

Mr Greg Jones
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Dear Mr Jones,

Thank you for the opportunity to provide comment on your Draft Report on the Review of the Governance Provisions in the *Gaming Machine Act 2004 (GMA)*.

Following the recent period of consultation, you have made six recommendations. I will respond to each as well as providing some general comment on behalf of the members of ClubsACT.

Recommendation 1

The Commission recommends that the GMA be amended to:

- *ensure associated organisations do not have the power to remove directors; and*
- *provide for voting members to elect at least 25% of board directors.*

Industry supports this recommendation.

While industry is supportive of this recommendation, ClubsACT notes that the Commission's reasoning behind the recommendation is a concern that the power of associated organisations to appoint and remove directors may lead to the emergence of directors failing to act in the best interests of the club and consequently breaches of the GMA and corporations law.

It is important to reiterate that the ACT Gambling and Racing Commission have never identified a case where a director has acted inappropriately as a result of pressure or undue influence by an associated organisation.

Indeed, even in the situation that led to this review being established, the directors were found to have acted appropriately and in the best interests of their club.

Notwithstanding that, ClubsACT believes it is a worthwhile measure to establish a minimum number of directors which are to be elected by the voting members. This will ensure an appropriate opportunity for the members of a club to influence the composition of the board and allow some level of independence to the board whilst also allowing associated

organisations to continue to appoint the majority of directors thereby protecting of the club's core objectives.

ClubsACT also believes removing the right of associated organisations to remove directors is an appropriate measure and in line with efforts to improve governance throughout the industry.

Recommendation 2

The Commission recommends that the GMA be amended to:

- require directors to discharge their powers and duties in the best interests of the club and for a proper purpose consistent with corporations law.

Industry strongly opposes this recommendation.

Fundamentally, industry believes there is no justification for this approach and any attempt to replicated certain provisions of federal law into ACT law would represent unnecessary regulation, be contrary to the Council of Australian Government's commitment to regulatory reform (to which the ACT is a signatory) and would set a very dangerous precedent.

The Commission's view that a breach of corporations law by an ACT club may not warrant the application of resources by the Australian Securities and Investment Commission (ASIC) due to their other responsibilities in no way justifies giving the Commission ASIC-like powers to investigate and prosecute ACT club directors for breaches of federal law.

Nor does the lack of specific provisions in the GMA to hold individual directors accountable provide a sound basis for duplicating federal legislation in ACT law. Amending the GMA to allow the Commission to investigate and/or prosecute directors also raises a number of serious practical issues.

If the Commission did have such powers and investigated and prosecuted an ACT club director for a breach of the corporations law provisions which were replicated in the GMA, would that director also be subject to potential prosecution by ASIC under the same provisions contained in federal law for example?

Further, would the Commission be obliged to run its own investigation into an ACT club director who was under investigation by ASIC and how would the Commission and ASIC manage parallel investigations whilst ensuring the rights of the director were protected?

What if the Commission and ASIC came to different conclusions following their respective investigations?

Or would the Commission prosecute an ACT club director under ACT law by solely relying on the evidence gathered by ASIC as part of its own investigation?

These are just a few of the serious questions this recommendation raises. There is no information whatsoever in the Draft Final Report which addresses any of these fundamental issues.

In our submission to the Issues Paper, ClubsACT recommended the Commission amend the GMA to require clubs be a corporation as a condition of their license. This will ensure that all directors are covered by the provisions of corporations law.

The primacy of federal law is well understood as is the obligations on directors contained therein. It also needs to be reiterated that no breach of corporations law has ever found to have occurred.

It is interesting to note that Section 3.4 of the Commission's Issues Paper into Governance stated:

"It should be noted that responsibility for compliance in relation to corporations law remains with the Australian Securities and Investments Commission and corporations law itself is not part of this review".

It is difficult to reconcile this statement with the Commission's recommendation to replicate corporations law in the GMA, with all the consequences that would involve.

The Commission's advice that 'in general terms...such a provision could be drafted without creating ambiguity or conflict with Federal corporations law', does not ease the very serious and strongly held concerns of ClubsACT that this recommendation is unnecessary, ill-conceived and would set a very dangerous precedent.

Indeed, it is highly likely that the ACT Legislative Assembly Scrutiny of Bills Committee would raise similar concerns.

It is for these reasons that industry strongly opposes this recommendation.

Recommendation 3

The Commission recommends that the GMA be amended to:

- provide the Commission with the power to direct a club to amend their constitution where a conflict exists between a provision in the constitution and a gaming law, or where provisions grant a power which if exercised would constitute a conflict; and*
- require, as a condition of a gaming machine licence, that a club's constitution include a provision that enables the constitution to be amended without a vote by members where the club has been so directed by the Commission.*

Industry does not support this recommendation.

There can be no argument with the principle that the constitution of a club should not include provisions which are inconsistent with applicable law, whether it be ACT or federal law. Certainly ClubsACT does not disagree with the Commission's view that the constitutions of clubs should not have provisions which allow for (or encourage) unlawful activity. The question is whether the Commission's recommendation is an appropriate and proportional response to the issue. It is the view of ClubsACT that it is neither appropriate nor proportional.

