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Gambling Law & Regulation



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Overview

Welcome to the January 2017 edition of Addisons' Gambling Law & Regulation Newsletter.

2016 saw significant developments in Australia's regulatory landscape relating to gambling. Among the key developments that took place in 2016 were:

- The announcement of the proposed merger between Tabcorp and Tatts Group, two of Australia's leading gambling operators. This merger is under consideration by Australia's anti trust regulator, the Australian Consumer and Competition Commission (**ACCC**). Recently, a consortium led by Macquarie Group launched a takeover bid for Tatts Group (which was rejected by the Board of Tatts Group). It has been suggested in the media that other offers are likely. The outcome of these transactions will have considerable ramifications for Australia's gambling and lottery sectors.
- The 2016 Federal election resulted in gambling becoming more of a debated topic in Australia's Federal Parliament. This is due to an increased number of politicians making comments on the gambling sector, with members of the Nick Xenophon Team (**NXT**) being the most vocal in their concerns relating to the potential harm caused by gambling.
- The proposed Interactive Gambling Amendment Bill. This Bill was introduced into Federal Parliament in October by Minister Alan Tudge MP, the Minister for Social Services, as part of the Government's response to the Review conducted by the Hon. Barry O'Farrell MP relating to offshore online wagering.
- The claim brought in the Federal Court of Australia against Aristocrat Technologies Limited and Crown Resorts Limited seeking a declaration that features of certain gambling machines constitute contraventions of the Australian Consumer Law.
- The increased focus on the activities of casinos globally in sourcing VIP customers from overseas, particularly from China.

We will monitor each of these issues throughout 2017. This newsletter cannot comment on all of the legal issues that arose in 2016, but it includes Focus Papers on a number of topics of relevance to participants in the gambling sector, both in Australia and globally.

Highlighted in this newsletter are the following topics:

- Junkets, premium players and Australian casinos: This focus paper seeks to dispel the mystique associated with junket arrangements particularly as they are part of the normal course of business of any casino, whether located in Australia or elsewhere in the world: see [Australian Land Based Casinos and Junkets – the Importance of Corporate Governance and Brand Protection](#).
- Developments in Australia relating to the regulation of online wagering and the possible implementation of a national consumer protection framework. As part of the reforms announced by the Federal Government in respect of the regulation in Australia of interactive gambling, details of which are summarised in focus papers which we published last year¹, it is proposed that a national consumer protection framework will also be introduced. This is summarised at: [A National Consumer Protection Framework for Australian Online Licensed Wagering Operators: Proposed Changes](#).
- eSports: One of the areas in which innovation in games development is most apparent is the development of eSports. This has been reported extensively globally and is less recognised in Australia. However, this is likely to change. For further information see: [Ready Player One – Is Australia ready for the next big thing in gaming: eSports?](#)

¹ [Offshore Online Wagering](#) and [Online Wagering](#).

- Wagering advertising: As mentioned in previous newsletters, one of the aspects of gambling most visible to Australians is wagering advertising. In 2016, a code of practice for wagering advertising and marketing was introduced by the AANA and there have been a number of decisions which have been published. These are summarised in [AANA Wagering Code Decisions – Trends in Complaints and Enforcement](#).
- Norfolk Island: An announcement in late 2016 marked the end of the role of Norfolk Island in regulating gambling in Australia. Norfolk Island was responsible for the licensing of a considerable number of online gambling participants. However, the Norfolk Island Gaming Authority will cease to be functional on and from 31 March 2017². For further information see: [Lights Off for the Norfolk Island Gaming Authority – Update](#).

We trust that you enjoy this edition of our Gambling Law & Regulation Newsletter and we wish all of our readers a successful and prosperous 2017.

If you have any queries or wish to discuss any of the matters set out in this newsletter or otherwise relating to gambling regulation in Australia or elsewhere, please do not hesitate to contact any of Addisons' Media and Gaming Team.

² [Norfolk Island](#).

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Australian Land Based Casinos and Junkets – the Importance of Corporate Governance and Brand Protection

Authors: Jamie Nettleton and Steven Hailstone

Overview

Casinos face a multitude of risks when engaging in junket programs as part of their international rebate business (**IRB**); risks that, if they materialise, pose a real threat of exposing casinos to investor and market uncertainty, as well as to potential 'show cause' investigations being initiated by the relevant regulatory authority into whether or not the casino (including its directors, senior executives and relevant key employees) are of good character, and are fit and proper persons for licensing purposes.

