12 Venue activities

Key points

- In the absence of government intervention, there are mixed incentives for gambling venues to introduce, and ensure the effectiveness of, voluntary harm minimisation measures. Venues face an inherent conflict of interest, in that effective measures would compromise their revenues.
  – It thus remains appropriate that governments mandate measures that are deemed necessary and cost-effective.
- Whether measures derive from industry self-regulation or formal government regulation, the incentive for venues to implement them properly would be heightened by governments or regulators:
  – monitoring venues' compliance with the measures
  – introducing a mechanism for handling complaints in addition to existing industry mechanisms
  – strengthening their supervision of venue behaviour through active enforcement and the use of penalties and other disciplines for serious breaches of regulatory measures.
- Given the difficulties with a new statutory cause of action for gamblers to seek redress against venues, it should not be proceeded with at this stage.
  – However, if proposed enhanced penalties and disciplinary measures were not implemented, or failed to be effective in deterring serious breaches of harm minimisation requirements, then such a proposal could be reconsidered.
- Government guidelines on identifying gamblers experiencing problems and on appropriate interventions would be beneficial. These should include a short list of clear indicators of problem gambling.
- A universal requirement for training is warranted for staff who interact with gamblers regularly, or who work in the gaming areas of a venue. It should cover such matters as the identification of gamblers experiencing problems, the provision of assistance (including information about help services), and the process for making complaints.
- There should be a prohibition of inducements likely to lead to problem gambling, or to exacerbate existing problems, including the provision of free alcohol to a patron who is gambling.
- Governments should accord much lesser priority to 'cosmetic' policy measures such as clocks, lights and sounds in venues.

12.1 Introduction

Gambling venues undertake a range of activities to help protect their patrons from gambling harms. These include: providing information to patrons about where counselling and treatment can be obtained; establishing entry requirements to the gambling venue or gaming area such as requiring age identification; providing alternative forms of entertainment to gambling; and designing the physical layout and environment of the venue so as to reduce the risks associated with gambling.

Whether it is sufficient for gambling venues to 'self-regulate' in these ways, or whether governments should intervene, depends on the incentives facing venues.

This chapter considers the nature and extent of these incentives, the industry self-regulation that has already been undertaken, and government measures introduced in relation to some venue-based activities.

Other chapters also look at venue-based activities to reduce harms — chapter 8 on gambling information, chapter 14 on accessibility of gaming machines (for example, hours of gaming machine operations), and chapter 13 on access to cash and credit.

12.2 Voluntary harm minimisation measures by venues

Are there sufficient incentives for venues to introduce measures?

A threshold issue for this inquiry is the extent to which gambling venues face incentives to introduce voluntarily measures that would reduce gambling risks for their patrons *in the absence of any government action*. If incentives are weak, governments may have a basis for intervening.

It is unlikely that individual venue managers and staff would deliberately set out to behave unethically towards their patrons. Indeed, it is apparent that, out of genuine concern for their patrons, many endeavour to ensure a safe environment for them and to assist them where needed. For example, BetSafe noted the following case:

> J approached the duty manager in a BetSafe club late in the evening and asked to borrow money to catch a taxi home as he had lost all his money gambling on the machines and there was no money in his bank account. The duty manager arranged for a taxi to take J home, paying the taxi by voucher to prevent J gambling the cash. The club … excluded J to prevent him from further problems. (sub. 93, p. 11)

It may also not be in the commercial interest of venues for their patrons to suffer harms through gambling. If venues were seen to provide poor customer service or safety, they may acquire a bad reputation and ultimately lose patrons, to their commercial detriment.

Venues might also have formal ‘corporate social responsibility’ objectives. These broadly encompass ‘wide-ranging social, ethical, environmental and economic obligations by corporations to stakeholders (including broader communities and future generations) and not just to their shareholders’ (Hancock et al. 2008, p. 60). Meeting such obligations, which could include addressing gambling harms, can enhance business reputations and networks.

The prospect of successful litigation by gamblers seeking redress against venues has the potential to buttress existing incentives facing venues to introduce harm minimisation measures. As noted later, litigation has already occurred on several bases. Notwithstanding the potential incentive effect on venues of litigation by gamblers, it is apparent that Australian courts have been reluctant to find in favour of a gambler suing a venue for redress other than in a prescribed, narrow set of circumstances. Moreover, given the expense and time involved in litigation, very few gamblers would be in a position to take action against a venue in the first place.

It is possible that insurers could respond to even the remote prospect of successful litigation by problem gamblers by increasing their premiums for venues. This in turn could place commercial pressure on venues to introduce harm minimisation measures. For example, a Canadian gambling provider noted that Lloyds of London had ‘carved out’ future liability to problem gamblers from its insurance policy.

> We do not have an explanation from the insurer why [our insurance coverage] was changed, but assume it is because the insurance industry recognises an increased risk related to the issue of problem gambling. … My view is that the change in insurance coverage is related to court cases continuing to be brought against operators by problem gamblers. (Duty of Care, sub. 177, attachment — email from Saskatchewan Gaming Corporation, 18 May 2006)

However, the Commission is not aware that insurers have followed this path in Australia, or that they are likely to do so.

Conflicting financial incentives

Contrary to the various inherent forces to introduce harm minimisation measures is the fact that problem gamblers comprise a large source of revenue for any venue. As Borderlands Cooperative said:

> … voluntary codes within gambling regulatory frameworks have been found to be ineffective for preventing harm, though they may have fared better as public relations vehicles for industries. … To put it briefly: less harm will mean less revenue. Within the current regime, a gambling industry or venue wishing to do the right thing and decrease fiscal dependence on excessive gambling would place itself at a great competitive disadvantage in the market place. … (sub. 126, p. 11)

Industry participants objected to this view. The Australasian Casino Association considered that:

> For from being conflicted, it is in a casino's interest to provide its services in a safe and sustainable manner. Casinos' long-term interests are consistent and not in conflict with harm minimisation objectives. (sub. DR365, p. 20)

Clubs participants emphasised that they were not-for-profit organisations, they worked for the benefit of clubs members and the community, it was in their 'absolute interest' to ensure gaming services were conducted in a responsible manner, and the irrelevance to them of the 'revenue' incentive — box 12.1.

However, although clubs are not-for-profit, they are still evidently concerned to maximise their returns from gaming machines and increasingly face similar pressures and conflicts as commercial operators. This is illustrated by the comment of a representative from Clubs Australia who, although clearly expressing concern about patron care, still saw clubs as a business (box 12.1).

That venues generally face weak incentives to address gambling harms is corroborated by surveys of venue managers and staff in relation to harm minimisation. For example, Professor Hing, of the Centre for Gambling Education and Research in Southern Cross University, noted the following based on her interviews with 30 venue managers, staff and gamblers:

> - Staff were told not to do anything if someone appeared to be upset over their machine. They were afraid for their jobs, did not feel empowered or trained to engage in … human interactions, or their training was five or six years ago.
> - No other entertainment or social activities were available other than the gaming room.
> - Few chairs were available outside the gaming machines area.
> - Coffee and soft drinks were more expensive at the bar than ordering while at [the] gaming machine.
> - Lighting was too dim and font too small to read the responsible gambling signs.
> - [A] duty manager advised that the self-exclusion scheme excluded a person from the whole club, not just the gaming room, and it was for life. (New South Wales Problem Gambling Roundtable 2008, p. 2)

Box 12.1 **Clubs' views on patron care**

Clubs Australia

> The notion that clubs will not implement harm minimisation measures that are likely to have an adverse impact on revenue cannot be reconciled from a commercial perspective. Why would a club be motivated to bankrupt and cause harm to a member, when commercially the goal must be to keep the patron for life? By working to ensure patrons enjoy their gaming experience and help them gamble responsibly, clubs hope to keep them and their social circle back to the venue for repeat visits well into the future. The idea that they are cravenly trying to extract every last dollar from a patron — .. via the 'revenue dilemma' — is a superficial, hypothetical, anti-gambling notion that is not supported by reality.(sub. DR359, p. 53)
>
> … clubs are in effect owned by their members, and it just contradicts all good sense that we would knowingly, or even unknowingly, seek to harm them, from a gambling point of view, when they are our owners. … So it's not in our interests to harm them. We want to preserve them and protect them in every reasonable way, but without sending our businesses to the wall in doing so. (Peter Newell, trans., p. 681)

ClubsACT said

> … clubs have a more moderating influence [than commercial operators] and do not exploit gaming activity to the extent that privateers do. Clubs provide a demonstrably and significantly higher social contribution/benefit to communities than other forms of gambling … as well as providing a more 'benign' gambling environment. (sub. DR337, p. 6)

Community Clubs Association of Victoria

> … the commercial difference between clubs and other licensed premises means that such [an inherent conflict facing a venue balancing their voluntary responsible gambling measures against commercial imperatives] is not an issue for clubs. Revenue from problem gamblers is not sustainable and not desired by our member clubs. (sub. DR366, p. 11)

Evidence of weak incentives facing venues is also apparent from the following judicial comments in cases involving gamblers in criminal offences:[1]

> Cases of this sort, which are increasing in number, call for consideration of legislation which would put the onus on Crown Casino and other gaming venues to make reasonable inquiries to ensure that large sums of money continually being lost by regular customers, as in this instance, are emanating from legitimate sources. (Dyett J, Victorian County Court, 19 June 2007)
>
> These clubs must know how much money is being spent on poker machines, and they just turn a blind eye. (Morgan J, New South Wales District Court, 13 August 2004)

In conclusion, although gaming venues may face natural incentives to protect their patrons from gambling harms, the Commission considers that they are insufficient without the impetus of some form of government intervention (including government 'backing' of a 'voluntary code' such as occurs in Queensland). Central

1 Extracted from Warfield (2008, p. 24).

to this is the fundamental commercial dilemma confronting all venues; effective actions to reduce gambling harms would be detrimental to revenue and profitability.

Codes of practice and programs

Since 1999, some 40 or more 'responsible gambling' codes of practice and programs have been introduced by the gambling industry to address gambling harms (for example, Australasian Gaming Council, sub. 230, p. 45 contains a list). According to the Australasian Gaming Council, the design of mandatory codes:

> … has been facilitated with active industry collaboration and insight and … many of the provisions put in place were already evident under voluntary structures. (sub. DR377, p. 27)

The introduction of these codes of practice and programs stem from a range of motivations within the gambling industry. These include ethical concerns, a desire to improve their public profile, and a concern to pre-empt the introduction of prescriptive government regulation.

The codes of practice and programs vary considerably in terms of:

- whether or not they are made mandatory by governments
- the forms of gambling to which they apply
- how they were developed (whether by the gambling industry alone or in concert with governments and community sector organisations)
- their scope (for example, some focus on advertising or self-exclusion practices, whereas others cover a broader range of practices)
- the specific measures they include.

The examples in box 12.2 illustrate the breadth and depth of codes of practice and programs.

Participants from the gambling industry pointed to the benefits of such industry self-regulation (for example, Australasian Gaming Council, sub. 230; Australasian Casino Association, sub. 214; and Clubs Queensland, sub. 121). They emphasised that:

- there are numerous and various initiatives introduced, or funded, voluntarily by the industries, some of which governments have subsequently mandated
- some have gone beyond minimum mandated requirements or have reflected best practice

Box 12.2 **Codes of practice and programs — some examples**

The voluntary **Queensland Responsible Gambling Code of Practice**, introduced in 2002, was developed by the Queensland gambling industry, the State Government and the Queensland community. The Code 'represents a voluntary, whole-of-industry commitment to best practice in the provision of responsible gambling' (Queensland Responsible Gambling Advisory Committee, sub. 235, p. 13). It contains 'responsible gambling practices' relating to: the provision of information; the interaction with customers and the community; exclusion; the physical environment; financial transactions; and advertising and promotions.

In South Australia, individual **Advertising and Responsible Gambling Codes of Practice** have mandatorily applied since 2004 to the casino, lotteries, TAB, licensed racing clubs and gaming machine venues (hotels and clubs). The gaming machine venue Advertising Code of Practice covers such matters as electronic media blackouts, the advertising of prizes, the sounds of gaming in radio and TV advertisements, and interior and exterior advertising. The gaming machine venue Responsible Gambling Code of Practice covers such matters as the screening of the sights and sounds of gambling, customer information and signage, coin availability, alcohol and gambling, inducements, self-exclusion and staff and training (South Australian Government, sub. 225, pp. 35–6).

