THE CONVERSATION

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How could Maurice Blackburn prove that poker machine gamblers might be misled by the 'losses disguised as wins' technique? AAP/Paul Jeffers

Poker machines and the law: when is a win not a win?

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If I took all of the money out of your wallet, you'd probably feel as though you'd lost something – wouldn't you? Now imagine instead that I only took 80% of your money. Would you feel as though you had "won" the remaining 20%?

What if I tried to convince you that you had actually benefited from this transaction by playing happy music and letting off a few firecrackers?

This thought experiment might help you to get your head around a proposed legal action by law firm Maurice Blackburn that plans to use Australian consumer law to argue that poker machine operators are engaging in misleading and deceptive conduct to entice gamblers into using poker machines.

Misleading and deceptive conduct is prohibited by Section 18 of the Australian Consumer Law. The central test for this is whether the conduct is likely to mislead or deceive consumers having regard to all the circumstances. To apply this test, you need to identity both the "conduct" and the "relevant class of consumers".

In this particular case, the class of consumers might be "gamblers". Or, it might focus more specifically on "novice gamblers" or "problem gamblers".

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Maurice Blackburn seems to have identified a range of potential conduct that it would like to target in its action. One that particularly stands out is the technique known as "losses disguised as wins". This is where a poker machine enables players to bet on more than one line and a minor win on one of these lines sets off a graphics and sound display that indicates a "win" when, in fact, the player has lost most of their money.

Applying the law to poker machines

The nice thing about consumer law is that it relies on fairly common-sense questions. So, the court would basically ask: if a poker machine displays a series of flashing symbols and music associated with winning and makes a chiming sound indicating that it is counting up winnings, would an ordinary and reasonable (novice) gambler be misled or deceived into thinking that they had won something despite having actually lost money?

Further inquiries or closer attention to detail that could enable a person to discover their error is not particularly relevant to this test. Also, the literal truth can be legally misleading, because the law recognises that humans do not behave rationally and tend to form an opinion in response to their overall impression of conduct.

In this case, for example, it might be argued that gamblers pay more attention to the flashing symbols and music than they do to their credit balance.

Previous cases give some idea of how the courts have applied this test. In ACCC v TPG Internet in 2013, the High Court found that TPG Internet had misled consumers by advertising "Unlimited ADSL2+ for $29.95 per month" when this price was available only to customers who bundled broadband with a home phone service.

The important detail was that TPG's advertisements actually contained an explanation of this condition, but it was displayed less prominently than the advertised deal.

The High Court found that the attention given to advertising material by an ordinary and reasonable person may well be "perfunctory" and, therefore, many will only absorb the "general thrust". The court also emphasised that it was enough if consumers were sufficiently misled to engage further with the company, even if they subsequently understood the true nature of the offer and chose not to purchase anything.

The TPG case was followed by the Federal Court in ACCC v Coles Supermarkets in 2014. In this case, the Australian Competition and Consumer Commission (ACCC) successfully alleged that Coles had misled consumers by advertising its reheated frozen par-baked bread with the words, "baked today, sold today" and "freshly baked". This finding was made despite par-baked bread being able to be truthfully described as having been "baked", and that Coles had detailed its par-baking method on its website.

Once again, the court emphasised the importance of considering both the context and the dominant message of the conduct.

Forming an argument

So, how could Maurice Blackburn possibly prove that gamblers might be misled by the "losses disguised as wins" technique?

It might draw on recent Canadian research which found that the flashing symbols and music that accompany "losses disguised as wins" trigger similar arousal levels in novice gamblers as real wins do – and that arousal is a key reinforcer in gambling behaviour.

In short, research seems to have demonstrated that novice gamblers do pay more attention to flashing symbols and music than they do to their credit balance. Perhaps unsurprisingly, these bright, loud messages appear to dominate.

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