

Odds & Evens Ltd

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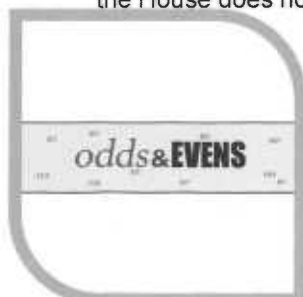
Odds & Evens Ltd are the holders of an operating licence from the UK gambling commission and operate a betting premises in Catrine, East Ayrshire with a licence from the local licensing board. We write in response to the Scottish Government Call for Evidence in relation to "Fixed Odds Betting Terminals" and Betting Premises.

Our betting premises offer customers a varied choice of betting options on numerous markets including traditional sporting markets and more novelty markets such as politics and reality TV. In addition to our betting offer, we also provide facilities for our customers to play gaming machines. We are licensed to provide Category B2 machines (otherwise known as Fixed Odds Betting Terminals (FOBTs) and Category C and D machines. Although we are entitled to use 4 FOBTs our shop is quite small and we only use one machine.

The call for evidence arises from a suggestion by the Scottish Government that the Scotland Bill does not go far enough to meet the proposals in the Smith Commission. We note that a series of amendments to the Scotland Bill were lodged on behalf of the Scottish Government at the House of Commons debate on 6 July 2015 in relation to the proposed Clause 45 of the Bill which appears to have an aim of giving Scottish licensing boards more powers to control the number of Category B2 gaming machines on betting premises. These amendments were:

- 31 - leave out "for which the maximum charge for use is more than £10". This would create the power for licensing boards to place limits on machine numbers irrespective of stake and therefore category.
- 32 - this amendment would make the power to introduce these limits retrospective
- 146 - this amendment would to make the power apply to all types of gambling licence not just betting premises
- 163 - this amendment would be to make the limit apply to machines for which "the maximum charge for use is more than £2".

Amendment 163 appears to be in the line with the separate English Private Members Bill on FOBTs which seeks a maximum £2 stake for Category B2 machines and is being considered separately. However, we note that an appeal by English councils to have the stake capped to £2 was rejected by the UK Government on 16 July 2015. This follows a previous rejection in January 2014 when a motion put forward by the Labour party, was defeated in a vote in the House of Commons last night with the Government winning by 314 to 232, a majority of 82. In addition to this, we note that the Gambling (Categorisation and Use of B2 Gaming Machines) Bill proposed by Lord Clement-Jones, which seeks to limit the maximum stake of Category B2 machines to £2, came 20th in a ballot of private member's Bills indicating the majority of the House does not believe that this proposal is of sufficient merit that it requires prioritization.



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We also note that the UK Government has consistently stated that there is insufficient evidence available which indicates that the regulation of Category B2 machines requires to be addressed. The UK Government said in July 2015: "We do not support Newham Council's proposals as we have already acted by introducing stronger gambling controls to further protect players and promote responsible gambling. The Government will continue to monitor the effectiveness of existing controls and will take further action if necessary".

We are greatly concerned that the scope of these amendments and the Call to Evidence suggest that Scotland should be given greater powers to limit FOBTs apply retrospectively. This would see our small family business placed in peril as the use of machines is a central part of our business and it would be a real blow if we lost the right to use FOBTs.

We are also unsure as to why the Scottish Government and Scotland Bill refers to machines with a maximum stake of £10 instead of referring to the existing definitions of machine categories under the Gambling Act 2005. Creating a new definition confuses the overall intent of what is being proposed here.

We run our premises responsibly and our internal policies and procedures are vetted and approved by the Gambling Commission. These proposals suggest that Scotland could be given powers which would mean our existing gaming machine entitlements could be removed at the whim of our local licensing board. It seems to us to be disproportionate and against the ideas of natural justice that our existing licence could be "called in" so that the licensing board could impose a limit on the number of gaming machines we can offer our customers, especially in the absence of any evidential test.

We are therefore opposed to any power which removes our existing entitlement to use B2, C and D machines in our betting premises which is a right given to us by virtue of the licence. Parliament sought not to give licensing authorities powers over machine numbers which is why the Gambling Act specifically prevents them from imposing a condition about machine numbers. These entitlements are given to us on the face of the Act.

The Gambling Act 2005 has sufficiently robust provision to allow anyone to seek a review of a licence if they believe any of the licensing objectives under that Act are imperilled. We do not see why further restrictions or powers are necessary when the existing legislation already provides a mechanism to allow any person to seek a licence review.

We have taken legal advice on this advice and have been advised that section 6(1) of the Human Rights Act 1998 provides that: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right". It was confirmed in *Tre Trektoror Aktiebolag v Sweden (1989) 13 EHRR 309* that an existing licence is a property right and a possession. A

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licensing authority is a public authority for these purposes. The proposal to limit our licence entitlements appears to us to be at odds with Article 1 Protocol 1, the "Right to peaceful enjoyment of possessions". It is established in Scots law that a licensing decision can engage Article 1 of the first protocol. The denial of a right to use entitlements provided by licence such as gaming machine entitlements is a deprivation of a possession, and by extension the imposition of a condition which restricts trade is an interference with the peaceful enjoyment of our licences.

We understand that prevailing legal advice suggests that a restriction might be where there is some over-riding requirement in the public interest but there is no evidence presented in the Smith Report, Scotland Bill or other consultations which demonstrate that limiting machines numbers is in the public interest or that an interference is necessary, justified or proportionate, in order to overcome adherence to Article 1.

The test here for the lawfulness of interference with licence entitlements is that of proportionality. It is a higher test than that of reasonableness. Is this proposed interference with our licence, by restricting our ability to trade, proportionate, given the absence of adequate material to support the perceived policy stance, and given that no general evidence has been relied upon, nor any specific evidence about these individual premises, operators, localities and machine categories has been presented?

In order to establish a fair basis for a limitation of this nature there must have a comprehensive evidence base in order to be satisfied that the policy is proportionate and that there is no "less restrictive" alternative available. In *Southampton Port Health Authority v Seahawk Marine Foods Ltd* [2002] EWCA Civ 54 at [34]-[35]: "*While in some cases it will be possible for a court to reach a conclusion on an issue of proportionality on the basis of commonsense and its own understanding of the process of government and administration, I doubt whether it will often be wise for a court to undertake that task in a case involving technical or professional decision-making without the benefit of evidence as to normal practices and the practicability of the suggested alternatives*".

We are a small local business which provides a leisure facility to our neighbours and local customers. Our shop is not just a place to bet or play machines but is also a friendly meeting place for people to meet and socialise and have many customers who like to come to our shop for a chat and cup of tea as well as to place a bet or play a machine. But the business has to financially viable and gaming machines are a key part of that.

Yours sincerely,
Robert & Shirley Brown
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