The **BetSafe Program**, developed in 1998 by a gambling counsellor and funded by industry members, provides over 40 New South Wales and ACT clubs with: staff training in responsible gambling; problem gambling counselling; a self-exclusion program, and information, publications, signage, and policies and procedures (BetSafe, sub. 93, pp. 1–3). Specific BetSafe policies and procedures cover such matters as unattended children, underage gambling, financial transactions, legal and compliance information, complementary food and drinks, payment of jackpots and winnings, helping problem gamblers, dealing with third party complaints, exclusion procedures and training policy.

The **ACT Clubsafe Program**, a joint initiative of ClubsACT and Lifeline Canberra commenced in 2001 and now applies to 26 clubs in the ACT, which operate over 90 per cent of gaming machines. Under the program, clubs contribute funding to Lifeline, which provides access to counselling for club patrons. The **ACT Clubstart Program**, an initiative of ClubsACT in 2007, among other things, provides training in the responsible service of gambling and alcohol to participants (ClubsACT, sub. DR337, pp. 8–9).

Crown Casino in Melbourne voluntarily operates an on-site **Responsible Gaming Support Centre**, 24 hours a day seven days a week, that provides a variety of services to assist patrons and their families including responsible gaming information, counselling and referral to other service providers. Trained Responsible Gaming Liaison Officers, a chaplain and two registered psychologists staff the Centre (Australasian Casino Association, sub. 214, attachment — Allen Consulting Group 2009b, p. 61).

- many have involved collaboration with community sector organisations and governments
- compared with government regulation, self-regulation is quicker to implement and amend, more flexible and more reflective of diversity in local conditions facing venues, and leads to greater ownership by venues.

Deficiencies with voluntary codes of practice and programs

However, despite their benefits in terms of their flexibility, there are three inter-related deficiencies with *voluntary* codes of practice and programs as a means of addressing gambling harms.

The first deficiency relates to the types of harm minimisation measures that voluntary codes of practice and programs include. Voluntary measures tend to be at the 'soft' end of the harm minimisation spectrum — that is, they appear to involve the provision of information or warnings, or the introduction of documentation or reporting systems, or the identification of venue liaison contacts, or merely restate government regulation (for example, Hing and Dickerson 2002). Such measures are unlikely to reduce gambling revenues significantly for a venue.

The second deficiency is the lack of effective monitoring and enforcement. There is very little evidence of industry associations or governments publicly reporting the extent of venue compliance with voluntary codes of practice and programs, or penalising venues for breaches. For example, McMillen noted that governments have different ways of monitoring the compliance of industries with codes of practice, with none commissioning an independent compliance audit. Furthermore, she noted that there is little public information on compliance or on consumer experiences of codes (sub. 223, p. 32). This is an important deficiency in that effective monitoring and enforcement has the potential to countervail the commercial incentive of venues not to vigorously pursue effective harm minimisation measures.

Linked to these two deficiencies is the third — namely, inconsistent and/or low compliance by venues with voluntary codes of practice and programs. Poor compliance was a concern for some participants in respect of both voluntary and mandatory codes of practice and programs (box 12.6).

Some studies suggest that venue compliance is better where codes are mandatory. Two studies that evaluated voluntary broad codes of practice applying in the Northern Territory and Queensland have indicated that, while overall compliance by venues has been high, variation has occurred across different types of venues — particularly in the hotels and clubs sectors — and for different measures (box 12.3).

Box 12.3 **Compliance with two voluntary codes of practice**

In their review of the then voluntary Northern Territory Code of Practice for Responsible Gambling for the Northern Territory Government, Crundall and Boon-Ngork (2005) found the following:[2]

- The average compliance rate for all gambling providers was 77 per cent, with the casinos at 93 per cent, the hotels at 84 per cent and the clubs at 82 per cent (pp. i-ii).
- Several main practices required improvement, particularly for clubs and hotels. These practices included: adequate displays of information about the risks of problem gambling; liaison with support services and local communities; maintenance of a Responsible Gambling Incident Register; ensuring appropriate gambling training is provided to staff within the set time frame; implementing full procedures for recording self-exclusions; encouraging self-exclusion to extend to other providers, problem gambling signage at ATMs; and compliance with national advertising standards (p. ii).
- Non-compliance was due to several factors, including: the content of the Code, with 'some strategies not clearly articulated and the relevance to particular industries being debatable'; and a 'degree of reluctance and/or resistance by some providers to make changes' (p. iii).

The most recent review of the Queensland Responsible Gambling Code of Practice (Queensland Government 2007) found the following:[3]

- The average commitment rate to the Code for all gambling providers was 77 per cent, with the casinos at 100 per cent, the hotels at 82 per cent, and the clubs at 74 per cent. There were large proportions of clubs and hotels that were small or in isolated regions that were not committed to the Code (pp. 33–4).
- In relation to the 'ongoing commitment' of clubs and hotels to the Code since the first phase review in 2004, 64 per cent of clubs and hotels surveyed in the first phase review maintained their commitment in the second phase review, with 13 per cent no longer committed to the Code (p. 35).
- The few practices where commitment rates were low for clubs and hotels were: the establishment of links with local gambling-related support services (52 per cent of clubs and 57 per cent of hotels were committed); the provision of responsible gambling training to relevant staff (60 per cent of clubs and 67 per cent of hotels); and the provision of assistance to gambling customers seeking exclusion from other venues (27 per cent of clubs and 23 per cent of hotels) (pp. 42–3).

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[2] Based on a survey of 100 gambling providers, which included two casinos, 35 clubs and 27 hotels.

[3] The results were based on a survey of around 1800 gambling providers, including the four casinos and over 1300 clubs and hotels.

By comparison, a study evaluating South Australia's mandatory advertising and responsible gambling codes of practice indicated that overall compliance with the codes was very high after 15 months (with non-compliance at less than 5 per cent) and variability in compliance across different measures also being very low (box 12.4).

Box 12.4 Compliance with mandatory codes of practice in South Australia

Martin and Moskos (2007) evaluated the impacts of South Australia's Advertising and Responsible Gambling Codes of Practice, which were introduced in April 2004. Their findings were based on interviews and surveys of stakeholders over four time points — immediately prior to the introduction of the Codes and over a period of 15 months following the introduction of the Codes. They found the following in relation to compliance with the Codes.

- Interviews with licensees indicated that they had made significant changes in progressing towards compliance with the Codes. Implementation was gradual. Compliance was quicker with aspects of the Codes that were clear and precise. However, other aspects of the Codes proved more difficult to implement, with some requiring quite substantial culture change in venues. As venue uncertainty about their responsibilities under the Codes were clarified and further understood, aspects of the Codes that initially proved problematic were adopted and implemented, albeit quite a time after the introduction of the codes and with some continuing concerns.
- Casino staff appeared to have been able to adapt to the Codes and implement them with relative ease.
- Hotel staff's experience of the implementation and operation of the Codes was variable. Some hotels established procedures that meant that many staff did not have major responsibilities for ensuring compliance. Other hotels operated on a more ad hoc basis with no well-defined division of responsibility. Staff themselves also responded to the Codes in variable ways.
- The Office of Liquor and Gambling Commissioner, which had major enforcement responsibility for the Codes, perceived ambiguities in the Codes in the early phases of implementation, to which they responded by providing more education to gambling venues. The Office considered that by the conclusion of the research project the level of compliance was high.
- Compliance data collected by the Office indicated that within five months following the introduction of the Responsible Gambling Codes of Practice, non-compliance was high for most aspects of the Codes. Non-compliance was above 20 per cent for the responsible gambling document, training certificates, the responsible gambling pamphlets, gambling helpline cards, sticker gambling helpline numbers, and code of practice signs. However, non-compliance was low for such aspects as alcohol and promotions and signs on playing multiple machines. By February 2006, non-compliance on all aspects was less than 5 per cent and variability in non-compliance for different aspects was much less than it was immediately following the introduction of the codes.

Several factors contribute to poor compliance. Already noted are the inherently weak incentives facing venues, the specific measures included in the codes and programs, and poor monitoring and enforcement. An additional reason for poor compliance is that venues may ‘lack ownership’ over a particular code or program that is externally imposed — they may not have been consulted in its development, or they genuinely believe that it does not reflect their particular circumstances.

Due to these concerns, several jurisdictions have moved to make hitherto voluntary codes of practice mandatory, or have indicated a preference for a mandatory approach to harm minimisation. For example:

- The New South Wales Government noted that, although there is provision for voluntary codes of practice to be approved by the minister, it has enshrined harm minimisation measures in legislation. It said:

  A mandatory/systematic approach addresses the following issues:

  - the potential conflict of interest that gambling venues face — actions to increase revenue as opposed to harm reduction; and
  - research has indicated that compliance and commitment to voluntary requirements is generally low. (sub. 247, p. 46)

- The Tasmanian Government has replaced voluntary industry codes with a new mandatory code in November 2009 (Aird 2009; Tasmanian Government, sub. 224, p. 6).
- The Northern Territory Responsible Gambling Code of Practice has been mandatory since June 2006. The Government’s rationale for adopting a mandatory code was to provide for a consistent standard for the gambling industry ‘to make the public aware of strategies to minimise the risk of problem gambling and the support services available for problem gamblers’ (sub. 252, p. 9). However, the Northern Territory Government said:

  Whilst a mandatory code is desirable, it may not be necessary to mandate if voluntary uptake is satisfactory and the code operates within the full spectrum of regulatory controls. …

  The need to mandate such regulatory instruments should be undertaken on a case by case basis having consideration for new developments within the gambling industry and the effectiveness of current regulatory frameworks. (sub. 252, p. 12)

- The ACT Mandatory Code of Gambling Practice, which has been in place since 2002, followed earlier voluntary codes (ClubsACT, sub. DR337, p. 7).

The Commission considers that, in the absence of strong incentives facing gambling venues to effectively address gambling harms, it would be inappropriate for governments and the community at large to depend solely on voluntary codes of practice and programs for harm minimisation. Indeed, as noted by Clubs Australia,

no jurisdiction appears to rely sole upon voluntary measures to address gambling harms (sub. DR359, p. 53).

This is not to say that such industry self-regulation does not have a role within gambling regulatory regimes. Voluntary codes of practice and programs are a source of useful guidance and direction for individual venues. By their nature, they can be flexible instruments, easily altered to accommodate changing business practices, technologies and consumer demands.

However, there will be certain types of measures that will need to be made mandatory by governments — whether through so-called 'mandatory codes of practice', venue licensing conditions or legislation — if harm minimisation is to be effectively achieved. Specific measures are considered in the remainder of this chapter as well as elsewhere in this report.

*A mandatory **national** code of practice?*

Several participants considered there should be a mandatory national code of practice. For example, McMillen recommended the development of a national gambling code of practice with exemptions or variations as appropriate for particular industry sectors (sub. 223, p. 33). Development of the national code could involve the participation of the Australian Competition and Consumer Commission (ACCC) and Standards Australia. The national code should be supported by effective sanctions and subject to regular independent reviews. McMillen recommended reviews by a Gambling Review Taskforce or by the ACCC under the Trade Practices Act (Part IVB), which contains provisions relating to industry codes.

The Community Sector Members of the Queensland Responsible Gambling Advisory Committee supported the development of a national mandatory code of practice that:

> … builds on the strength of each jurisdictions experience as a matter of priority. Such a Code would reinforce the future work of the RGAC and policy direction in Queensland. A universal code would protect consumers, especially young people, in the highly mobile modern society that Australia has become. It would also minimise competitive advantages between states as they would no longer have to choose between protecting consumers and losing revenue to other jurisdictions. (sub. 112, pp. 10–11)

SA Council of Social Service (and National, State and Territory Councils of Social Service, sub. 180) supported a national mandatory code of practice that:

> … assists in providing a mechanism to fetter the continuation of the industry while also offering a raft of protections for consumers. A code of practice is vitally important in

> standards protection offered to consumers across the country, particularly in regards to new evolving gambling related technologies. (sub. 179, p. 10)

The Commission notes that the Ministerial Council on Gambling has issued a set of national principles for the conduct of responsible gaming machine activity in clubs and hotels — this is not dissimilar to a national code of practice (box 12.5).

From the perspective of consumers and the gambling industry, a nationally consistent approach may be seen as desirable. This is particularly the case if levels of compliance with state and territory voluntary codes were very low, or if state and territory mandatory codes had significantly different requirements.

However, the Commission considers that a national mandatory code of practice is not yet warranted.

