VICTORIAN GAMING VENUES & CASH FACILITIES

JOINT ADVICE

1. The Uniting Church in Australia wishes to see a legislative ban introduced on the placement in or near electronic gaming machine ("EGM") venues of facilities such as automatic teller machines ("ATMs") which permit customers to withdraw funds from a financial institution.

2. The question has arisen whether such a legislative measure is, at least as far as Victoria is concerned, within the legislative competence of the Victorian Parliament, or is, instead a matter within the purview of the Parliament of the Commonwealth of Australia.

3. We are not aware of any case law dealing directly with the issue.

Summary

4. For the reasons set out below we are of the view that the proposed measure would lie within the legislative competence of the Federal Parliament, and also within the legislative competence of the Victorian Parliament.

Federal Powers

5. Any consideration of whether a measure is within either or both federal or State legislative competence must begin with the Australian Constitution. As regards financial institutions two heads of federal power suggest themselves: the power to legislate with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth", conferred by s. 51(xx) of the Constitution, and the power to legislate with respect to "Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money" conferred by s. 51(xiii).

6. "State banking" refers only to banking conducted by a State as banker rather than customer. The words "extending beyond the limits of the State concerned" refer to a State bank's business beyond the State to which it belongs.[1]

Banking Power

7. The definition of "banking" provided in the *Banking Act 1959* (Cth) (the "Banking Act")[2] draws directly on its constitutional sources. Section 5 of the Banking Act defines banking as a business that consists of banking within paragraph 51(xiii) of the Constitution or a business carried on by a corporation under section 51(xx) of the Constitution that consists of both taking money on deposit and making advances of money, or other financial activities prescribed by the regulations for the purpose of the definition.

8. The Victorian Court of Appeal observed in 2002 in *R* v *Jost* [3] that this definition essentially restates the definition developed by the High Court of Australia over a number of cases.[4]

9. Isaacs J of the High Court of Australia set out the essential characteristics of banking business in *Commissioners of the State Savings Bank of Victoria* v *Permewan Wright and Company Ltd* [5] as follows: "the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required."

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[1] *City of Melbourne* v *The Commonwealth* (1947) 74 CLR 31 at 87.
[2] The definition was inserted by the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 and came into effect 1 July 1998.
[3] *R* v *Jost* [2002] VSCA 198 per Chernov JA paragraph 39.
[4] See *PP Consultants Pty Ltd* v *Finance Sector Union of Australia* (2000) 201 CLR 648 at 655-656 per Gleeson CJ, Gaudron, McHugh and Gummow JJ; *Commissioners of the State Savings Bank of Victoria* v *Permewan Wright and Company Ltd* (1914) 19 CLR 457; and *Yango Pastoral Co Pty Ltd* v *First Chicago Australia Limited* (1978) 139 CLR 410.
[5] *Commissioners of the State Savings Bank of Victoria* v *Permewan Wright and Company Ltd* (1914) 19 CLR 457 at 470-471.

10. The measure sought by the Uniting Church would restrict the places in which electronic facilities for the withdrawal of money by a customer might be located by a financial institution. The Banking Act does not deal specifically with this subject matter.

Financial Sector Regulation

11. Australia's financial sector is administered and regulated by the following statutory bodies established under federal legislation:

- The Reserve Bank of Australia ("RBA");
- The Australian Prudential Regulation Authority ("APRA");
- The Australian Securities and Investments Commission ("ASIC") which is responsible for consumer protection, market integrity, disclosure standards and the licensing of providers of financial products[6]; and
- The Australian Competition and Consumer Commission ("ACCC") which protects competition in the financial sector.

The RBA[7] is Australia's central bank and is responsible for monetary policy, the payments system and the overall stability of the financial system. APRA is responsible for the prudential supervision and regulation of Australian banks and authorised deposit taking institutions ("ADIs"). APRA's powers originate from the Banking Act and are wide ranging.[8] It may be inferred from the provisions of the legislation in question[9] that the general purposes of these federal measures are primarily to ensure the stability of the financial sector

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[6] An ATM facility is a non-cash payment facility and as such is a "financial product" for the purposes of the *Financial Services Reform Act 2001* (Cth) (the "FSRA"). The FSRA amends the *Corporations Act* and requires providers of financial products to be licensed by the Australian Securities and Investment Commission ("ASIC"). We note that the FSRA does not provide for the manner by which customers may access such facilities.

[7] The RBA is constituted by *the Reserve Bank Act* 1959 (Cth). This act contains the legislative basis for the RBA's powers.

[8] Section 12 of the Banking Act states that APRA must use its powers to protect depositors. These powers include the ability to issue and revoke banking licences, wind-up a bank and appoint administrators to control a bank in financial difficulty. In addition, the *Australian Prudential Regulation Authority Act 1998* (Cth) sets out APRA's supervisory powers for reducing the risk of bank collapses.