As was stated in our response to the Issues Paper, all clubs are aware that where a conflict arises between the constitution of a club and the GMA, clearly the GMA prevails. In other words, a club can and should be found to be in breach of the GMA (if a breach has occurred) regardless of what is contained in the constitution. In that sense, what is included in the constitution is immaterial to the Commission's ability to enforce the GMA and the case has not been made that inconsistencies in clubs' constitutions lead to a greater risk of breaches of the GMA occurring.

As is acknowledged in the Draft Final Report, the Commission currently has the power to direct a club to change its constitution through its general directions provisions. The case has not been made as to why this power is insufficient – indeed, the Draft Final Report does not even attempt to make the case that this power is in some way insufficient.

Nor has the Commission provided any evidence that the use of this power, when exercised in the past, has not produced the desired outcome. Certainly, clubs have no option but to carry out any instructions the Commission chooses to make under its general directions powers.

Given the fact that sufficient power exists for the Commission to require changes to the constitution of clubs, ClubsACT sees no reason to amend the GMA as recommended.

Recommendation 4

The Commission recommends that the GMA be amended to provide the Commission with powers to:

- investigate the operations of an associated organisation and request relevant documents or information (for example financial statements and board minutes) where there are reasonable concerns that the associated organisation has changed its objects, is no longer assisting the club to meet its eligible objects or that the relationship is impacting detrimentally on the club's governance; and*
- suspend or revoke the approval of an associated organisation (subject to appropriate review mechanisms) if it no longer meets the requirements of the GMA.*

Industry supports this recommendation in principle.

The principle that the Commission should have the power to revoke or suspend the approval of an associated organisation if the circumstances that led to the approval in the first place change in a material way, is supported by ClubsACT.

However, it is the firm view of ClubsACT that the powers of investigation, including the information that can be compelled by the Commission needs to be very clearly codified in the legislation.

As would the provisions that govern what constitutes 'reasonable concerns' that allow the Commission to commence an investigation.

Industry is not supportive of powers to investigate associated organisations and to suspend or revoke their approval resting on broad, non-specific bases such as the Commission being concerned that the associated organisation is 'impacting detrimentally on the club's governance'. The triggers for an investigation to be conducted and for an approval to be suspended or revoked would need to be detailed in the legislation.

The power to investigate an associated organisation, and to potentially suspend or revoke their approval, is a very significant power to have. These associated organisations are not licensees and are generally not in and of themselves subject to the GMA. It is a major step to bring these organisations into the purview of the ACT Gambling and Racing Commission and whilst industry supports the recommendation in principle, we would want to see the legislation in draft form prior to deciding on a final position.

Recommendation 5

The Commission recommends that the Minister write to ClubsACT requesting that the ClubsACT Code of Governance be reviewed and updated to include "best practice" provisions to improve club accountability and transparency to their members. The Minister could require the Commission to monitor the progress of the review and the application of the results and provide advice back to the Minister in due course whether legislative reform is required in this area.

Industry supports this recommendation in principle.

In general terms, ClubsACT agrees that there is scope for the Code of Governance to be updated and enhanced to improve accountability and transparency. On behalf of ClubsACT, I can confirm that such a review will be conducted and a new Code of Governance will be released following a thorough review period.

As an independent industry association, ClubsACT is not subject to the Commission. This is of course not to say that we do not work cooperatively and constructively as a matter of course. However in terms of the conduct of the review of the Code of Governance, rather than the Commission 'monitoring the review's progress', at the conclusion of the review, I will provide a copy of the new draft code to the Commission for their input. Changes which are acceptable to ClubsACT will be incorporated and the new code will then be ratified by the board.

In order for the review to be successful, it is essential that industry sees that it is in control of the process and the outcome. The Minister will always have the opportunity to pursue a legislative approach with or without advice from the Commission, should he choose to do so.

Recommendation 6

The Commission recommends that amendments to sections 14(1)(a), 53 (4)(a), 53 (4)(b), 54 and 55(d) of the GMA be undertaken as outlined in the review report.

Industry supports this recommendation.

Conclusion

It is important that the context of this review be kept in mind to ensure the ultimate outcome is not in any way unrelated to the original issue that was raised. More specifically, the events that led to this review demonstrated a number of things including:

- The primacy of federal legislation, particularly as it pertains to the obligations of directors, is well understood;
- The directors of the Canberra Labor Club Group were found to have acted in the best interests of the company and fulfilled their duties in accordance with their obligations under corporations law; and
- No breach of any federal or territory law was found to have taken place.

If anything, it was clear that the existing legislation and regulation was not found to be deficient in ensuring high standards of governance are applied by clubs.

Notwithstanding that, the review has identified a number of areas where steps can be taken to improve governance and the industry stands ready to continue to work with the Commission to ensure the currently high standards of governance are maintained.

Kind regards

A handwritten signature in black ink, appearing to read 'Jeff House', with a stylized, cursive script.

Jeff House
Chief Executive
24 September 2010.