- Obtaining agreement among jurisdictions on its content and legal basis is likely to be difficult and time-consuming. There is still considerable variability amongst the jurisdictions in many aspects of the regulation (and self-regulation) of venue activities to address gambling harms (for example, in relation to ATMs, shutdown hours for gaming machines, and staff training). Jurisdictions are also likely to hold firm views as to the legislative basis of the code — for example, whether it is state and territory template legislation or Australian Government legislation.
- Because of the challenges in reaching agreement, there is the likelihood that a national mandatory code would contain the lowest common denominator of measures. This appears evident from the national principles in box 12.5.
- A further deficiency with adopting a national mandatory code at this stage is that it limits the opportunity of jurisdictions to learn from each other's measures and identify what is likely to be most effective.

12.3 Strengthening incentives for venues to implement harm minimisation measures

Regardless of the types of harm minimisation measures introduced, whether mandatory or voluntary, a number of ancillary measures help strengthen the incentive of venues to implement them. These include the monitoring and enforcement of venue compliance, and complaints handling.

Box 12.5 MCG principles for the conduct of responsible gaming machine activity in clubs and hotels

The following principles should underpin the regulatory and policy frameworks for the conduct of responsible gaming machine activity in clubs and hotels across Australia.

Access to gambling needs to be restricted where there is heightened risk of loss of control.

- Minors should not be allowed to gamble or be exposed to gambling areas within venues.
- Adults who are intoxicated by either alcohol or drugs should not be permitted to gamble.

Information and support should be provided to patrons seeking help and those that have been identified by staff as potentially having a problem with gambling.

- Venues should act promptly to assist persons to self-exclude if requested.
- Venues should display problem gambling help information in the gambling area and venue more broadly.
- Venues have a responsibility to train their staff in problem gambling issues.
- Specifically trained contact officers should be available in venues to provide referral information or assist with undertaking exclusion.
- Venues should monitor suspected problem gamblers and take reasonable steps to offer them assistance.
- Venues should not knowingly allow problem gamblers to gamble in their venues.

Breaks in play should be encouraged.

- Gambling areas should be smoke free.
- Alcohol should not be served to patrons while they are at a gaming machine.
- There should be daily shut down periods within each venue of at least three hours.

'Reality checks' for gamblers should be incorporated into the venue such as wall clocks or clocks on individual machines and adequate lighting that enables consumer information/signage to be read easily.

Consumer information about gaming machines and how they work should be displayed or made readily available within the venue.

Advertising, promotions and inducements by venues should be controlled such as in relation to content, placement and conduct.

Source: MCG (2009b).

There are already arrangements in the states and territories for ensuring venue compliance with mandatory measures, including penalties and disciplines, and the handling of complaints. Industry participants generally expressed the view that existing arrangements were adequate and effective. For example, in relation to the arrangements applying to casinos, the Australasian Casino Association said:

> … current compliance and complaints handling arrangements are well entrenched and working well and do not require enhancement … the casino industry already has in place well-developed and effective compliance and complaints handling arrangements. Their operation and effectiveness should not be compromised by further reviews or unnecessary alterations. (sub. DR365, p. 21)

The remainder of this section focuses on particular measures within compliance and complaints-handling arrangements, recognising that such measures might already apply in some states and territories, and for some classes of venue (for example, casinos). The section concludes with a discussion of judicial redress.

Monitoring and enforcing venue compliance

Gambling regulators, like Australian regulators generally, apply a mix of criminal, civil, administrative and educative interventions to encourage venue compliance with regulation. The application of these interventions mirrors an 'enforcement pyramid', whereby interventions of increasing intensity, severity and cost are imposed on a hierarchy of regulatory breaches.

Several participants, commenting on deficiencies in venue compliance with both regulatory and self-regulatory harm minimisation measures, expressed concerns about variable compliance and the lack of monitoring of compliance (box 12.6).

Compliance auditing

One measure to strengthen compliance of venues is for gambling regulators — or an accredited compliance auditor — to undertake regular 'integrity testing' of the venues against harm minimisation measures. This would include testing venues' claims of compliance under voluntary codes of practice.

In the context of internet gambling, Toneguzzo referred to the importance of ensuring integrity of online providers by independently confirming 'the industry's claims of compliance through testing and audits … [against] regulatory requirements, prior to permitting communications-based gambling equipment to be operated' (sub. 60, p. 11). He noted that ensuring integrity would involve proof of reasonable compliance with regulatory requirements of such matters as:

1. Compliance of the technology.
2. Compliant configuration and installation of the technology.
3. Compliant environment in which the technology is to operate (both physical and logical).
4. Effective system of internal controls.
5. Capable operating staff. (sub. 60, p. 12)

Box 12.6 **Participants' concerns about venue compliance**

McMillen noted that, although jurisdictions have different ways of monitoring the compliance of voluntary and mandatory codes of practice, a common method was for venues to complete a self-assessment compliance audit checklist, supplemented by 'occasional inspections' by regulators. But she was unaware 'of any government that has commissioned an independent compliance audit of the gambling code in that jurisdiction' (sub. 223, p. 31). She also noted that the public has little information on which to assess if the industry is complying with the regulations (p. 32).

PokieWatch.org, in their observations of 180 hotels and clubs with gaming machines in Queensland, South Australia and Victoria, recorded numerous instances of non-compliance with the intent and wording of self-regulatory and regulatory harm minimisation measures (sub. 119). It considered that any measures must involve 'comprehensively worded prescriptive regulation, otherwise they will fail to be effectively implemented' (p. 35).

The Centre for Gambling Education and Research, in reporting the findings of a case study of responsible gambling practices at one large club, noted that 'legal compliance alone does not guarantee social responsibility in the provision of gambling services' (sub. 76, p. 8). The case study showed that 'while the legislation may be underpinned by good intentions', there is 'much opportunity for its requirements to be rendered largely ineffective' (p. 9).

An approach like that proposed by Toneguzzo could be applied to gambling venues as well. Gambling regulators, or an independent and accredited compliance auditor, should appraise gambling venues against specific harm minimisation measures and this should be publicly reported.

Appraisal of venue compliance against harm minimisation measures should go beyond mere 'tick a box' checking, but be corroborated against such data as the number of self-excluded patrons the venue has, complaints data from gamblers and others, and inspections. For example, BetSafe said:

> … the standard of a gaming machine venue's responsible gambling program should be a key consideration in an application for an increase in gaming machine numbers. Generally a gaming machine venue that is active in promoting its self-exclusion program and counselling service will be able to demonstrate a healthy number of self-

> excluded patrons. This would be an effective indicator of the standard of the venue's self-exclusion program. (sub. 93, p. 18)

Compliance auditing requires adequate resourcing of the regulator or auditor to undertake the work. As the Council of Gambler's Help Services noted:

> The Council supports compliance auditing, though has some concern that regulatory bodies may lack the necessary resources to ensure a high level of ongoing compliance. Whilst it would be expected in current circumstances that gaming venues will be inspected annually, a higher frequency than this may not be assured. Annual inspections will not adequately assess ongoing compliance, which requires sufficient resources to undertake regular anonymous, unannounced inspection visits. (sub. DR326, p. 22)

Also, if compliance auditors outside a regulator are used, they should be accredited (and appropriately trained) and independent. The Community Clubs Association of Victoria said:

> … It is our experience that there are examples of 'anti gambling auditors' who:
>
> - have never previously entered gaming rooms so do not understand what to look for
> - do not understand where to locate required collateral
> - do not understand intent of codes.
>
> Any such auditing needs to be conducted by trained auditors, not participants with an already skewed opinion against the product. (sub. DR366, pp. 11–12)

The Council of Gambler's Help Services saw added benefits in using compliance auditors:

> Development of independent accredited compliance audit agencies may provide an advantage to consumers, in that they may not only undertake statutory work but also develop services that value add to gambling providers' quality improvement processes. Encouragement of a continuous improvement culture in responsible gambling is strongly supported, and an independent agency or agencies may be best placed to facilitate this work. (sub. DR326, p. 22)

However, the Australasian Casino Association expressed concern about potential duplication associated with the use of compliance auditors in relation to casinos:

> If compliance assessments were to be vested in an "accredited compliance auditor", this provides a potential for duplication between the current state and territory casinos regulators and any such auditors. (sub. DR365, p. 21)

The Commission considers that compliance with both voluntary and mandatory harm minimisation measures would be assisted by gambling regulators, or independent accredited compliance auditors, regularly appraising venues' compliance and public reporting their findings. Any such regular appraisal and

public reporting should be integrated and made consistent, where possible, with existing compliance arrangements (such as in relation to with probity and integrity requirements) to avoid unnecessary duplication and added complexity for venues.

The Commission also notes an approach taken in South Australia that has the potential to yield improved venue compliance (box 12.7). Under that State's mandatory Advertising and Responsible Gambling Codes of Practice, a venue is exempt from complying with specific elements of the Codes if it has an agreement with an 'industry responsible gambling agency'. A function of the agency is to assist with venue compliance under the Codes and a particular outcome sought is increased compliance.

Box 12.7 **The role of 'industry responsible gambling agencies' in South Australia**

Under South Australia's revised (mandatory) Gaming Machines Advertising and Responsible Gambling Codes of Practice, the Independent Gambling Authority introduced an incentive for 'the industry to directly take responsibility for creating better responsible gambling environments'. It exempted gaming venues from six specific measures in the Codes, if the venue is a party to, and is fully compliant with, the terms of an Industry Responsible Gambling Agency Agreement.

The exempted measures cover measures relating to advertising, the screening of the sights and sounds of gambling, coin availability and the prohibition of inducements that involve participation in a loyalty program.

Among the conditions established by the Independent Gambling Authority are that:

- employees and agents of the industry responsible gambling agency have free and unrestricted access to the gambling providers' premises, staff and patrons at all times the premises are open for business
- the gambling provider consents to, and facilitates, comprehensive regular reporting to the Independent Gambling Authority by the industry responsible gambling agency of its activities in respect of the gambling providers' business.

There are currently two industry responsible gambling agencies — Gaming Care is the industry responsible gambling agency established by the Australian Hotels Association South Australian Division, and Club Safe established by Clubs South Australia.

An aim of both agencies is to assist venues to comply with the Codes of Practice through undertaking voluntary audits of venues. An outcome sought by both agencies is increased compliance with the Responsible Gambling Codes of Practice.

Source: South Australian Government (sub. 225).

Penalties and disciplines

As well as integrity testing, venue compliance could be strengthened by introducing ‘incentive compatible’ measures where there are breaches of harm minimisation measures.

Industry participants regarded existing approaches to penalties and disciplines as already adequate and, indeed, robust. For example, the Australasian Gaming Council said:

> … options for enforcement of fines, restrictions on licensing and indeed loss of gaming license already exist within the power of the relevant regulatory authorities. (sub. DR377, p. 28)

However, participants from the community sector and other participants expressed particular concerns about this area. For example, UnitingCare Australia said:

> … most regulators are content to administer small fines or warnings for breaches of gambling regulations. While these presumably have some impact on the gambling venue, they are usually too small to have any impact on the longer term profitability of the venue. This approach creates an operating environment in which a gambling venue will be better off financially by using all possible means to attract and keep ‘good customers’ even if there is a risk of breaking the law, if the sanction is only a small fine or warning.
>
> … Regrettably, regulators in some States such as NSW have bowed to gambling industry pressure and no longer make public the names of gaming venues they prosecute or details of penalties imposed. Without publicity of enforcement, the gambling venue operators are encouraged to think that they can get away with lowering their standards, and a race to the bottom results. Also, without providing this information, governments may feel they no longer need to be fully transparent to the public about what they do or fail to do. (sub. DR387, p. 16)

Participants expressed views on how penalties and disciplines for breaches of harm minimisation measures could be improved or made more effective, including.

