Guide: Treatment of Class 4 gambling profits where exceptional circumstances have prevented its banking

Purpose
This document provides guidance on situations where Class 4 gambling profits (GMP) have not been banked into a Class 4 society’s bank account because of exceptional circumstances such as a natural disaster or through theft or armed robbery.

Issue
A natural disaster or theft of GMP can impact on a Class 4 venue manager’s ability to bank GMP into a gaming machine society’s bank account in accordance with the requirements of the Gambling Act 2003 (the Act).

Essentially, the money is gone and therefore cannot be banked into the society’s account. Usually the GMP will have been insured. If it has, then the issue is whether the venue operator or the society is responsible for covering any excess. If the GMP has not been insured, then the issue is whether the venue operator is responsible for recompensing the society for its lost GMP or whether the society carries the loss.

The Act is silent on these issues. Accordingly, guidance is necessary to assist Departmental decision-making in these circumstances.

Relevant law
Section 104(1) of the Act requires a venue manager to bank all GMP directly into a dedicated account for gaming machine profits specified by the gaming machine society.

Section 104(2) states that GMP must be banked within the timeframe specified in regulations. Regulation 4 of the Gambling (Class 4 Banking) Regulations 2006 states that GMP must be banked within the five days beginning on the day the GMP are, or ought to be, calculated.

Rule 11 of the Gambling Act (Class 4) Game Rules 2016 states that all cash removed from gaming machines is the responsibility of the venue operator until such time as it is banked in accordance with the requirements of the Act and any relevant regulations.
There is no relevant case law on this issue. None of the above provisions specifically address situations where GMP losses have occurred as a result of events beyond the venue operator’s control.

**Background**

There have been reasonably frequent occasions where GMP has not been able to be banked with the Class 4 society due to events like a theft, robbery or a natural disaster. For example, in the period January 2013 to January 2015, approximately 21 incidents of theft occurred at Class 4 gambling venues. Amounts stolen ranged from $582 to $32,000 with an average of $8087. There have also been cases of GMP losses arising through fires at venues and earthquake damage. Guidance is frequently sought from the Department on how this money should be treated, or more specifically, who should bear the loss.

Most venues have taken out insurance on GMP. The cost of this insurance is allowed for under Limit B Weekly Operating Costs in the venue costs schedule under the heading *Annual Insurance on Gambling Funds*. The cost of insurance must be actual, reasonable and necessary (ARN). A point to note, however, is that some venues are unable to obtain insurance due to the location of the venue and/or its history.

Although there is no regulatory requirement to hold insurance, the issue has been the subject of previous advice in *Gambits* in July 2012:

- Venues are reminded that they should hold adequate insurance against theft, as they are responsible for the banking of GMP regardless of whether a theft has occurred or not, ...While late banking due to theft may be treated as an exceptional circumstance by the Department, resulting in no sanctions against a venue operator, it will still be important to advise the Department as soon as practicable and to ensure the banking of proceeds does occur as soon as possible following a theft.

The following clauses (with minor variations) commonly appear in venue agreements between societies and venue operators:

- The venue operator will obtain insurance to cover the loss of gaming machine funds from theft, robbery or any other cause unless the venue operator has every effort to get insurance but is unable to obtain insurance;
- The venue operator must reimburse all outstanding GMP to the society unless the Department agrees that reimbursement is not required in a particular case due to exceptional circumstances.

**Recommended approach**

Based on the relevant law, the Department’s position on this issue is that the venue operator is responsible for meeting all GMP losses, unless exceptional circumstances exist. If the venue operator satisfies the Department that the failure to bank the GMP was due to exceptional circumstances, then the requirement for the venue operator to bear the insurance excess payment or meet GMP losses may be waived.
Determining whether exceptional circumstances exist is done on a case-by-case basis, with the final decision to be made by the Manager, Gambling Compliance. The Manager’s assessment will need to be informed by a full factual summary of the events leading to the GMP loss.

Given that rule 11 of the Class 4 Game Rules provides that the venue operator is responsible for GMP until it is banked with the society, the onus for satisfying the Department that exceptional circumstances exist lies with the venue operator.

**Examples of exceptional circumstances**

This will usually involve situations where GMP losses have occurred in situations where there is an absence of fault on the part of the venue and/or the loss occurs through circumstances beyond the venue’s control.

Examples of events beyond the venue operator’s control might include:

- an armed robbery of GMP at a venue;
- a burglary or theft of GMP where all reasonable precautions were taken and/or any specified cash-handling procedures were met;
- the occurrence of a natural disaster or similar event like an earthquake or a fire.

One of the key factors underpinning this approach is ensuring that Class 4 venues are safe workplaces, and needing to avoid situations arising where venue staff are putting themselves at risk through misguided attempts to protect GMP.

**Examples of events where venue operator has to bear the loss**

Examples of events that might see the venue operator having to bear the loss might be a theft resulting from lax security or cash-handling procedures at the venue and/or failing to comply with requirements in the venue agreement.

Other relevant factors pointing to the venue operator having to bear the loss might include:

- unreasonably long GMP banking intervals;
- no insurance cover and a failure to mitigate the risks of having cash on the premises (e.g. through the very prompt banking of GMP into the society’s bank account);
- invalidation of insurance cover due to non-compliance with insurance policy conditions.

**Other non-GMP venue losses**

There may be situations where the venue has suffered business losses (cash generated by the venue business, damage, breakages etc.) as well as GMP losses as a result of a theft, burglary or natural event.

Any insurance excess pertaining to the business losses suffered by the venue should be met by the venue operator. If necessary, an apportionment exercise may have to be undertaken to identify the proportion of excess pertaining to the lost GMP that can be claimed as ARN and that pertaining to venue losses, which cannot be claimed as ARN.
Suggested areas for investigation

The following suggestions are intended to act as prompts to assist in establishing how the GMP loss occurred. It does not pretend to be exhaustive, as there may well be other issues that arise in a particular case that warrant attention.

- How did the GMP loss occur? (i.e. reconstruct the events leading to the loss)
- What cash-management procedures does the venue have? Were they robust? Were they appropriate in the circumstances? If the procedures were appropriate, were they adhered to?
- Does the venue have insurance for GMP losses/ theft etc.? If so, has the insurance company agreed to meet a claim for the loss? If not, why?
- If the venue did not have insurance, there will be a need to find out why. Were appropriate risk mitigation measures taken as a result (e.g. very frequent banking of GMP into society’s bank account)?
- How often does the venue bank GMP? Was the frequency of banking appropriate in the circumstances? Could GMP have been banked more frequently relatively easily?
- Were the GMP losses the only losses suffered? Were there other losses relating to the venue business (e.g. cash, property damage, breakages etc.)? GMP-only losses could point to slack GMP-management processes.