In recent times, junket operators and the nature of their business has been the subject of significant media scrutiny. There have been frequent media reports of junket operators allegedly engaging in bribery of government officials as well as having ties with Asian underworld groups like the Triads. In light of this, and to endeavour to ensure that there can be no criticism of the IRB of Australian land based casino operators, it is essential that boards and senior executives take steps to ensure that:

- all existing corporate governance policies and procedures are in order. This should include a complete review of existing policies and procedures to ensure that all are up-to-date with clear standards, practices and protocols in place relating to internal controls, AML/CTF compliance, disaster recovery and audit and risk;
- a variety of protective measures are put in place to endeavour to reduce any risk of reputational damage; and
- early engagement with all relevant regulatory bodies prior to entering into a junket agreement, especially in circumstances where international participants are involved.

Although matters of corporate governance and brand protection should be front of mind at all times, and are clearly relevant for all day-to-day operations of casinos, the significance of these considerations are heightened for casinos that wish to include junkets as part of their IRB. This is because international junkets pose a unique risk to the business of casino operators which, if they go wrong, can lead to significant adverse consequences for the casino's business.

Accordingly, it is essential for directors and senior executives of casino operators to surround themselves with advisers who have the necessary legal, compliance and PR expertise to ensure that a holistic approach is taken when it comes to mitigating the risks associated with junkets and the IRB of casinos.

Casino operations in Australia

The Australian gambling industry and in particular land based casinos, is highly regulated.

Casino regulation in Australia is fragmented, with different statutory/regulatory arrangements in place in each State/Territory. Unique regulations exist in each State/Territory, for example taxation rates or licence fees; however, it is common ground for Australian casinos that:

- only authorised and pre-approved casino games may be offered on the gaming room floor;
- the operations of the casino must be in strict accordance with governing legislative provisions, the terms of their licence and their respective casino agreement/s;

- any form of credit betting is prohibited (save that a specific exception exists in NSW which allows the holder of a 'restricted casino licence'¹ to extend to a person, who is not ordinarily a resident of Australia, any form of credit to enable that person/s to participate in a premium player arrangement or junket program²);
- they may engage in junket programs subject to compliance with strict conditions, which include the execution of a junket agreement, disclosure to the regulatory authority of the material terms of that agreement, as well as certain other reporting obligations to both their governing regulator and the Australian Transaction Reports and Analysis Centre.

Junkets and Premium Player Arrangements

What are they?

Junkets and premium player arrangements (or special junkets as they can be known) are terms defined by statute.

Generally, a junket involves a group of people who are introduced to a casino by a junket promoter for the purpose of gambling. A commission is paid to the junket promoter at a rate attributable to the turnover of the junket participants.

A premium player arrangement is an agreement between a casino and an individual, under which a commission (or rebate) is paid to the individual premium player based on their gambling play.

Each program requires the creation of a front money account and the deposit of funds into that account by either the junket promoter or the premium player.

The distinction between these terms was described aptly in the 2004 Federal Court decision of *Li Pei Ye v Crown Limited*.³ In this decision, the Court accepted that a junket and a premium player arrangement have the following key features:

Junkets:

- there is no interaction between a casino and junket participant;
- a front money account is opened in the name of the junket promoter, and it is the junket promoter who makes the deposit of the required front money into the cage;
- the junket promoter is provided with a chip purchase voucher which is converted to non-negotiable gambling chips at the gambling table. Those non-negotiable chips are then distributed to junket participants;
- a junket promoter is not entitled to receive commission on gambling conducted with commission based chips; only non-negotiable chips.

Premium player arrangements:

- the premium player must open a front money account and deposit the necessary sum of money into their front money account (in this case, Crown required a deposit of \$50,000);
- the premium player is entitled to purchase chip purchase vouchers up to the amount held in their front money account, or up to the amount of any funds advancement arrangement agreed between the casino and the premium player;
- any commission (or rebate) paid to the premium player is calculated on their winnings.

¹ In NSW a restricted casino licence means a casino licence relating to the Barangaroo restricted gaming facility (*Casino Control Act 1992 NSW s3*).

² *Casino Control Act 1992 NSW s74(5)*.

³ [2004] FCAFC 8.

What are the risks in conducting a junket?