- ensuring penalties and disciplines are rationalised and commensurate with the seriousness of the breach (Public Interest Advocacy Centre, sub. DR 389, p. 11)
- revoking (either temporarily or permanently) a venue’s gaming licence for serious breaches, or after a series of repeated breaches (Duty of Care, trans., p. 424; UnitingCare Australia, sub. DR387, p. 16; Councils of Social Services, sub. DR369, p. 6; Marybyrnong City Council, sub. DR364, p. 4)
- applying a ‘three strikes policy’ involving the eventual loss of licence after three breaches (Council of Gambler’s Help Services, sub. DR326, p. 22)

- requiring enforced periods of shutdowns of a venue for serious or extreme breaches (Kildonan UnitingCare, sub. DR 339, p. 5; Amity Community Services, sub. DR388, p. 4)
- linking penalties for breaches to a venue's gambling revenues (Duty of Care, trans., p. 424; Public Interest Advocacy Centre, sub. 222, p. 32)
- combining mandated identification and intervention items with clear penalties (Disability, Child, Youth and Family Services (Tasmania) (sub. DR370, p. 8)
- requiring venues to re-train all staff in areas of harm minimisation where there are breaches (Amity Community Services, sub. DR388, p. 4)
- publicly reporting individual venues that have been found to have committed substantiated breaches, the penalties imposed, and details of any prosecutions (UnitingCare Australia, sub. DR387, p. 16; Councils of Social Services, sub. DR360, p. 6)
- placing owners and managers at risk of prosecution or penalties for failure to create an adequate responsible gambling environment in their venue (UnitingCare Australia, sub. DR387, pp. 16–17; Councils of Social Services, sub. DR369, p. 6)

Evident from these views are a range of penalties and disciplines for breaches of harm minimisation measures. A proper resolution of the most appropriate of these would require more detailed analysis than is possible in this inquiry.

That said, the Commission considers that, where the regulator is satisfied that there have been *serious breaches* of harm minimisation measures — such as failing to administer an exclusion order or serving alcohol to an intoxicated gambler on the gaming floor —strong penalties and disciplines should be applied, including:

- a pecuniary penalty for a serious breach of a required harm minimisation measure linked closely to a venue's gambling revenue.
- temporary suspensions of a venue's gaming licence, or temporary shutdowns of a venue's gaming floor (as in the ACT, where a liquor outlet can face temporary operating suspensions for breaches of liquor licensing provisions).
- publicly reporting individual venues that have been found to have committed serious breaches, including by publishing a 'worst offenders' list.

These measures would strengthen incentives for venues to implement and comply with mandatory harm minimisation measures.

Complaints handling

Most codes of practice or government regulation relating to harm minimisation require venues to have mechanisms for the handling of gamblers' complaints against venues (for an example, box 12.8). At the first instance, the venue handles the complaint but, if unresolved, the complaint may go to the relevant industry association, a private mediation or dispute resolution body or the gambling regulator for further resolution. As the Australasian Gaming Council noted:

> Venues currently resolve a number of issues on the spot thereby reducing the need for yet another level of oversight with corresponding legislation/regulation. Where this process may be considered insufficient there is already provision for complaints to be escalated to the appropriate regulatory authority.
>
> Current codes already contain requirements for appropriate complaints processes. (sub. DR377, p. 27)

Box 12.8 **Complaints handling under the Victorian Responsible Gambling Code of Conduct**

A customer with a complaint about the operation of the Code must make it in writing directly to the venue management. The venue manager investigates the complaint 'sensitively and as soon as possible'.

Complaints are resolved in the following way:

- all complaints are acknowledged promptly
- the customer is informed of any reasons for not investigating the complaint (that is, the complaint does not pertain to the operation of the Code)
- the venue manager may seek information from the staff member concerned on the subject of the complaint
- the venue manager seeks to establish whether the customer has been treated reasonably and in accordance with the Code
- if the complaint is substantiated, the venue manager informs the customer of the action that is to be taken to remedy the problem
- the customer is always informed of the outcome of the complaint
- complaint details are maintained in the responsible gambling folder or register
- information about the complaints are provided to the Victorian Commission of Gambling Regulation if further investigation is required.

If a complaint cannot be resolved at the venue it goes for resolution to the Institute of Arbitrators and Mediators Australia.

Source: Australian Hotels Association (Vic) (sub. 86).

The Australasian Casino Association also noted features of complaints-handling processes relating to casinos (box 12.9).

Box 12.9 **Complaints handling in casinos**

- Any gaming customer can make complaints directly to the relevant casino regulator.
- All casinos have in place processes to receive customer feedback (including complaints) and to deal with that feedback and those complaints.
- Many casinos have HR processes in place to ensure staff can freely raise any issues of concern with management or an HR representative.
- Many casinos operate an independent (third party operated) “whistleblowers” service to take and handle any staff complaints or concerns in relation to matters including, but not limited to, any issues of integrity, including harm minimisation matters. Casino operators regularly conduct awareness programs about the service.
- Many casino operators actively promote complaints and dispute resolution processes and staff are well-trained to direct patrons to these processes.
- Casino regulators, in their regular reviews of casino operations, publish the number of complaints and statements as to their resolution or otherwise.

Source: Australasian Casino Association (sub. DR365, p. 21).

Venues are likely to see commercial benefit in resolving complaints as quickly as possible. Not to do so would mean a loss of future patronage and revenue. As Clubs Australia noted:

> … it is commercially sound practice for a club to try and accommodate any grievances brought to their attention, in order to secure the person’s continued patronage. (sub. DR359, p. 53)

However, for many people, making a complaint to a gambling venue or industry association may not be easy.

- Patrons might rather have their complaints handled by a body that they perceive to be independent of the venue.
- Staff with concerns about their venue’s approach to harm minimisation measures might fear possible repercussions.

There is thus merit in enabling both patrons and venue staff to have recourse to a body other than the venue or industry association.

Among the existing non-industry bodies that could handle complaints from gamblers about a venue’s approach to harm minimisation are gambling regulators, state and territory ombudsman’s offices, and independent alternative dispute

resolution bodies. Several gambling regulators already have mechanisms for receiving and handling complaints about gambling venues,[4] or are the next level of appeal for gamblers who have made their complaint known to a venue (for example, in Western Australian in respect of the Burswood Casino). One participant recommended the creation of a new body — a gambling industry ombudsman (UnitingCare Australia, sub. 238, p. 12; sub. DR387, p. 17).

The Commission considers that, in addition to venues and industry associations, gamblers should have the option of making complaints about a venue's approach to harm minimisation in the first instance to gambling regulators. Gambling regulators should also be able to receive complaints from persons other than gamblers, including members of the gambler's family, venue staff and providers of problem gambling treatment services. All complaints should be treated in confidence. A regulator's complaints-handling mechanism should be actively promoted within gambling venues, as part of the suite of harm minimisation information that is already required to be provided, and to staff through their responsible gambling training.

Establishing a new process within the office of gambling regulators to handle complaints should not pose significant added costs to venues, as the regulators would bear the costs of administering and providing information about the process. It would have an added benefit in that information from the complaints could be used to supplement regulators' monitoring of venues' compliance with mandatory harm minimisation measures.

Also, it would be desirable to have public reporting of the number and nature of complaints against a venue, and any action taken by the regulator. The venue that is the subject of a complaint should be named only where the complaint has been investigated and found to be substantiated by the regulator, and following the conclusion of any review or appeal process. Such transparency would help strengthen the incentive of venues to comply with harm minimisation measures.

RECOMMENDATION 12.1

Governments should enhance existing compliance and complaints-handling arrangements by:

- ***enabling their gambling regulators, or accredited compliance auditors, to regularly appraise gambling venues' compliance with harm minimisation measures, both mandatory and voluntary, and publicly report their findings***

[4] For example, the New South Wales Office of Liquor and Gaming Regulation, the ACT Gambling and Racing Commission, and the South Australian Office of the Liquor and Gambling Commissioner.

- ***strengthening penalties and disciplines for serious breaches by venues of harm minimisation measures and ensuring their enforcement by gambling regulators***
- ***introducing and promoting a mechanism for gamblers and venue staff to make complaints to the relevant gambling regulator about venue conduct contributing to problem gambling***
- ***requiring their gambling regulators to publish annually the number and nature of complaints about a venue, the action taken and, where the complaint is substantiated, the name of the venue.***

Judicial redress

Redress for the 'detriment' consumers sustain from the purchase of goods or services is an important element of consumer policy. This may involve compensation or some other form of amends.

For gamblers, a potential avenue of redress for the harms they experience is through the courts.

Case histories

Within Australia, instances of litigation by gamblers or problem gamblers against the operators of gambling venues have been:

- *Preston v Star City Pty Ltd (1999 and later)*[5]
- *American Express International v Simon Famularo; Simon Famularo v Burst Pty Ltd (2001)*[6]
- *Reynolds v Katoomba RSL All Services Club Ltd (2001)*[7]
- *Foroughi v Star City Pty Ltd (2007)*[8]
- *Kakavas v Crown Ltd (2007)*[9] and *Kakavas v Crown Melbourne Ltd & Ors (2009).*[10]

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5 There are a number of *Preston* cases. The ones considered here are [1999] NSWSC 459; [1999] NSWSC 1273; and [2005] NSWSC 1223.

6 District Court of New South Wales, McNaughton DCJ, unreported, 19 February 2001.

7 [2001] NSWCA 234.

8 [2007] FCA 1503.

9 [2007] VSC 526.

10 [2009] VSC 559.

Appendix H reviews these cases in more detail.

Of the above cases, the *Famularo, Reynolds* and *Foroughi* cases have involved final decisions. The *Preston* case has yet to be finally decided, although it has been subject to several 'interlocutory decisions' (that is, decisions made in the course of dealing with the case). As a result of the interlocutory decision in the *Kakavas* case in 2007, the plaintiff re-pleaded his case against Crown and two Crown employees. This new case was decided by the Supreme Court of Victoria in November 2009. The decision has since been appealed by Kakavas.

What is apparent from these cases is that Australian courts are still determining the application of existing legal principles in respect of the circumstances in which gamblers are able to seek redress from gambling venues. But from those few cases decided thus far — particularly, the *Kakavas* case — the courts have been clearly reluctant to assign responsibility to venues for the losses sustained by gambler patrons. There are strong parallels with cases involving actions by patrons against venues licensed to serve alcohol who have suffered damage associated with intoxication (appendix H).

The cases involved three possible causes of action that a gambler can take against a venue: common law negligence (and as part of that a breach of duty of care by the venue), breach of statutory duty, and unconscionable conduct.

Common law negligence

Several of the above cases involved a claim of common law negligence by the gambler against the venue, with the gambler asserting the existence of a duty of care by the venue to avoid foreseeable harm. It is apparent from those cases, particularly *Reynolds*, that Australian courts are unlikely to find the existence of a duty of care owed by venues to gamblers other than in 'extraordinary circumstances'.

Notably, Chief Justice Spigelman in the *Reynolds* case said that a venue's 'knowledge' of vulnerability of the problem gambler might be a factor in deciding whether a duty of care existed.[11] However, on the facts of that case, the venue's knowledge of Reynolds being a problem gambler was considered insufficient to create a duty of care. Subsequent cases appeared to have played down the relevance of vulnerability in a negligence claim. (Vulnerability as it is relevant to special disadvantage or special disability is an aspect of unconscionable conduct — see later.)

[11] [2001] NSWCA 234 at [46]–[47].

Breach of statutory duty

As well as claims of common law negligence, several of the cases involved claims for a breach of statutory duty.

According to a guiding principle established in 1995 by the High Court of Australia, a cause of action for breach of statutory duty will generally arise where a statute:

> … which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind which the statue was designed to afford protection. (*Byrne & Frew v Australian Airlines* (1995)185 CLR 410 at 424, Brennan CJ, Dawson and Toohey, JJ)

However, the courts have seemed reluctant to recognise that gamblers had a private cause of action for a breach of statutory duty. The courts appeared not only to look to the relevant statutory provision claimed to be in breach, but to the intent and history of the entire statute — for example, *Preston* and *Foroughi.*

Unconscionable conduct

Another cause of action relied upon in some of the cases is unconscionable conduct under the *Trade Practices Act 1974*. In only one case, *Famularo*, has a gambler succeeded in taking action against the venue.

The Trade Practices Act (Part IVA) contains a general prohibition on unconscionable conduct, recognised as part of the law of equity of Australia (section 51AA). The Act also prohibits unconscionable conduct in consumer transactions (section 51AB) and business transactions (section 51AC). The Act sets out the factors that the courts may consider in determining if unconscionable conduct has taken place. In relation to consumer transactions (section 51AB), the factors include the relative strengths of the bargaining positions and whether any undue influence, pressure or unfair tactics were used.

