

Can a federal court case against pokies succeed where politics has failed?

Written by The Conversation

Maurice Blackburn [today launched](#) a federal court case against poker machine manufacturer Aristocrat Technologies Australia and casino owner Crown Melbourne Limited. The case could decide whether the design and operation of poker machines can deliberately deceive players about their chances of winning.

If this case is successful then it will have ramifications for the entire industry. While the defendant, Ms Guy, is not seeking damages and is targeting only one casino and one poker machine manufacturer, a precedent could be set for every poker machine in the country.

The gambling industry is a [major contributor](#) to Australian political parties and has thus far defeated efforts to reform poker machines. It makes a lot of sense for those in favour of gambling reform to turn to the legal system.

Read more: [Three charts on: Australia's addiction to poker machines](#)

Australians [lost A\\$11.59 billion](#) gambling in 2014-2015 alone. This averages out to A\$633 per adult. However, the true figures are far more concerning. Only 8% of Australian adults typically use pokies regularly, meaning these regular users lose between [A\\$1,500 and A\\$3,500 each year](#)

One of the reasons that we seem to be willing as a nation to tolerate such losses – and the [res](#)
[ulting social harms](#)
– is due to the idea that gambling is a free choice.

Our laws are largely based on this idea of informed and rational consumers who make free choices in a marketplace. But this case is being brought under [Australian Consumer Law](#), which recognises that consumers are not always rational.

The key arguments

While you may assume that the odds are always against people who play poker machines, Maurice Blackburn is alleging that certain aspects of the design of the “Dolphin Treasure” poker machine mislead consumers as to the true nature of these odds. These include:

- *The oversized reel* – Maurice Blackburn alleges that when playing Dolphin Treasure all five reels on the screen appear to be the same size. However, one of the reels is actually significantly bigger than the other four, making it far less likely that it will return a high-value symbol.
- *The starving of the reels* – Similarly, Maurice Blackburn says the symbols are not distributed evenly across the five wheels in Dolphin Treasure. Maurice Blackburn has likened this to “playing a game of cards without knowing the deck has four aces of spades, three queen of hearts and seven tens of diamonds”. The uneven distribution of symbols makes lining them up (and therefore winning) far less likely than you would naturally assume.
- *Onscreen information* – Maurice Blackburn also alleges that the Dolphin Treasure machine gives players misleading information about the likely returns from playing the machine. The lawyers say the machine tells players that the returns start at 87%, but that this figure bears no relation to how much an individual might lose per spin or session. Instead, this is a theoretical statement based on the expected return over millions of spins.
- *Losses disguised as wins* – Finally, Maurice Blackburn is arguing that by displaying lights and sounds for a partial return on a spin, the machines mislead players into feeling as though they are winning when they have, in fact, lost money.

Read more: [Losses disguised as wins – the science behind casino profits](#)

Why sue under the consumer law?

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The Australian Consumer Law provides a strong legal foundation for this case. Unlike traditional contract law, consumer law recognises that many consumers do not behave rationally, that we often make choices based on first impressions and poor information, and that businesses exploit this fact.

Previous cases give some idea of how the courts have applied this logic.

In [one case](#) the High Court found that an ordinary and reasonable person gives only “perfunctory” attention to advertising material and, therefore, many will only absorb the “general thrust”.

Similarly, [a recent case](#) about Nurofen “Special Pain” products focused on the impact of first impressions. While the ingredients are plainly listed on the packaging, and a consumer could have compared boxes of “back pain” and “tension headache” medication and discovered they were identical, the Federal Court found that most consumers would simply rely on the name of the product and its (unfounded) claim to target specific pain.

In the Nurofen case the Federal Court imposed a penalty of A\$6 million and a further compensation payout of \$3.5 in a [class action](#) earlier this year. This indicates that consumers are entitled to rely on these first impressions and businesses do not have free rein to exploit this.

This is why section 18 of the Australian Consumer Law provides protection against misleading and deceptive conduct – even where consumers could have discovered the truth had they dug a little deeper. It also provides protection against unconscionable conduct, which in this case relates to the plaintiff’s claim that the poker machines are designed to be addictive.

Read more: [Poker machines and the law – when is a win not a win?](#)

What are the implications?

While Ms Gay is not seeking damages, if her case is successful it will open the way for the ACCC to take action against the entire poker machine industry. The potential penalties from this could be significant.

Penalties and damages awarded in consumer law cases have traditionally been far lower than those awarded in competition law cases. However, this has changed over the last 12 months, spearheaded by the A\$6 million penalty in the Nurofen case.

In this case, the court emphasised the importance of imposing penalties that are high enough to ensure “other ‘would-be wrongdoers’ think twice and decide not to act against the strong public interest”. The ACCC has since made it clear it intends to [take up this call](#) and to ensure penalties are seen as more than just a cost of doing business.

In this new environment, a successful case against the poker machine industry would be one to watch.

Cristy Clark is a member of the NSW Greens.

Read more <http://theconversation.com/can-a-federal-court-case-against-pokies-succeed-where-politics-has-failed-83871>