In general terms, Australian casinos need to implement strategies to combat the following:

- Issues of integrity. Usually junket programs involve very large sums of money, the sources of which are not always known to casino operators.
- Enforcement of the junket agreement. Australia has a very clear set of established laws and regulations relating to junkets. However, it is the laws and political sensitivities of the foreign jurisdiction where the junket promoter and/or junket participants originate which gives rise to risks for Australian casinos. For example, where gambling or the marketing of gambling products is prohibited in a jurisdiction, it is nearly impossible for a casino to enforce the terms of a junket agreement or to recover debts from a junket promoter once the junket promoter leaves Australia.
- Reputational risk and money laundering. Australian casinos take each of these matters extremely seriously; however it has been widely reported recently that junket operators, especially those who conduct business from jurisdictions such as Macau and/or the Philippines have been involved in corruption, bribery and money laundering.⁴

Given the risks, why do casino operators engage in junkets?

The VIP international market is big business for Australian casinos, and is a segment of the market which is hotly contested. This is demonstrated by the fact that it is not uncommon for Australian casinos to have dedicated gaming salons or suites available in their casinos aimed almost exclusively at the international VIP market.

Given the competition within this segment of the market, although casinos have a great network of VIP international players, they rely on the ability of junket promoters to introduce to them new and/or existing high roller VIP clients under a junket program.

Australian casinos also receive certain tax advantages for revenue received under a junket program. For example, in Queensland, casinos are required to pay tax monthly in arrears at a rate of 10% on junket revenue. This is opposed to a monthly tax rate of 20% on revenue received from table games and 30% on revenue received from slot machines.⁵

Why is good corporate governance and brand protection important to casino operators when engaging in junket programs?

The events of October 2016 which saw 18 employees of Crown Resorts detained by Chinese Authorities on the suspicion of committing gambling crimes highlight just how fundamentally important these issues are for boards and senior executives of Australian casinos.

There was an almost immediate reaction from the market with a substantial decrease in the share price. But in addition, Crown has been the subject of significant and continuing media scrutiny. One report notes that Crown is now performing a “review of potential corporate governance and risk management failures in the lead up to the arrests”.⁶

Although the outcome relating to the Crown events is yet to be finalised, the message is clear for directors and senior executives of Australian casinos. Directors and senior executives who do not put in place adequate practices and procedures with respect to their IRB and junket programs expose their respective businesses to significant legal and commercial risk. This could have the effect of impinging on the integrity of their casino licence as well as the licences of each senior executive and other key employees.

⁴ For example on 7 December 2016, it was reported by Muhammad Cohen at www.forbes.com that a presidential arrest warrant has been issued against Macau junket operator Jack Lam, operator of Fontana Hot Spring Leisure Park on suspicion of sabotage and bribery.

⁵ Queensland Government, *Fees and Charges, Queensland gaming licensing*, current as at 1 July 2016.

⁶ Wren P; Hawthorne, M, *Crown assembles legal war room in act of ‘a—covering*, Sydney Morning Herald, 26 November 2016.

A National Consumer Protection Framework for Australian Online Licensed Wagering Operators: Proposed Changes

Authors: Jamie Nettleton, Steven Hailstone and Mia Corbett

Background

Following the Review of Illegal Offshore Wagering which concluded last year (**O'Farrell Review**)¹ the Australian Government, in its response to the O'Farrell Review, recommended the adoption of a number of measures to:

1. prohibit illegal offshore online wagering operators; and
2. implement a national consumer protection framework (**NCPF**), to be met by licensed online wagering service providers.

Prohibition on illegal online gambling operators

The first element of the Government's proposed course of action is in the process of being implemented. On 10 November 2016, the *Interactive Gambling Amendment Bill 2016 (IGA Amendment Bill)* was introduced into the House of Representatives, and seeks to amend the *Interactive Gambling Act 2001 (Cth) (IGA Act)*. If passed, the IGA Amendment Bill will bring major change to the way online gambling is regulated in Australia through the introduction of additional enforcement measures and making it unlawful for wagering operators to provide online wagering services to persons present in Australia in the absence of having an Australian wagering licence.²

Uniform approach to consumer protection in Australia

The second action item identified by the Government will be the introduction of the NCPF. The objective of the NCPF will be to “empower individual gamblers to ensure that problem gambling is minimised,”³ and to put in place a nationally consistent policy framework for the regulation of online wagering.