There is no definition of the term ‘unconscionable’ in the Trade Practices Act. Its interpretation is based on a body of case law and principles. For example, in its 2008 report on the need, scope and content of a definition of unconscionable conduct under the Trade Practices Act, the Senate Standing Committee on Economics said:

> The legal interpretation of the term [unconscionable] is based on a body of case law enunciated by the High Court and principles from the law of equity. The legal concept of unconscionability comes form equity’s idea of conduct which is contrary to what a properly informed conscience would say is right. (SSCE 2008, p. 1)

Relief under the law of equity on the basis of unconscionable conduct has traditionally been available where:

> … one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands. (*Blomley v Ryan* (1956) CLR 362 at 415, per Kitto J)

Courts have found it difficult to define or circumscribe the concept of unconscionable conduct with any greater degree of specificity. As the Australian Government Treasury has said:

> Any consideration of unconscionability will rest, in any particular case, on the idiosyncratic nature of the facts at issue and the subjective nature of their assessment. (2009, p. 2)

In relation to the cases above, it is apparent that, apart from the *Foroughi* case*,* the courts have been reluctant to make a finding of unconscionable conduct against venues. This was most evident in the *Kakavas* case (box 12.10).

There is currently a review by an expert panel commissioned by the Australian Government into whether there is a need to introduce into the Trade Practices Act a list of examples or a statement of principles as to what constitutes unconscionable conduct and, if so, what these might be (box 12.11). The panel is expected to report in February. This review presents a valuable opportunity to obtain further clarity on the circumstances in which unconscionable conduct might apply within a gambling context.

Self-responsibility

An important underlying factor explaining the position to date of Australian courts is the concept of self-responsibility — that gamblers are ultimately responsible for their own actions. This factor has also been evident in cases involving alcohol intoxication (appendix H).

In the *Kakavas* case*,* Harper J noted that, although equity is concerned to protect the vulnerable, persons must ordinarily be responsible for their own actions or inactions, stating:

> The seeds of tyranny are to be found in the footsteps of those who profess to know more about what is good for the subjects of their attention than do the subjects themselves. [2009] VSC 559 [426]

Box 12.10 **The *Kakavas* case**

Kakavas was a 'high roller' who sued Crown to recover around $30 million in gambling losses incurred at its casino. Kakavas had been subject to a voluntary exclusion order from 1995 and from 1998 he was prohibited from entering Crown premises by a withdrawal of licence by the casino. Crown accepted Kakavas back into the casino in June 2005, where he recommenced gambling until August 2006, resulting in substantial gambling losses. Kakavas claimed he suffered from 'pathological gambling' from July 2004 or thereabouts, and that Crown and the chief operating officer knew of this yet devised a scheme in late 2004 to lure him back to the casino. Kakavas claimed that he was provided with inducements including favourable betting arrangements, lines of credit of up to $3.8 million (revised to $4.5 million in the 2009 case), and boxes and bags of cash containing $30 000 to $50 000.

In the first case in 2007,[12] Kakavas' claimed negligence and unconscionable conduct by Crown. Harper J dismissed Kakavas' plea of a cause of action in negligence against Crown, but allowed him to re-plead his claim on the ground of unconscionable conduct.

In 2009, Kakavas subsequently re-pleaded his claim, based on unconscionable conduct against Crown (and the chief operating officer and the chief executive officer).[13] But Harper J again rejected Kakavas' claim. He found no evidence of a plan to exploit Kakavas. He considered that Kakavas was in a strong bargaining position vis-à-vis Crown because of his ability to go elsewhere to gamble and his ability to self-exclude. He found Kakavas was able to negotiate very favourable terms for his visits to Crown, and was able to abstain from visiting the casino until his demands were met. The court found that the nature of high-stakes baccarat is such that very high wins and losses are common, so the loss of $2.3 million in 28 minutes was not proof of a gambling problem. Indeed, on one occasion, Kakavas left the casino with $10 million in winnings. Harper J found that the various inducements held out by Crown, including access to credit facilities, travel allowances and use of Crown's private jet, as well as food, accommodation and monetary gifts did not lure an unwilling Kakavas back to Crown. Rather, they were negotiated after Kakavas agreed to return and were comparable to benefits he was offered at casinos in Las Vegas and elsewhere.

Harper J criticised Crown's 'uncoordinated, unstructured and unsatisfactory' way of allowing excluded patrons back into the casino and also its failure to recognise the application of certain legislation to Kakavas which would have prevented him from gambling. But in the end, he said that Kakavas could not shift responsibility to Crown for his own decisions.

Kakavas subsequently appealed this decision to the Court of Appeal in the Supreme Court of Victoria.

12 *Kakavas v Crown Ltd & Anor* [2007] VSC 526.

13 *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559.

Box 12.11 **Two reviews of unconscionable conduct under the Trade Practices Act**

In 2008, the Senate Standing Committee on Economics conducted an inquiry into the need, scope and content of a definition of unconscionable conduct under the Trade Practices Act in 2008. The inquiry arose out of a proposed amendment to section 51AC, which related to unconscionable conduct in business transactions.

Focusing on section 51AC, the Committee recommended (among other things) that the Australian Government hold an inquiry to consider the option of producing a list of clear examples that all parties agree constitute unconscionable conduct into the Trade Practices Act. As part of a national dialogue, a statement of principles should also be considered. Industry participants from the retail tenancy and franchising sectors (among others) should be engaged in the inquiry.

In response to this recommendation, the Australian Government established an expert panel in November 2009 to:

- inquire and report on the need to introduce in the Trade Practices Act a list of examples that constitute ‘unconscionable conduct’, or a statement of principles, in the efficacy and legal effects
- compile a list of examples or a statement of principles where the panel is satisfied that they would improve the effectiveness of Part IVA of Trade Practices Act.

Although the Committee in its recommendation had intended to clarify section 51AC, the expert panel’s remit appears broader, extending to all of Part IVA of the Act.

In addition to considering a list of examples or a statement of principles in the Trade Practice Act, the expert panel is also considering alternative approaches, including guidance from regulators (the ACCC and ASIC), regulators litigating test cases, and the introduction of codes of conduct targeted at problems identified in specific industries.

The expert panel was required to report by end of January 2010. The report as yet has not been made public.

Sources: SSCE (2008); Treasury (2009).

And later:

> The limits of individual responsibility are more a question for the theologians and politicians than for judges. Nevertheless, the principles of law and equity should mark in tune with general community conceptions of those limits. That means … that the law must require that, in the general case, men and women of full age and capacity cannot shift to an external party responsibility for what they do. Speaking generally, we should not be compelled to be our siblings’ keepers. Accordingly, the law must be very careful before it imposes on third parties a requirement to protect someone else from the consequences of the decisions of that other person. [2009] VSC 559 [437]

In relation to the facts of that case, Harper J found:

> … Mr Kakavas wanted to return to the Melbourne Casino, and (with some fluctuations in his position) wanted to remain a patron thereafter. He took the relevant decisions. Crown did not dictate the outcome of his deliberations about those decisions. Of course it sought to influence them. But it did not have the power to have him do that which he in truth did not want to do. He now seeks to blame Crown for his own decisions; to place upon it responsibility for failing to do for him that which he failed to do for himself. But this is not something to which equity can accede. The responsibility was his. In the words of the [psychologist's] report: he knew how to self-exclude, and he would do it if that was his wish. [2009] VSC 559 [661]

In the *Reynolds* case, Spigelman CJ also acknowledged the trend in community sentiment about persons accepting responsibility for their own actions:

> There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. [2001] NSWCA 234 [26]

On the facts of that case, Spigelman CJ found:

> It may well be that [Reynolds] 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. [2001] NSWCA 234 [48]

Although the courts' attitude to self-responsibility in the cases above limits the scope for judicial redress for gamblers, this does not negate the need for effective regulation in addressing gambling harms — this is discussed in chapter 3.

Summing up

It is apparent from the case histories that the courts will generally not find in favour of a gambler, whether or not a problem gambler, suing a venue for negligence, breach of statutory duty or unconscionable conduct, other than in a prescribed and narrow set of circumstances. An important factor is the courts' view, in keeping with community sentiment, that people must take responsibility for their own actions and that this extends to problem gamblers. Moreover, given the expense and time involved in litigation, very few gamblers would be in a position to take action against gambling venues in the first place. Consequently, it is very unlikely that the threat of litigation will provide sufficient incentives to venues to introduce voluntarily measures that address gambling risks to their patrons.

A statutory cause of action?

In the draft report, the Commission concluded that governments needed at least to enhance gamblers' capacity to obtain judicial redress against gambling providers that behaved in an 'egregious' manner. It suggested that this could involve a new statutory cause of action to apply in circumstances where a venue-based provider has behaved in specified ways that would clearly contribute to harms, such as where:

- the venue failed to respond to repeated requests by a patron to take specific actions to prevent the patron from gambling at the venue
- the venue offered alcohol to a patron showing signs of being intoxicated whilst gambling
- the venue assisted a self-excluded patrons to breach or revoke the self-exclusion order in order to gamble in the venue.[14]

As noted by participants, there are several arguments for and against a new statutory cause of action (box 12.12 and box 12.13).

As evident from the cases so far litigated, the process of courts identifying and refining all the circumstances under which gamblers are able to seek redress using traditional causes of action is likely to involve lengthy periods of legal uncertainty. In the meantime, gamblers would be left without compensation that might otherwise be warranted.

However, there would be some obstacles in providing a new avenue of redress for gamblers.

Firstly, there would be difficulties in defining 'egregious behaviours' and distinguishing them from unconscionable conduct. Identifying the circumstances where redress would be available under a statutory cause of action may well duplicate or overlap with this traditional cause of action.

Second, even were it possible to draft the elements of a new statutory cause of action so as to reduce the challenges associated with traditional avenues of redress, such as in relation to the calculation of damages, gamblers would be required to elicit evidence that the venue behaved egregiously. It is thus not clear that a statutory cause of action would be less costly or less difficult for gamblers to use than traditional causes of action.

[14] The Public Interest Advocacy Centre provided details in its submission on how a new statutory cause of action could be formulated (sub. DR389, pp. 13–16).

Third, a new statutory cause of action would create a special avenue of redress for a class of consumer that is not currently available to other consumers.

In light of these difficulties, the Commission considers that it would be preferable for governments to pursue the alternative of enhancing compliance and complaints-handling arrangements, particularly strengthening penalties and disciplines for serious breaches (recommendation 12.1). Although these alternative measures would not give gamblers redress, they would improve incentives for venues to effectively implement and apply harm minimisation requirements.

If such alternative measures either were not implemented or failed to deter egregious venue behaviour, a statutory cause of action could be given further consideration in the future.

Box 12.12 **Participants' views in favour a statutory cause of action**

Traditional avenues of redress are inadequate

> … there is a void in the law in respect of providing adequate protection for individuals in cases where a gambling provider has acted unconscionably or negligently. In Australia, courts seem to be heavily influenced by notions of free will and autonomy and are extremely reluctant to impose any liability on a gambling provider for losses suffered by a consumer. …
>
> … courts appear to have failed to fully grasp the nature and consequences of problem gambling. In comparison to other addictions, even while acknowledging that consumer suffers from problem gambling, Australian courts continue to insist that ultimately consumers can restrain themselves from gambling … (Public Interest Advocacy Centre, sub. DR389, pp 6, 8)
>
> [The *Kakavas*] decision reinforces the view … that a statutory cause of action is required. … Notwithstanding all [the] evidence of illegality and inducements, Judge Harper considered that Kakavas was able to exercise control and Crown did not unconscientiously exploit his gambling addiction. (UnitingCare Australia, sub. DR387, p. 13)

A need to protect vulnerable consumers

> The lack of adequate protection for consumers is particularly serious when one bears in mind that there are a number of groups that are particularly likely to become problem gamblers including Indigenous Australians, young people, people with intellectual or physical disability and low-income earners. … the rates of problem gambling amongst these groups is high and particularly concerning given their vulnerability. (Public Interest Advocacy Centre, sub. DR389, p. 8)

More certainty and consistency

> … the introduction of a statutory cause of action would provide greater certainty and uniformity by clarifying the rights and responsibilities of all the parties. In so doing, it would not only provide consumers with better protection but would also assist gambling venues and other gambling service providers to understand the scope of their obligations, allowing them to predict whether or not their conduct would give rise to legal liability and allowing them to put in place adequate procedures to minimise the risk of a breach. (Public Interest Advocacy Centre, sub. DR389, p. 6)

Box 12.13 Participants' views against a statutory cause of action

Traditional avenues of redress are adequate

… not only are disputes between gamblers and venues often resolved without the need to seek judicial redress, but there have been examples of gamblers succeeding against venues (*Famularo* is an example of a successful claim being brought).