[9] *The Banking Act 1959 (Cth); The Reserve Bank Act 1959* (Cth); *Australian Prudential Regulation Authority Act 1998* (Cth); and *Financial Sector (Shareholdings) Act 1998* (Cth) among others.

and to afford financial security to depositors. It would lengthen this Advice unacceptably, and be of doubtful utility, to detail the legislative provisions by which these goals are sought to be achieved.

12. The purpose of affording financial security for customers' deposits is of course a different purpose from that of inhibiting customers from accessing their funds at or near places where improvident use of the withdrawn funds may follow. We do not see measures of this kind either in the Banking Act or in the Commonwealth's other legislation relating to the financial sector.

13. There is no federal Act directly controlling electronic funds transfer ("EFT"). In 1984 the Federal Government established a working group to examine the rights and obligations of users and providers of EFT systems. The resulting Electronic Funds Transfer Code of Conduct (the "EFT Code") covers all forms of EFT including ATMs. The EFT Code is a voluntary code of conduct administered by ASIC. It does not contain any provisions in relation to the provision or location of ATMs.

14. There are other federal measures relating to ATMs though none deals with the placement of ATMs or seeks to limit customers accessing their funds.[10]

15. [Banking in Australia is also "self-regulated" to a degree through the Australian Bankers' Association ("ABA"). In 1993 the ABA introduced a *Code of Banking Practice* (the "Banking Code") to ensure that its members comply with uniform rules relating to the duties of banks and their staff to customers and the handling of disputes between customers and banks. The Code has no legislative force. It does not seek to limit banks in the placement of ATMs or in giving customers access to funds in the vicinity of gaming venues.]

[10] For example an ATM card is within the definition of "debit card" as set out in section 63A of the *Trade Practices Act 1974* (Cth) ("TPA"). The TPA contains provisions in relation to debit card distribution.

Corporations Power

16. The Federal Parliament also has power under section 51(xx) of the Constitution to make laws "with respect to...Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

17. A foreign corporation is simply a corporation formed outside Australia. A financial corporation is a corporation that engages in transactions such as borrowing and lending or other commercial dealings.[11] Similar considerations such as those set out above with respect to the definition of banking will apply in deciding whether or not a corporation is a financial corporation for the purposes of section 51(xx). There is no requirement for the financial activities to be the predominant activity of the corporation.

18. A trading corporation is a corporation that engages in trading activities such buying and selling. The definition is particularly broad. It is not only limited to buying and selling but can also extend to the 'pursuit of a calling'[12] or business activities carried on with a view to earning revenue.[13] It is not necessary that trading transactions be the predominant or primary activity of a particular corporation although they should form a significant part of its overall activities.[14] Factors such as the purpose for which a corporation was formed will be taken into account although it appears that its current activities will be the criterion for determining whether or not a corporation is a trading corporation.[15] A trading corporation can also be categorized as a financial corporation and vice versa.

19. The full extent of the power with respect to the three types of corporations is unclear. The corporations power was not much utilized before the decision of

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[11] *State Superannuation Board* v *Trade Practices Commission* (1982) 150 CLR 282 at 305; *Fencott* v *Muller* (1983) 152 CLR 570 at 589.
[12] Ibid.
[13] *R* v *Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 *(Adamson's Case)*.
[14] Ibid at 304; *Commonwealth of Australia* v *State of Tasmania* (1983) 46 ALR 625.
[15]; *Adamson's Case*; *Fencott* v *Muller*.

the High Court in 1971 in the *Concrete Pipes* case[16] that the power could support the regulation of trading activities of a corporation.[17] Since this case views have differed as to the extent of the power. There is one view that the power only relates to specific aspects of a corporation of one of these kinds so that for example a law with respect to trading must relate to the specific trading activities of a corporation.[18] The broader view is that the power supports any laws relating to corporations of one of the three kinds.[19] The High Court has generally looked at particular corporate activities on a case-by-case basis in order to determine whether the legislative measure under scrutiny relates to trading or financial activities.

20. This is consistent with the general rule that the constitutional heads of power are to be construed widely.[20] Legislation often has more than just a single purpose and the Federal power with respect to trading corporations is likely to be regarded as a power that deals with more than just the existence of such corporations. As stated above the power has already been seen to deal with consumer activities and the use of market power.[21]

Federal Competence

21. The competence of the Federal Parliament is to make laws "with respect to" either of the two heads of power mentioned above. For a federal measure to be within power it must bear a sufficient connection with a head of power enumerated in the Constitution. No narrow view is taken in the High Court as to the degree of required connection. Thus it has been said that "A power to make laws 'with respect to' a subject matter is as wide a legislative power as can be created. No form of words has been suggested which would give a