Currently, the NCPF is in the consultation phase, and is yet to be formally agreed between the States and Territories. However, once adopted, any online wagering operator licensed in Australia will need to adjust their business practices so as to ensure that they are NCPF compliant.

Regulation of Consumer Protection in Australia

Australia does not currently have a nationally consistent consumer protection framework in place which relates specifically to online wagering. Currently, consumer protection in Australia is regulated differently in each State and Territory. While the obligations on wagering operators are onerous, the variation between jurisdictions is problematic for Australian licensed wagering operators conducting business on a national basis. For example, in some cases, it is necessary to prepare up to four different versions of a marketing communication to ensure compliance throughout Australia.

¹ For more information, please see our focus paper “Australia – Release of Report on Illegal Offshore Wagering – Another Missed Opportunity for Reform of Australia's Prohibitions on Online Gambling?”, available [here](#).

² For further discussion on the effects of the IGA Amendment Bill click [here](#).

³ See

http://www.minister.communications.gov.au/mitch_fifield/news/consumer_protections_and_tougher_laws_to_combat_illegal_offshore_wagering#.WE5LzrJ96Uk.

Proposed changes under the NCPF and what they mean for Wagering Operators

According to the Communiqué⁴ released on 25 November 2016, State and Federal Government Ministers have agreed that 11 harm minimisation measures are to be included in the NCPF.

We have previously set out a list of each proposed measure, and you can see that [here](#).

Some of the key changes proposed to be introduced by the NCPF are:

1. A national self-exclusion register for online wagering

This register would facilitate the exclusion of a person from accessing the services of multiple online wagering operators through a single, centralised application process. It is intended that this will combat the ease with which consumers are able to circumnavigate current self-exclusion restrictions, simply through signing up with an alternate online wagering operator.

The mechanics of exactly how the self-exclusion register will work are presently unclear. For example, it is not known whether the limits set for self-exclusion will relate to time or monetary expenditure (or both). Additionally, whether the power to exclude a person from participating in gambling activities could be exercised by third parties (such as family members) has not yet been determined.

2. A voluntary, opt-out pre-commitment scheme for online wagering

It would be mandatory for online wagering operators to offer each of their Australian based customers the opportunity to set pre-commitment limits to help control their wagering activities. Similar requirements are already imposed on online wagering operators who offer their services to South Australian customers under the *Gambling Code of Practice Notice 2013*.

The implementation of a nationally consistent regime to limit the amount spent and amount lost by a customer is consistent with the approach taken by the UK Gambling Commission.

3. Prohibition of lines of credit being offered by online wagering providers

Despite the recommendation made by the O'Farrell Review that "*operators should be required to apply additional consumer protections where 'credit or deferred settlement is available'*",⁵ the Australian Government has indicated that it intends to impose an outright ban on online wagering operators making available any form of 'credit betting' or deferred settlement facilities to their customers.

4. A reduction in the current 90 day verification period

The current 90 day verification time period mandated under the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* is considered to be in excess of the period needed to verify a customer.

There is also an additional anti-money laundering risk under the current 90 day verification process, as currently a customer may open an account, load it with (illicit) funds and then close that same account before expiry of the 90 day period.

Accordingly, a reduction in the verification period is aimed at mitigating the risks associated with money laundering and terrorist financing, as well as preventing children under the age of 18 from opening a wagering account and participating in gambling activities.

The O'Farrell Review recommended a reduction in the verification period to 45 days. This is still longer than the time periods allowed for licensees in the United Kingdom (72 hours), Gibraltar and Italy (who each allow only 30 days for verification).

⁴ The Communiqué outlining all 11 measures is available [here](#).

⁵ See page 154 of the Review, available at:

https://www.dss.gov.au/sites/default/files/documents/04_2016/review_of_illegal_offshore_wagering_18_december_2015.pdf.

What does this mean?

Many of the measures that are proposed to be introduced by the NCPF, for example, staff training and 45 day KYC verification are generally already required under the Northern Territory Racing Commission (**NTRC**) licence conditions, or otherwise under the *NT Code of Practice for Responsible Online Gambling*, with which all operators licensed in the NT are required to comply. (Most of Australia's online wagering operators are licensed by the NTRC.)

It is difficult to speculate whether the introduction of these measures would achieve the objectives of the NCPF, given that there is little empirical data on the success of many of the proposed harm minimisation measures in the online gambling space.