… the case law is indicative that gambling venue operators have not breached their duties and responsibilities to gamblers and this is in fact why few cases, which have been brought, have been successful. (Australasian Casino Association, sub. DR365, p. 22)

The common law contains sensible, well-understood and well-worked safeguards including burden of proof, causation and remoteness tests. (Australasian Casino Association, sub. DR365, p. 23)

Overlaps with existing legislation

It is difficult to justify the imposition of an additional statutory regime [to that of the Trade Practices Act] to apply only to gambling consumers. Any such regime has the obvious risks of duplicating and/or confusing a well entrenched and long serving body of consumer protection legislation which is available for all consumers including gamblers … (Australasian Casino Association, sub. DR365, p. 22)

The specific examples of egregious behaviour proffered by the Commission only illustrate the overlap with existing regulation, and how the proposed changes would be both unnecessary and unworkable in practice. (Clubs Australia, sub. DR359, p. 58)

Creates moral hazards

… an additional avenue of redress might encourage some gamblers to engage in extreme betting practices, in the hope or expectation that any eventual losses would be reimbursed following legal action. (Clubs Australia, sub. DR359, p. 54)

Encourages a lack of self-responsibility

By treating gamblers differently to other consumers and giving them a new, specific and easier cause of action, this runs the risk that gamblers will not recognise that the problem is theirs and they will not take responsibility and commit to dealing with the problem. (Australasian Casino Association, sub. DR365, p. 22)

Practical difficulties with implementation

a. The damage suffered by a problem gamer is not over a short period of time, and in particular does not occur as a result of a single identifiable incident which is the case in relation to the consumption of alcohol.

b. Problem gamers are likely to game in many different venues. It may well be that a number of those venues complied with all the appropriate standards in relation to the conduct of the venue, yet they would be joined as one of a large number of defendants to any statutory cause of action. The allocation of responsibility, if any between the parties would raise very considerable forensic difficulties particularly in relation to the apportionment of liability. …

c. There would also be practicable difficulties in the ability for the venue operator to defend a claim that a gamer attended the premises and that various incidents took place would be difficult on a practical level particularly in relation to a hotel where there is no record kept of a person's attendance. …. (RSL (Vic Branch), sub. DR368, p. 6–7)

Better alternatives exist

If there is a desire to provide some compensation to problem gamers, it is submitted … that the bodies in charge of gaming in each State … be in a position as part of the disciplinary proceedings to impose a financial penalty on a venue for breaches … That part of the penalty if persons can be identified could be paid to persons who have been affected by the flagrant breaches of the Code by the venue. (RSL (Vic Branch), sub. DR368, p. 7)

12.4 Staff training in harm minimisation

Venue staff are usually the first point of contact for gamblers experiencing problems who seek assistance. As BetSafe said:

> Problem gamblers spend a lot of time gambling and may get to know staff quite well. They see staff as being non-judgmental and worthy of trust. There is frequent interaction between gamblers and staff. At the point when gamblers realise they have a problem and decide to take steps to address that problem, they usually disclose the gambling problem and seek help from a staff member where they gamble. That staff member may be a gaming staff member, barperson, or security staff. (sub. 93, p. 6)

All jurisdictions now have mandatory and voluntary requirements for staff training in 'responsible gambling' (for example, box 12.14 in relation to New South Wales training requirements for hotel and club staff). The Queensland Government introduced mandatory requirements for the training of employees in clubs and hotels who are directly involved in the delivery of gaming services (sub. 234, p. 8; sub. 235, p. 14).

Box 12.14 New South Wales responsible conduct of gambling training for club and hotel staff

New South Wales gaming machine legislation requires all registered club secretaries, hotel licensees, and club and hotel staff working in gaming-related areas to undertake a six-hour training course in the responsible conduct of gambling.

The training course was developed by TAFE New South Wales with the assistance of the Office of Liquor, Gaming and Racing, ClubsNSW, the Australian Hotels Association (NSW) and welfare agencies. It was approved by the New South Wales Vocational Education & Training Accreditation Board and by the Casino, Liquor and Gaming Control Authority (the Authority) in July 2000.

The course seeks to give participants the skills and knowledge to provide responsible gambling services, identify the impact of problem gambling, and to provide information to customers who require assistance with their gambling.

The course is to be reviewed, with the review considering a range of issues including the need for refresher training and the identification of problem gamblers, which follows on from the 2007 report by Delfabbro et al. for Gambling Research Australia.

The course is conducted by registered training organisations including TAFE New South Wales Institutes and the Open Training and Education Network, with trainers approved by the Authority.

Source: New South Wales Government (sub. 247, p. 62).

Coexisting with mandatory requirements are voluntary requirements for staff training within responsible gambling codes of practice and programs. The focus of these requirements is, in general terms, for staff training to provide a 'greater understanding of consumer behaviours, knowledge of the indicators of problem gambling and sources of available assistance for problem gamblers' (Australasian Gaming Council, sub. 230, p. 46).

Operating alongside mandatory and voluntary training requirements are accredited training programs in responsible gambling throughout Australia, which provide knowledge and skills for staff to 'support responsible gambling and respond appropriately to those who are experiencing difficulties with their gambling' (Australasian Gaming Council, sub. 230, p. 48). For example:

- In New South Wales, ClubSafe and in the ACT, ClubCare offer responsible gaming training to club staff.
- The Australian Hotels Association (NSW) provides training for hotel staff in the responsible conduct of gambling.
- In Queensland, there are responsible service of gaming training programs for hotels, clubs and casinos (Australasian Gaming Council, sub. 230, p. 49).

Many of the programs were developed by a collaboration of industry groups, registered training providers and community support services, with some of the programs exceeding the training standards set out in mandatory requirements.

There is survey evidence of the value placed by gamblers on staff training in responsible gambling, although this does not rate as highly in a broader suite of harm minimisation measures. For example:

- Hing (2003) in her two surveys of members of 10 Sydney clubs (involving a total of around 950 respondents), found that respondents rated the measure of responsible gambling training of club staff as fourth of 13 listed responsible gambling measures (p. 78).
- Caraniche (2005) in a survey of 418 players of gaming machines in Victoria found that 58 per cent reported that gaming venue staff trained in responsible gaming practices would be an effective measure (table 5.70). But compared with a broader suite of ideas about what venues should be doing to encourage responsible gambling, the players gave training a relatively low rating (table 5.41). A greater proportion of the 297 venue managers (87 per cent) reported that staff training would be an effective measure (table 6.56).
- In a national survey of gambler pre-commitment behaviour, McDonnell-Phillips (2006) found that, of 65 unprompted ideas about ways to help gamblers to keep

to limits, 4 per cent of 482 regular gamblers nominated training staff on monitoring/awareness of problem gambling (around 17th on the list) (p. 279).

Some participants commented on the adequacy of existing staff training requirements in regulation. BetSafe expressed the following concerns in relation to New South Wales requirements:

> Governments need to consider the effectiveness of the mandatory elements of responsible gambling regulation. For example, in NSW gaming machine venue staff are required to attend a 6 hour responsible conduct of gambling course. The current course is out of date and provides little guidance for gaming venue staff on how to provide assistance to problem gamblers who may seek help. The content of the mandatory course is poorly conceived and of limited effect, focusing on legal compliance issues with little content in how best to help the gambling consumer and those seeking help. This is recognised by industry, government and the gaming staff who undertake the course, but to date there has not been an improved version. Gaming staff who work for BetSafe clubs undertake the mandatory course and in addition undertake BetSafe's shorter but more effective training courses, which are relevant to the key issue of providing help for problem gamblers. (sub. 93, p. 5)

Clubs Australia also called for the Australian Government to make Responsible Conduct of Gambling training — along the lines of the ClubSafe program or the Responsible Gambling Code of Practice in Queensland — mandatory for all frontline staff. This would include not only staff in land-based venues but also staff of internet and other new gambling providers (sub. 164, p. 38).

As noted next in section 12.5, some participants also considered that enhanced staff training in the identification of problematic player behaviours and appropriate interventions was warranted.

There is a reasonable case for governments to mandate training for staff who work regularly with gamblers or who work primarily on the gaming floor of a venue. The interaction of these staff with gamblers is an important element of harm minimisation. Such staff are likely to be more effective in assisting gamblers, and problem gamblers, if they received appropriate training and in knowing their responsibilities as set out in industry self-regulation and regulation.

As noted in section 12.5, the Commission recommends additional staff training in the identification of problematic player behaviours and appropriate interventions, and training that provides staff with knowledge of where they could go if they had concerns about a venue.

However, governments should not be overly prescriptive as to what is required of staff training. It is sufficient that regulation set out broad criteria as to course

content, including providing an understanding of staff responsibilities under regulation, and as to who should be accredited to provide the courses.

12.5 Problematic player behaviour identification and intervention

Some commentators have investigated the scope for venue staff to take an active role in identifying problematic player behaviour within venues, and intervening before harms occur. In setting out the rationale for their study on the identification of problem gamblers in venues, Delfabbro et al. said:

> Rather than assuming that venue staff should wait until problem gamblers identified themselves by approaching venue staff for assistance (as is the common practice in many venues around Australia), the aim [of the project] is to consider whether it is feasible for staff to play a greater role in intercepting those patrons needing assistance. Such early interventions could potentially enhance existing harm minimisation strategies such as exclusion schemes … or be used more proactively in referral arrangements involving industry links with counselling services. (2007, p. 23)

Apart from the ACT, no jurisdiction has legislative requirements for venues to be ‘proactive’ in the identification of problematic player behaviours. Several jurisdictions have mandatory requirements providing for venues to record problem gambling incidents and actions in providing assistance to gamblers with problems, or providing for venues to train staff in identification and intervention strategies.

For example, in the ACT, there are mandatory requirements under the Gambling and Racing Control (Code of Practice) Regulation 2002 imposed on gambling venues to record ‘problem gambling incidents’ (including details of anyone on the gaming floor showing signs of having a gambling problem and the action taken) and to have a gambling contact officer. The gambling contact officer, among other things, is required to give anyone who is the subject of a report of problem gambling help in obtaining information about counselling. The Regulation also sets out examples of the signs that a person with a gambling problem may exhibit — such as admitting being unable to stop gambling and having a disagreement with a family member or friend about the person’s gambling behaviour.

In South Australia, the mandatory Responsible Gambling Code of Practice applying to gaming machine venues,[15] includes requirements that a venue prepare a document detailing the manner in which staff training and measures for intervention with problem gamblers are implemented; and ensure that gaming employees and

[15] The wording in other South Australian mandatory Responsible Gambling Codes of Practice (for example, applying to providers of lotteries and the casino) is similar.

managers receive training related to identification and/or intervention. Further, in order to be exempted from certain measures within the Code a venue must have an agreement with an 'industry responsible gambling agency', which (among other things) aims to assist venues with the identification and provision of support for problem gamblers. (Australian Hotels Association (SA) (trans., p. 352) noted this has effectively led to greater pro-activity by South Australian venues)

In the Northern Territory, the mandatory Code of Practice for Responsible Gambling merely requires gambling venues to maintain an incident register, which includes recording of actions taken by staff to assist people with a gambling problem.

In contrast to these Australian examples, some countries such as New Zealand, the United Kingdom and Switzerland, have mandatory requirements for more 'proactive' identification and intervention in venues (box 12.15). Switzerland is considered to have the most 'comprehensive and strictly enforced' requirements for problematic player behaviour identification and intervention in casinos (Delfabbro et al. 2007, p. 10)

Box 12.15 **International examples**

The New Zealand *Gambling Act 2003* requires gambling providers to develop a policy for identifying problem gamblers and to 'take all reasonable steps' to implement the policy to identify actual or potential problem gamblers (section 308).

The UK Licence Conditions and Codes of Practice (section 2.1) under the *Gambling ACT 2005* imposes a 'social responsibility code provision' on licensees, which among other things, requires licensees' policies and procedures for socially responsible gambling to include a 'commitment to and how they will contribute to the identification and treatment of problem gamblers'.

The Swiss *Federal Law on Games of Chance and Casinos 2000* requires casinos as one of their licensing conditions to actively participate in the identification and prevention of problem gambling as well as to contribute to support services designed for identification and assistance to those involved in excessive gambling (articles 27 and 28).

Source: Hancock et al. (2008, p. 66).

There is some survey evidence to support the view that gaming venues and staff should be more proactive in intervening to assist gamblers exhibiting problematic player behaviours. Caraniche (2005) found that gaming machine players in Victoria rated 'more attention by staff' (for example, by contacting family or asking gamblers to leave the venue when they have spent too much time or money or if they have had a win) as the second most popular of 19 ideas for what venues should

do to encourage responsible gambling (table 5.41). New Focus Research (2004) found that 64 per cent of 116 self-identified problem gamblers reported that having venue staff intervene to stop someone gambling to excess would be effective (p. 46), although rating this well below various other initiatives (p. 48).

