on Developing a Rational Law of Misleading Conduct. However, the views I express in this submission are mine alone. I have also drawn on my work conducted pursuant to ARC Future Fellowship project FT190100475, which addresses the rules governing corporate responsibility for commercial fraud.

Finally, I draw the Commission's attention to the forthcoming interim report of the Australian Law Reform Commission into financial services regulation. I disclose I am a member of the Advisory Committee to that inquiry. Notwithstanding that the ALRC's field of inquiry is very different from that addressed by the PCRC (including, because addressing numerous and diverse financial service providers, as well as products and services), the ALRC inquiry engages with important issues of statutory and regulatory design that appear to be directly relevant to the DP. Its inquiry is also aimed at a highly regulated and complex commercial context in which there is a strong public (indeed, community) interest. From its discussions, publications and consultations to date, we may expect the ALRC's interim report to consider topics including (1) the role, comparative strengths and weaknesses of principles-based, rules-based, performance and outcomes-based regulation; and (2) the role and form of objects clauses; and identification of fundamental norms that underpin financial services.

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

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

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

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

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

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

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

A similar, strategic approach could be adopted to future attempts to ban or highly regulate 'junket' activities. Adopting a narrow definition of these, for example to encompass only certain forms of commission-based, international group tours, would leave open profitable work-arounds that might generate similar risks of criminal infiltration and activity: see, eg, the discussion of definitions of prohibited international players, and Crown's appetite to recommence international patronage, in the transcript of Mr Alan McGregor, 20 October 2021, 3.34-3.52pm. While these risks might not be avoided entirely through principles-based regulation, a strongly rules-based regime will inevitably, it is submitted, provide more fertile ground for their (re-)growth. Accordingly, care must be taken to ensure substantive, purposive approaches to casino regulation are embedded in any reforms. This may be significantly assisted by careful expression of objects and principles clauses (to which I briefly return below).

More broadly, rules-based regulation can have the effect of stultifying beneficial influence and interaction between general law principles and related statutory enactments. Presumably, any change in casino and gaming regulation in Western Australia will not be enacted in the form of a code. Rather, it will sit alongside general law doctrines (both common law and equitable) and statutory schemes that potentially operate to regulate casino activity. These might include general law principles of fraud, equitable and statutory regulation of unconscionable conduct, and general and statutory prohibitions on misleading conduct, for example. It will be highly desirable in that context for there to be opportunities for effective and just casino regulation to draw upon that suite of principles and doctrines in a manner that promotes coherent oversight, control and guidance of related activities.

Also of importance in considering regulatory design are the methods adopted by courts to interpret principles-based legislation, which may legitimately inform regulators' approaches to administering and enforcing the law. Professor Paterson and I have explained that principles-based drafting may operate to promote certainty, to a degree impossible for rules-based regimes (see in particular *Misrepresentation, Misleading Conduct and Statute*). An essential ingredient in achieving this certainty is the use of an appropriate interpretive method. Here, Professor Paterson and I have argued that Australian courts have developed an important and laudable interpretive approach in applying principles-based regulation of misleading conduct, which draws upon common law and equitable principles to the extent that they are consistent with and promote the statutory language and purpose: see publications above and E Bant and J Paterson, 'Limitations On Defendant Liability For Misleading Or Deceptive Conduct Under Statute: Some Insights From Negligent Misstatement' in K Barker, W Swain and R Grantham (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing, 2015) 159. The consequence of this interpretive method is that the statutory regime is integrated with, yet not collapsed into, its general law context, and statutory and general law principles may cross-fertilise one another. This interpretive method is very important to achieving certain, principled and coherent regulation which is, arguably, much more difficult through a strict and formalistic rules-based regime. In *Misleading Conduct before the Federal Court*, 182, Professor Paterson and I argue that these 'interpretive frameworks developed and applied by courts should be factored in at the point of legislative design.' That is, legislation should be designed with a good understanding of the interpretive method that will inform its application.

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

New Directions for Law in Australia: Essays in Contemporary Law Reform (ANU epress 2017) 301, available for download at

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

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

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

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

Objects and principles clauses.

One of the questions raised in the DP is whether the regulatory legislation should contain an objects clause and/or a principles clause. In considering these questions, and in addition to those examples given in the DP, I note that the financial services space again offers potentially valuable insights. Thus the objects clause for Chapter 7 of the *Corporations Act* includes objectives of 'fairness, honesty and professionalism by those who provide financial services' (s760A(b)). This ties in to the financial services licensing obligation under s912 A to provide services 'efficiently, honestly and fairly'. While these address financial service providers, further objectives under s760A(d) relate to 'fair, orderly and transparent markets for financial products'. That is, there

are objects clauses for both regulated actors, and for the industry in which they operate. The ASIC Act then provides purpose clauses for the regulator:

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

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

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

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

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

statutory proscriptions of misleading conduct, there lie long-standing statutory regimes concerned with protecting intellectual property rights, such as copyright and trademarks, which routinely operate in circumstances involving misleading conduct.

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

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

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

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

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

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

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

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

In my view, in the casino context, 'fairness' may properly go beyond not acting unconscionably (exploiting people), or taking active measures to minimise harm. It could properly encompass taking active measures to provide safe services and products, or, indeed, to promote the overall wellbeing of users of its products and services. Casting the norm in positive terms would require Crown to substantiate, 'live' and be adjudged by its professed corporate values to 'provide exceptional experiences with respect and care for our communities'. This broader expectation could be reinforced through appropriate sector- and regulator- orientated objectives (discussed very briefly below).

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

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

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

Turning to possible objectives for the gaming and wagering sector(s), I do not have specific suggestions here as (unlike the financial services sector) I largely consider the lasting harms derived from (in particular) casino activities to outweigh any claimed benefits. For the reasons explained above, I would hope, however, that providing a safe environment for users of relevant products and services, or adopting policies, systems and practices that are apt to promote users' overall wellbeing, would be fundamental. It cannot be enough to demand that casino act to reduce the risk of harm. And the financial stability of the sector cannot be a chief consideration. Nor

should we accept that loss of the casino in Western Australia would inevitably be economically disadvantageous to the state or its communities. While there may (and have been) serious concerns expressed about loss of employment and taxation revenue from casino activities, should Crown lose its licence completely, there has been no sustained or forensic accounting to my knowledge of the cost borne through the public purse through the harms resulting from its activities, nor the impossibility of developing other employment opportunities for Crown's existing staff. It does not seem, for example, that Western Australians were noticeably unhappier, or poorer, or more unemployed prior to the introduction of the casino than after it.

Finally, so far as the regulator is concerned, although this falls outside my fields of research, one would think that its objects would need to align with and support the other two. It may be helpful to consider in this respect the desired regulatory culture that should be adopted. In the FSRC Final Report, this was encapsulated by Commissioner Hayne's directions regarding enforcement attitudes (such as 'why not litigate', discussed at 425-428). For the reasons given earlier, and in the context of casino oversight, one would think that the financial wellbeing or stability of the casino operator (or gaming sector(s)) cannot be a chief consideration. Community safety and wellbeing, as well as compliance with the substance of the law, must be paramount. A hierarchy of objects and principles, connected to guidelines on enforcement strategies (similar to Commissioner Hayne's guidance on the varied roles of litigation, enforceable undertaking and the like, the subject of Recommendation 6.2 in the FSRC Final Report) may be useful. Finally, a direction to engage purposively with its legislative remit may encourage the regulator to avoid formalistic approaches to enforcement, that accept activities and remediation approaches that meet the form but not the substance of the law.

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