Additionally, to what extent the NCPF will vary the current regime, particularly with respect to online advertising and the provision of inducements, is not clear.

An NCPF working group has been established and is likely to meet again early this year.

Ready Player One – Is Australia ready for the next big thing in gaming: eSports?

Authors: Jamie Nettleton and Karina Chong

With the growing popularity of video gaming globally, the video gaming industry is fast becoming an industry of business opportunities, not only for game developers and players, but for businesses looking for sponsorship opportunities and even gambling operators. One key feature driving this interest is eSports.

What is eSports?

eSports or electronic sports, refers to competitive video gaming where players compete individually, or more often by joining teams, against each other in a specific video game.

What started as an online social activity amongst friends has transformed into a multi-million dollar industry worldwide and now offers opportunities for some players to consider “professional gaming” as a career opportunity centred on the competitive participation in computer games within a professional environment.

However, eSports is nothing new. eSports and competitive gaming has been in existence for several decades. In 1980, game publisher company, Atari, hosted the “Space Invaders Tournament” which attracted 10,000 attendees in the United States.¹ In the 1990s, eSports gained mainstream popularity through first-person shooter games such as Doom and Quake with tournaments hosted in Europe and USA.

Faster internet speeds led to the increased popularity of more complex strategic games such as StarCraft, World of Warcraft and League of Legends, with these games being featured in televised eSports tournaments in South Korea in the 2000s.² These gaming tournaments often offer significant cash prizes for the winning team, sometimes involving millions of dollars.

Is eSports only popular in Asia and in the US?

The eSports industry is now a highly organised and established industry. There are global leagues and tournaments. Online streaming services such as Twitch and YouTube Red allow spectators from all over the world to engage with the tournaments and players. In 2014, there were approximately 205 million people engaging with eSports through Twitch as players or spectators.³ The global eSports industry is estimated to be valued at USD \$463 million as of 2016 and it is predicted that this could increase to over \$1 billion by 2019.⁴

In August 2008, the International eSports Federation (the **IeSF**) was founded by nine national eSport member associations from South Korea, Denmark, Germany, Austria, Belgium, The Netherlands, Switzerland, Vietnam and Taiwan. The IeSF was formed to develop an organised global framework focused on promoting eSports as a true sport and establishing integrity standardisation such as requirements for certification, referees, competition standards and player management.

By comparison to overseas eSports markets, Australia’s eSports market is still a relatively small market. A number of reasons have been proposed for Australia’s hesitation to embrace fully the eSports industry, including Australia’s small population size, most large competitive events with significant cash prizes being held overseas, the majority of the high paying sponsors being overseas companies and Australia’s relatively slow internet speeds

¹ Andrew Lynch, *Tracing the 70-Year History of Video Games Becoming eSports* (6 May 2016) Fox Sports.

² Ibid.

³ Martin D Owens, ‘What’s in a Name? eSports, Betting, and Gaming Law’ (2016) 20 *Gaming Law Review and Economics* 567, p 568.

⁴ Ibid.

which place Australian players at a disadvantage in tournaments conducted over the internet.⁵

Further, some researchers consider that Australia's lack of interest in eSports may be due to the Australian preference for "traditional" sports, such as the four codes of football and cricket. This is in contrast with eSports which is still viewed by many as lacking the same level of physical exertion and skill to be considered a "real sport".⁶ This is despite the fact that professional eSports players often spend the same amount of time training mentally and physically to hone their craft.

However, while it may take some time for Australia to catch up with the rest of the world in respect of the recognition of eSports, there are signs that the growth of Australia's eSports sector is gaining momentum.

What opportunities are available for businesses in the eSports industry?

Establishing a regulatory/integrity body

The Australian eSports Association (**AESA**) was established in April 2013. The AESA is a Member Nation of the IeSF and is the Australian national body involved in the development of policy, planning, infrastructure and initiatives for eSports in Australia.⁷

The AESA is focused on good governance and transparency within the Australian eSports industry and is developing a code of practice for all members to ensure integrity within Australian eSports. This will likely include provisions which govern the protection of players' rights and the provision of support services and education for players with protocols for anti-doping, anti-discrimination and fair play.

Currently, the AESA, together with the IeSF, is working towards earning membership with SportsAccord and recognition by the International Olympic Committee.