During the Commission's 1999 inquiry, most participants expressed opposition to the idea of problem gambler identification and intervention in venues. There appears to be less opposition now (box 12.16). However, there are continuing concerns from participants in the gambling industry, who see practical difficulties with proactive identification and intervention, particularly where it might involve 'diagnosing' problem gambling.

The visual cues and behaviours associated with identifying problem gamblers within gambling venues have been the subject of a number of studies (for example, Hancock et al. 2008 contains a list). Notable among these are studies by Allcock et al. (2002) and by Delfabbro et al. (2007).

Allcock et al. (2002) were commissioned by then Australian Gaming Council to develop appropriate staff training. Psychologists and practitioners in the field gave their views on how to identify and handle people with gambling problems in a venue. Allcock concluded that staff should not 'diagnose' problem gamblers as 'they are not qualified, nor is it appropriate for them to do so'. But Allcock listed some behaviours that may be indicators of possible harm, and suggested that staff awareness in this area may be used to direct assistance in the form of information and referral. The four most frequent behaviours listed were:

- repeated visits to an ATM, borrowing on site, and trying to cash cheques
- 'disorderly behaviour' or 'signs of agitation' such as crying, holding their heads in their hands and loudly criticising the machines
- family enquiries about a gambler
- long playing sessions, 'certainly' five to six hours or more, and linked to a number of number of sessions per week.

In the more recent study by Delfabbro et al. (2007), prepared for Gambling Research Australia, various possible visible indicators of problem gamblers within venues were examined. Based on surveys of 125 venue staff, 680 regular gamblers (for whom the CPGI was applied to assess their problem gambling risk profiles) and 15 counsellors as well as venue-based observations, Delfabbro et al. concluded among other things that:

> … the identification of problem gamblers within venues is certainly theoretically possible, and that there are a number of visible indicators that can be used to differentiate problem players *in situ* from others who gamble. (2007, p. 18)

Box 12.16 **Participants' views on identification and intervention**

ACT Council of Social Service

> [The ACT mandatory code of practice] was then considered among the most progressive in the country because of its emphasis on pro-active identification of potential problem gamblers by gaming machine venues. What is not clear, however, is the extent to which the code has been pro-actively implemented by ACT gaming machine venues. (sub. 176, p. 5)

Senator Xenophon

> The adequacy of training of venue staff to identify problem gamblers needs to be addressed and the mandating of the use of the software programs [that permit player tracking] would be a significant step forward. (sub. 99, p. 11)

The Victorian InterChurch Gambling Taskforce

> In … Switzerland, gambling venue staff are trained in appropriate interventions to assist people when they are showing signs that they are highly likely to have a gambling problem. Such a requirement for training and intervention should be introduced in Australian jurisdictions. (sub. 220, p. 21)

Australian Hotels Association (SA) on industry responsible gambling agency arrangements said

> What is now starting to happen … is that, because staff are in fact more alert to the sorts of [problem gambling] issues because of their training, they are more inclined to … either call Gaming Care or an agency direct and invite them to come and assist. … because staff now have the confidence and knowledge that if they run into a problem, Gaming Care will come and assist and actually do the intervention with them, or the agency will come in. (trans., p. 352)

Clubs Australia

> [problem gambler identification] remains a particularly vexed area as unlike excessive alcohol consumption, which exhibits a number of identifiable characteristics, a venue employee will find positive identification of a person betting beyond their means a much more problematic area in which to intervene.
>
> Professionals in the field of problem gambling are undecided about how to identify a problem gambler. While some research has identified some key indicators, the majority of experts do not accept that staff should approach patrons based on these indicators [reference to Allcock et al. 2002].
>
> Many of these signs must be interpreted in the context of the presence of possible non-gambling related stresses that an individual may be experiencing and displaying in a gambling venue, the level of available disposable income that can be spent on gaming without causing problems, alternative leisure pursuits, and so on. ...
>
> … There are many potential problems in requiring venues to identify problem gamblers. These include questions of liability if the venue fails to identify someone or offending members by questioning their financial position.
>
> It is always better if the player makes the first approach. (sub. 164, p. 220)

The Australasian Gaming Council

> … has long advocated training in staff awareness of the visible signs that an individual may be experiencing difficulties with their gambling and have welcomed the insight of the detailed work in this field by Delfabbro et al. ...
>
> …emphasises that the research base for identification of problem gamblers in the gaming venue states to a <u>theoretical possibility</u> of identification — not surety — and certainly not surety of a type that could warrant action for failure [to identify and intervene]. (sub. DR377, p. 28)

Notably, from their regular gamblers' survey, Delfabbro et al. (2007, p. 6) found that indicators fell into two different categories:

- Behaviours that were very rarely observed in the general gambling population — for example, trying to disguise one's presence from others who come to the venue or trying to borrow from other patrons. The study found that such behaviours were the 'potential hallmarks of problem gambling and should be treated as important' by venue staff.
- Behaviours that could be observed in a range of gamblers, but that are more frequently observed in problem gamblers — for example, playing very fast or playing for three or more hours. The study found that these behaviours were less indicative on their own (for example, gambling for long periods), but may come to have greater significance if observed with other behaviours (for example, multiple trips to ATMs).

Using the collective findings from their surveys and venue-based observations, Delfabbro et al. compiled a final list of 50 validated indicators of problem gambling 'that might be usefully included in staff training' (2007, p. 285–7). Box 12.17 includes a selected list of the most highly probabilistic indicators. Some of these indicators reflect some but not all the elements of problem gambling screens such as the SOGS and CPGI — for example, the visible indicator of a gambler asking venue staff to not let other people know that he is there correlates with the SOGS item associated with hiding signs of gambling from spouse, partner, children or other important people.

Although it was not the purpose of the study, Delfabbro et al. made some specific suggestions to enhance identification and intervention in respect of problematic player behaviour in venues.

> - Staff should be given more extensive training into the nature of gambling and the range of visible behaviours that might be observed. The findings in this study could be usefully included in this training.
> - Staff require greater specific training relating to interactions with patrons, e.g., how to approach gamblers, anger management, conflict resolution and counselling.
> - Expenditure and machine usage data might be more effectively tracked within venues so as to obtain objective information concerning player expenditure and time on machines. (2007, p. 20)

Some gambling venues have also developed their own list of indicators of problem gambling behaviours. For example, Burswood Casino requires its staff to report any of six 'easy-to-remember' indicators where they observe them — box 12.18.

Box 12.17 **Selected list of visible indicators of problem gamblers in venues in Delfabbro et al. (2007)[16]**

Asks for loan or credit from venues (16.0)

Cries after losing a lot of money (11.6)

Seen to be shaking (while gambling) (10.0)

Asked venue staff to not let other people know that they are there (8.0)

Sweats a lot (while gambling) (8.0)

Vocally displays anger (for example, swears to themselves, grunts) (6.1)

Kicks or violently strikes machines with fists (5.8)

Sits with head in hands after losing (5.7)

Has friends or relatives call or arrive at the venue asking if the person is still there (5.3)

Finds it difficult to stop gambling at closing time (5.3)

Borrows money from other people at venues (4.9)

Gambles right through usual lunch break or dinner time (4.4)

Looks nervous/edgy (for example, leg switching, bites lip continuously) (4.4)

Source: Delfabbro et al. (2007, pp. 185–7; 285–7).

Box 12.18 **Burswood Casino's list of problem gambling indicators**

Burswood Casino requires its staff to report any of the following indicators of problem gambling whenever they observe them:

1. body odour
2. excessive time playing
3. aggression towards dealers
4. multiple visits to ATMs
5. unattended children
6. sleeping in gaming areas.

The Commission considers that there is now scope for more active identification of problematic player behaviours and appropriate interventions by venues than was considered previously possible by Allcock et al. (2002). This need not involve a

16 Estimated relative probability of the observed behaviour occurring in a problem gambler in brackets. Thus, for example, a gambler that asks for a loan or credit from venues is 16 times more likely to be observed in problem gamblers than other gamblers.

‘medical diagnosis’ by staff of gamblers as problem gamblers. However, appropriate and discrete interventions on the basis of a short list of well-established indicators of common problem gambling behaviours should be feasible, and even desirable for the venue (in order to maintain general patron safety and amenity). For example, such a list could comprise the following — the patron:

- gambles for five or more hours without a break
- asks venue staff to not let other people know that they are there
- has friends or relatives call or arrive at the venue asking if the person is still there
- asks for a loan or credit
- exhibits behavioural features while gambling such as shaking, becoming abusive, striking a machine, or crying.

However, even with such a list of problem gambling indicators, there are several major difficulties and drawbacks for venues with problem player behaviour identification and intervention.

- Notwithstanding training, staff may find intervention too hard — they may see it as confrontational or fear the reactions of patrons.
- Even well-trained staff will inevitably make a mistake and wrongly identify a person as a problem gambler, risking giving offence.[17]
- Once approached by venue staff, a gambler might simply leave the venue and go to another.
- Venues could be exposed to litigation by vexatious or opportunistic gamblers who lose money gambling and then claim that the venue failed to intervene when there were apparent indicators of a problem.
- Mere regulation is not sufficient for transforming a venue culture from one that is reactive — based on responding to situations where a gambler self-reports and approaches staff for assistance — into one that is proactive.

[17] That gamblers may react badly to being approached by venue staff appeared to be consistent with findings by Schottler Consulting (2009a) from its survey of 1000 Victorian gaming machine players. When asked how their play would be affected if venues ‘sensitively’ approached any player they ‘suspect’ may be experiencing a problem with their gambling, Schottler Consulting found that 58 per cent of problem gamblers (CPGI), 41 per cent of moderate risk gamblers, 29 per cent of low risk gamblers and 17 per cent of non-problem gamblers reported decreased enjoyment (p. 69). Significant proportions of all groups of gamblers also reported decreases in money spent, session length and play frequency.

For these reasons, the Commission does not support a general mandatory requirement for venue-based problematic player behaviour identification and intervention. However, two specific measures should be introduced by governments to assist with problem player behaviour identification and intervention within venues.

- Firstly, gambling regulators should prepare guidelines for venues as to visual cues or behaviours for identifying gamblers potentially at risk of problems in the venue, and as to appropriate intervention strategies. The guidelines should incorporate well-established indicators of problem gambling behaviours.
- Secondly, regulation requiring all venues to conduct responsible gambling staff training should specify that training occur in the guidelines, and in the processes for lodging complaints about a venue. Many larger venues, including the casinos, would already meet this training standard. Training in problematic player behaviour identification and intervention would provide staff with the necessary skills and confidence to approach potential problem gamblers. Training in complaints processes would provide staff with ability to make their concerns known where they felt unable to directly approach potential problem gamblers due to lack of encouragement by venue management, or where they had concerns that a venue was not taking appropriate actions after being alerted by them to potential problem gamblers.

As proposed by the Commission in recommendation 12.1, gambling regulators should have a mechanism for handling complaints from venue staff about a venue — this mechanism should also encompass complaints about identification and intervention practices in a venue.

RECOMMENDATION 12.2

Governments should enhance existing training requirements by:

- ***preparing guidelines, including a short list of commonly agreed indicators of problem gambling, to help venue staff identify and, where appropriate, respond to problematic player behaviours***
- ***requiring gambling venues to provide staff training on these guidelines and on the process for lodging complaints about a venue.***

The Commission notes that visual identification of problematic player behaviours could be corroborated by venues monitoring data on expenditure and machine usage from a venue's player loyalty scheme and central monitoring system, or by using a 'player tracking system'. Whether or not this should be required under government regulation is discussed in chapter 10 on pre-commitment.

12.6 Inducements to gamble

Many gambling venues offer inducements to their patrons. These may include free food, alcohol, drinks, transport, tickets to shows, and product give-aways. Other inducements may be specifically linked to gambling, such as gifts awarded when gamblers reach a certain number of points on their loyalty cards, or jackpot nights where the first person who obtains a certain number of points on their loyalty card receives a cash prize or raffle tickets, or coupons that can be converted into credits on gaming machines (Delfabbro 2008b, p. 146).

A few jurisdictions have mandatory restrictions on venues offering inducements to gamble (table 12.1). For example, in New South Wales, gaming machine venues are prohibited from offering free or discounted liquor, or free credits, as inducements for people to play gaming machines. Action may also be taken against a club or hotel that offers individual promotions or inducements that offend general responsible gambling practices, with a general prohibition on venues engaging in conduct that has encouraged, or is likely to encourage, the misuse and abuse of gambling activities in the hotel or club. (New South Wales Government, sub. 247, p. 34).