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[16] *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468
[17] This case supports the restrictive trade practices and consumer protection provisions in the *Trade Practices Act 1974* (Cth).
[18] *Commonwealth of Australia* v *State of Tasmania* (1983) 46 ALR 625 *(The Franklin Dam case)*: per Gibbs CJ; *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 150 CLR at 181-3 (*Actors and Announcers Equity Case*).
[19] *Actors and Announcers Equity Case* at 207-8 per Mason J, at 212 per Murphy J, at 215 per Aikin J; *(The Franklin Dam case)* per Mason, Deane and Murphy JJ.
[20] *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 511.
[21] See Parts IV and V of the *Trade Practices Act 1974* (Cth)

wider power".[22] Further, if a measure is characterised as having a sufficient connection with a head of federal power (by reason of the rights or duties which it creates or alters), it matters not that the law also serves or achieves another purpose not within Commonwealth competence[23]. Not uncommonly, for example, the federal taxation power is used so as to stimulate or control economic activity or conduct which would not otherwise be amenable to Commonwealth legislative action. And, for example, rights to compensation may be conferred on natural persons in respect of misleading and deceptive conduct engaged in by a trading corporation.

22. Against this background, we can now return to the question in hand: would a measure controlling the location of ATMs be within federal power?

23. The proposed measure would presumably impose duties on banks and other financial corporations not to place ATMs in or near EGM venues. The purpose of the proposed measure would appear to be to protect customers from their own improvidence. The Commonwealth has no general power to make welfare laws. Such an interpretation would, however, not be to the point, in our view, if the proposed measure could otherwise be characterized as with respect to a head of federal power.

24. In our view, a measure which controlled the locations at which a bank or financial corporation was prohibited from allowing customers to withdraw funds would probably be characterized, if challenged in the High Court, as a measure with respect to banking, and as a measure with respect to financial corporations.

Victorian Competence

25. The powers of the Federal Parliament with respect to banking and financial corporations are not exclusive powers in the sense that the States have no

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[22] *Bank of NSW v Cth* (1948) 76 CLR 1, 186.
[23] See, eg, *The Tasmanian Dam case, Cth v Tasmania* (1983) 158 CLR 1, at 179, 214-5, 269-70, 275.

competence to legislate with respect to those subject matters. The States do have such competence.

26. The State Parliaments have general legislative competence. It is not necessary to characterise a State law as being with respect to an enumerated head of power in order for it to be valid. It suffices usually only to find a link between the State measure and the particular State to found its validity, and the linkage is usually self-evident, as would be the case in respect of a measure restricting the location of ATMs in respect of EGM venues in Victoria. Of course State legislative competence is controlled by the Commonwealth Constitution[24]. However, the fact is that most federal powers (such as those considered above) are concurrent and not exclusive powers, with the consequence that the States retain legislative competence with respect to their subject matter (subject of course to the Constitution of the particular State).[25]

27. Section 16 of the *Constitution Act 1975* (Vic) (the "Victorian Constitution") gives the Victorian Parliament power to "make laws in and for Victoria in all cases whatsoever". Thus the Victorian Parliament can make laws on matters such as banking or welfare provided the measure has sufficient nexus with the State. The fact that the Commonwealth may have concurrent legislative competence with respect to the particular subject matter will be of no significance unless it can be seen that the federal law is inconsistent in a relevant sense with the State law. In that event, the State law will hang in abeyance for so long as the federal law operates.[26]

28. The Victorian Parliament has legislated to control gambling and gaming by the enactment of the *Gambling Regulation Act 2003* (Vic) and the *Casino Control Act 1991* (Vic). It has not enacted a measure of the kind sought by the Uniting Church. Other States have legislated to regulate the provision of cash facilities

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[24] Section 106 of the Commonwealth Constitution
[25] Section 107.
[26] Section 109 of the Commonwealth Constitution. There is a body of learning on what is required before a State law will be regarded as inconsistent with a federal law. As there is no federal law at present controlling the location of ATMs in relation to EGM venues, we do not expound on this point.

in gaming venues[27]. No State has yet legislated to ban completely ATMs from EGM venues[28]. Generally the prohibition has stopped at placing ATMs in the actual gaming area rather than in other areas of the venue. Nevertheless, it is clear in our view that the Victorian Parliament has competence to legislate to control or prohibit the placement of ATMs in or near EGM venues.

Conclusion

29. In our view, an appropriately drawn measure of the kind proposed would be within both federal and State competence. If both legislatures enacted laws of the kind proposed, then subject to the terms of the federal measure, the operation of the State measure might be suspended for the period of operation of the federal law.

1 February 2005

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[27] See section 153 of the *Gaming Machine Act 2004* (ACT) and section 51A of the *Gaming Machines Act 1992* (SA).
[28] We note that in 1999 the Tasmanian Gaming Commission introduced a rule prohibiting the placement of ATMs in EGM venues.