Australian businesses going global

In Australia, there are numerous opportunities for companies within the eSports industry to take their businesses global. This is demonstrated by the recent listing on the Australian Stock Exchange of eSports Mogul Asia Pacific Limited (**ESM**). Addisons acted for ESM in this exciting project. Part of ESM's objective is to expand into the global trading market.⁸

The global eSports industry is one of the fastest growing, interactive and innovative industries, which, as demonstrated by ESM, provides great scope for new and existing Australian businesses to explore business opportunities and partnerships overseas.

Venue hosting and broadcasting deals

In October 2015, Australia's first eSports tournament was held at Melbourne's Crown Casino. Tickets to spectate Australia and New Zealand's best players of the game Counter-Strike: Global Offensive (**CS:GO**) compete for an AUD \$55,555 prize pool quickly sold out. The Crown Counter-Strike Invitational was also the first Australian eSports tournament to be broadcast on Australian television through a broadcasting deal with Fox Sports.⁹

Crown has held a number of eSports tournaments since. The success of eSports tournaments can be seen through the Crown examples. For Crown, ticket sales of single

⁵ Daily Review, *The Question of eSports in Australia* (29 October 2014) <https://dailyreview.com.au/gaming-the-question-of-esports-in-australia/14765/>

⁶ Ibid.

⁷ The AESA's website is located at: <http://www.aesa.org.au/about/>

⁸ Lucy Battersby and Thomas Hounslow, 'Australia's first eSports company starts trading', *The Sydney Morning Herald* (online) 27 November 2016 <http://www.smh.com.au/technology/games/australias-first-listed-esports-company-starts-trading-20161125-gsxuc6.html>

⁹ Alex Walker, 'FOX Sports Will Be Broadcasting Australian Counter-Strike This Saturday (And Next Week)', *Kotaku* (online) 8 October 2015 <http://www.kotaku.com.au/2015/10/fox-sports-will-be-broadcasting-australian-counter-strike-next-week/>

day tickets to spectate the event cost just over \$56, weekend passes cost over \$100 and VIP packages cost over \$500.¹⁰

More recently, Crown has developed the ZEN Gaming Lounge, described as Australia's first dedicated eSports hub, providing a central location for gamers and non-gamers to meet and utilise top of the line equipment and services including tournament specific computers, video game consoles and a VIP tournament viewing lounge. Also, the ZEN Gaming Lounge is located "over three floors next to Melbourne's iconic Crown Casino".¹¹

This demonstrates that there are considerable opportunities for traditional gambling venues, such as casinos, hotels, pubs and clubs, to support a rapidly growing industry and tap into a new generation and type of gamers.

Opportunities for gambling operators

With the development of a competitive eSports industry, opportunities for gambling operators have also arisen. At its core, the global eSports industry offers sporting events and competitions on which bets can be placed. The global revenue from gambling on eSports is estimated to be \$55.8 million.¹²

Pinnacle Sports, the first online bookmaker to offer markets on eSports since 2010 has reported that eSports is its seventh largest market. In April 2015, dedicated eSports betting operator, Unikrn, partnered with, Tabcorp (through its sports betting arm, Luxbet) to set up a digital platform to allow online eSports betting.¹³

Now, a number of major Australian corporate bookmakers such as William Hill and Ladbrokes offer markets on Australian and international eSports competitions. Indeed, the Northern Territory Racing Commission, the gambling regulator in the Northern Territory where the majority of Australia's major corporate bookmakers are licensed, has listed expressly eSports as a declared sporting event¹⁴ upon which bets may be offered by the licensed bookmakers in accordance with their NT licences.

Crossover between gaming and gambling: key considerations and concerns

However, with the development of new forms of events on which gambling can occur, concerns have begun to arise. We set out some of the key considerations and concerns which have impacted on Australia's eSports industry.

Normalisation of gambling on video games

There has been considerable concern recently amongst a number of Australian anti-gambling politicians that allowing betting to take place on eSports events and tournaments, normally played, spectated and participated in by young people, encourages the normalisation of gambling on video games and is particularly damaging to children and young people.