Table 12.1 **Regulatory bans on inducements**

	Measure
NSW	Hotels and clubs prohibited from offering free or discounted alcohol or free credits as inducements. Action may be taken against hotels and clubs for offering individual inducements that ‘offend’ general responsible gambling practices.
Vic	No ban on inducements.
Qld	No ban on inducements.
SA	Inducements banned.
WA	No ban on inducements in the casino.
Tas	Restricts inducements that may lead to problem gambling behaviour such as free food, drinks or games.[18]
ACT	Permits licensees to offer inducements, but with restrictions. Licensees must not offer inducements that include free or discounted alcohol, cash, or discounted gambling (unless the discounted gambling is offered to all patrons as part of the venues’ regular prize schedule).
NT	Gambling-related inducements banned.

Sources: ACT Gambling and Racing Commission (2009a); FaHCSIA (2009b); New South Wales Government (sub. 247).

The evidence that inducements increased problem gambling is mixed.

[18] A new mandatory code of practice is being developed that will include provisions prohibiting the serving of food and drinks in gaming areas from 9 pm to close of business and restricting inducements that will lead to problem gambling.

- Delfabbro and Panozza (2004, cited in Delfabbro 2008b, p. 147) found that, based on focus group data collected from problem gamblers in South Australia, most did not consider the schemes to be a major cause of their excessive gambling . However, some continued to gamble in order to obtain prizes and win something back from the venue under player loyalty schemes.
- New Focus Research (2004) found that 60 per cent of 117 self-identified problem gamblers in Victoria reported that 'reducing incentives to go to the venues' (such as cheap food and free bus) would be an effective minimisation initiative (p. 46). However, within a broader suite of initiatives, they rated reducing incentives quite low (p. 49).
- Caraniche found that 35 per cent of 418 gaming machine players and 17 per cent of 297 venue managers in Victoria reported that not offering free food and beverages to players would be an effective problem gambling measure (2005, tables 5.71 and 6.59).
- In its national survey of gambler pre-commitment behaviour, McDonnell-Phillips (2006) found that, of 65 unprompted ideas about helping gamblers keep to limits, 3 per cent of 482 regular gamblers nominated stopping 'freebies' for more gambling (21st on the list) (p. 279).
- The Australian Institute for Primary Care (2006, cited in Delfabbro 2008b, p. 147) found that problem gamblers did not feel that incentives had contributed to their problems, but some saw player loyalty schemes as ways in which their time in the venue was extended.
- From its survey of 1000 Victorian gaming machine players, Schottler Consulting (2009a, p. 67) found that 'not being able to drink alcohol at all while playing pokies' decreased the enjoyment, money spent, session length and play frequency for significant proportions of players across the different CPGI risk groups. Furthermore, 39 per cent of non-problem gamblers reported reduced enjoyment if there were not able to drink alcohol whilst gambling.

It is important to distinguish between the different types of inducements offered by venues. Inducements that are part of the general promotion and marketing of venues to increase their patronage are likely to have broad recreational appeal. To restrict them would reduce the enjoyment of venue patrons. However, those inducements that are likely to lead to problem gambling, or exacerbate existing problems, are very difficult to justify and should be prohibited.

- Offering *free* alcohol to patrons who are gambling (or in the gaming room) is likely to diminish their capacity to make informed decisions about their gambling.

- Making gaming machine credits or cash available only if the gambler plays at a high intensity or level of expenditure is likely to exacerbate losses.

However, it is not clear cut whether offering free food or drinks to those gambling fall within the class of inducements that should be prohibited.

- On the one hand, offering food or drinks may inhibit gamblers taking a break away from the gaming machine. Several prevalence surveys (SACES 2008b, p. 40; Office for Problem Gambling 2006, pp. 167–8; Centre for Gambling Research 2004a, p. 69) found that eating and drinking are important natural sources of breaks in play for patrons.
- On the other hand, offering food and drinks may provide venue staff with an opportunity to monitor gamblers as well as be beneficial in other ways. As the Community Clubs Association of Victoria noted:

  > Staff members roaming gaming areas with complimentary food, offering tea and coffee, provide an opportunity to customers for a break in play and interaction with that staff member. … Providing food …[can also help] customer/s avoid disorientation of time and space through becoming fixed on the gaming machine. (sub. DR366, p. 12)

RECOMMENDATION 12.3

Governments should prohibit venues from offering inducements that are likely to lead to problem gambling, or are likely to exacerbate existing problems, including offering free alcohol to a patron who is gambling.

As in New South Wales and the ACT, governments should complement a general prohibition on inducements with an inclusive list of examples of specific inducements. This list could be added to over time.

Several participants expressed concern about the provision of free credit or bets for online gambling (for example, Australian Hotels Association, sub. 175; BetSafe, sub. 93; UnitingCare Australia, sub. 238; Clubs Australia, sub. DR359). This is covered in chapter 15 on online gaming and the Interactive Gambling Act.

12.7 'Reality checks'

All jurisdictions have introduced mandatory or voluntary measures relating to clocks and lighting in venues. Indeed, incorporating wall clocks and adequate lighting in venues are among the national responsible gambling principles agreed to by the Ministerial Council on Gambling in July 2009 (MCG 2009b).

The rationale underpinning these requirements is primarily to provide gamblers with 'environmental cues' to help them 're-establish a sense or reality' (Delfabbro

2008b, p. 150). For example, the Regulatory Impact Statement accompanying the Victorian Gambling Regulations 2005 noted that the rationale for lighting requirements and external views was to provide gamblers with a ‘sense of connection with the environment outside gaming venues, and to people and things inside gambling venues other than gaming machines’ (Department of Justice (Victoria) 2005). And the Queensland Responsible Gambling Code of Practice referred to the need to make gamblers ‘aware of the passage of time’. Another lesser rationale, chiefly associated with lighting requirements, is to enable gamblers and other patrons to read consumer information and signage (MCG 2009b).

Several studies have provided survey evidence of support by gamblers for such ‘reality checks’ as effective harm minimisation measures — for example, Caraniche (2005, tables 5.54 and 5.60); Hing (2003, p. 76); New Focus Research (2004, pp. 43, 47).

But as Delfabbro noted, there have been no studies of the measures that have involved objective assessments of behavioural changes in gamblers (2008a, p. 139). He noted that an important reason for the lack of such studies is that:

> … it is very difficult to ascertain the specific effect of these measures using established research methodologies. Apart form the fact that introducing natural lighting to gaming areas would be impractical or prohibitively expensive for many venues, it would be very difficult to investigate the effects unless one could compare the behaviour of a captive population of gamblers who only used that venue. One would be heavily reliant on self-report data and this might only reflect the perception that people consider this to ‘be a good idea’ rather than one that worked in practice. Similarly, an attempt to measure the effect of clocks would be challenged by the fact that this type of measure is often introduced along with a suite of other measures, so that it would be very difficult to discern the specific influence of the clock. It is not clear that patrons would necessarily look at clocks if they were otherwise preoccupied with gambling, and many may not judge the duration of the session based on the time elapsed, but on the achievement of specific goals (eg obtaining a certain sized win, or a bonus sequence). (2008a, p. 139)

A Queensland study by Rockloff (2007) on the impacts of introducing mirrors in the gaming room is a good illustration of the difficulties in designing experiments as well as of the risks of using intuition as a basis for policy (box 12.19).

Box 12.19 **A study on the effects of mirrors in gambling venues**

In a study for the Queensland Office of Gaming Regulation, Rockloff investigated the extent to which mirrors in gambling venues would be an effective harm minimisation measure. 102 players of gaming machines (who were assessed as to their CPGI risk) were exposed to large mirrors strategically placed so they were obliged to see their own reflection during play. The study tested the first element of the 'Four E's theory' (that is, Escape, Excitement, Esteem and Excess) that the presence of the mirror should remove the escape quality of the gambling experience and thus make the experience less attractive. Three measures of gambling intensity were used to measure the gambling experience — average bet size, average final payment and speed of betting.

The experiment utilised a laptop computer, which simulated a traditional 3 reel gaming machine. Players were given $10 as compensation. A coin flip determined the experimental condition for the participant — whether playing with a mirror or playing with no mirror. The 'gaming machine' was set up in a room and two large mirrors were positioned to reflect the image of the player while gambling (as determined by the coin toss). Participants were asked whether they wanted to gamble with their $10, which they all did. They were told they could decide when to quit their game and that they could keep the amount of money remaining on the machine at the end of play.

Rockloff found that the results of the study were 'weaker than expected' and 'did not confirm general expectations of lower intensity of gambling behaviour resulting from exposure to the mirror' (p. 4). Difficulties arose in obtaining statistically significant results in relation to the two experimental conditions, due to the small numbers of problem gamblers. The only significant result he found was that problem gamblers were betting faster *with* a mirror than without a mirror. Rockloff reflected that the reason for the result, in contradiction with the study's a priori expectations, was that 'by gambling more quickly, participants could seek to lose their money fast and terminate the experience sooner' (p. 18).[19]

Source: Rockloff (2007).

Even if there were evidence that measures providing reality checks could reduce gambling harms, that evidence needs to be weighed against the costs of implementation. Although the cost of placing a clock is very small, measures requiring structural modifications such as introducing access to natural light would be significant for some existing venues.[20]

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[19] There might also be merit if the experiment tested whether gamblers would come back to the venue with the mirrors, or go to another venue.

[20] Even ensuring adequate lighting involves no small cost. The Regulation Impact Statement accompanying the Victorian Gambling Regulations 2005 estimated that the likely cost impacts of proposed new lighting requirements were $5500 to $7500 (in 2005 dollars) for each new gaming venue. The average number of new gaming venues per year was estimated to be three making a total estimated cost of $0.16 million to $0.22 million (in 2005 dollars) over the

The Commission considers that, because of the methodological difficulties in assessing the effectiveness of clocks and lights in venues, governments should accord a low priority to introducing or investigating similar types of 'reality checks' such as mirrors. This would reflect survey evidence that gamblers and venues rank these measures as very low in usefulness within a much broader suite of harm minimisation measures (for example, Hing 2003, p. 78; Caraniche 2005, tables 5.41 and 6.19; McDonnell-Phillips 2006, pp. 279, 282–3; New Focus Research 2004, p. 49).

12.8 Exposure of children to gambling activity

All jurisdictions have measures prohibiting gambling by minors, or prohibiting the entry of minors into the gaming areas of venues.

Some participants have suggested that governments go further than these measures and limit the 'exposure' of children to all the sights and sounds of gambling activity within gambling venues (for example, PokieWatch.org, sub. 119 and the Commission on Social Questions and Bioethical Issues, Lutheran Church, sub. 136).

Indeed, among the national responsible gambling principles agreed to by the Ministerial Council on Gambling in July 2009 is that 'minors should not … be exposed to gambling areas within venues' (MCG 2009b).

The rationale for limiting the exposure of children to the sights and sounds of gambling activity has been expressed as follows:

> One of the ways in which pokie gambling is 'normalised' — made to seem like an everyday, average sort of activity — is by exposing young children to poker machine venues in the company of family and friends. Just as smoking, drinking and poor eating habits are passed on by example, allowing children to accompany adults to gaming venue, and indeed encouraging this by providing play rooms, free meals and so on, is likely to result in the development of problems later in life. Pokie gambling is a potentially dangerous activity and children should not be encouraged to think it's just another harmless pastime. (Livingstone, cited in PokieWatch.org, sub. 119, p. 2)

The Commission notes that going beyond existing measures to further limit the exposure of children to gambling activity could be justifiable provided that such measures adequately reflect community expectations and norms. Some people in the community may be indifferent as to whether their children are exposed to gambling.

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10 year life of the proposed regulations. The Regulation Impact Statement also noted possible opportunity costs in venues not being able to carry out certain renovations, but which were not able to be quantified (Department of Justice (Victoria) 2005, p. 26).

Others may have deep-seated concerns. Weighing these competing views is ultimately a matter for governments, as has been reflected in the Ministerial Council on Gambling's agreement of July 2009.

Competing options as to how further restrictions on exposure to children of gambling should be achieved should be properly evaluated according to their cost-effectiveness. Such options might include prohibiting the entry of children into gambling venues (as currently occurs with casinos) or imposing venue design standards that are intended to mitigate the sights and sounds of gambling to patrons, and children, outside the gaming areas.