In July 2016, Australian Senator Nick Xenophon indicated his intention to introduce into Australian federal parliament legislation which would result in the playing of highly popular first person shooter games to be considered as gambling, and therefore prohibited under Australia's Interactive Gambling Act 2001 (Cth) without an Australian licence. Senator Xenophon has indicated that his views are driven by the concern that "this is the Wild West of online gambling that is actually targeting kids...the "insidious" games played by hundreds

¹⁰ Alex Walker, 'Crown Casino extends its affiliation with eSports', *Kotaku* (online) 22 May 2016 <http://www.kotaku.com.au/2016/03/crown-casino-extends-its-affiliation-with-esports/>

¹¹ The Zen Gaming Lounge website is located at: <http://zengaming.com.au/>

¹² John Gaudiosi, 'Global eSports Revenues to Surpass \$1.9 Billion by 2018', *Fortune* (online) 28 October 2015

<http://fortune.com/2015/10/28/global-esports-revenues-nearing-2-billion/>

¹³ Business Wire, 'Unikrn Announces Global Partnership With Tabcorp To Create New Platform for Worldwide eSports' (online) 28 April 2015 <http://www.businesswire.com/news/home/20150428005219/en/Unikrn-Announces-Global-Partnership-Tabcorp-Create-Platform>

¹⁴ The Northern Territory Racing Commission has declared the following to be a declared sporting event, 'eSports, including Counter Strike series, DOTA series, League of Legends Championship series, StarCraft series, FIFA Interactive World Cup, Call of Duty, Hearthstone, Heroes of the Storm, Smite and World of Tanks: <https://nt.gov.au/industry/gambling/bookmaker-licences-and-permits/declared-sporting-events-for-bookmaking>

of thousands of Australian teenagers "purport to be one thing" but are "morphing into full-on gambling..."¹⁵

Senator Xenophon's harsh stance on eSports is shared by the South Australian government which, in August 2016, indicated that it had advised the South Australian gambling regulator, the Independent Gambling Authority (the **SA IGA**), to reject betting on computer gaming sporting events. The SA IGA accepted this advice. Betting on eSports competitions is now banned in South Australia. This is in contrast to the position in the Northern Territory where eSports is a declared sporting event upon which bets may be placed.

South Australian Consumer and Business Affairs Minister John Rau indicated that the South Australian government's reasons for this ban is that *"children are particularly vulnerable to the attraction of gambling on sporting contests conducted on the platform of video games...we do not want them to be introduced to gambling under the guise of a game."*¹⁶

Accordingly, gambling operators looking to offer betting on eSports events must ensure that they do not offer betting on those events to South Australian residents.

Further, gambling operators who offer betting on eSports tournaments must ensure that the same standard of responsible gambling and harm minimisation policies and mechanisms which apply to traditional sports betting also apply to betting on eSports. This may include, for example, ensuring that stringent know your customer and age verification procedures are in place to prevent minors from opening a betting account with the operator.

Protecting the integrity of the sport

In certain states in Australia, gambling operators are required by statute to enter into product fee and integrity agreements with each of the national sporting bodies before the gambling operator may conduct sports betting on the events controlled by that sporting body. This occurs as a matter of practice for leading Australian sports in respect of events held throughout Australia. For example, the offering of betting markets on A-league soccer games in Australia is subject to the gambling operator entering into a product fee and integrity agreement with the governing body, Football Federation Australia.

These product fee and integrity agreements set out obligations for gambling operators to ensure that (among other things) suspicious betting transactions and behaviour is reported to the sporting body protect the integrity of the sport in Australia.

While the AESA has been established and is working towards developing policies and a framework for regulating eSports in Australia, this remains in its infancy. There are therefore concerns that, without a standardised and regulated framework for eSports in place in Australia, the protection of the integrity of the Australian eSports betting markets will be difficult.

Rise of unregulated gambling markets

There has been significant concern globally that the rise of the popularity of eSports and video gaming in general inadvertently leads to unregulated and uncontrolled gambling.

Most of the recent adverse attention in relation to eSports from a gambling perspective has been in respect of "skins betting". "Skins" are digital designs which can be applied to in-game items, for example, a green camouflage print which may be applied to a gun used in CS:GO. In April 2016, it was revealed that CS:GO, a game offered by game publishing company Valve through its online game distribution platform Steam, had given rise to a popular secondary market to trade "skins" as a form of virtual currency.¹⁷

¹⁵ Catherine Armitage, 'Nick Xenophon calls for curbs on teen gambling in eSports video game', *The Sydney Morning Herald* (online) 31 July 2016 <http://www.smh.com.au/technology/games/just-when-we-got-used-to-kids-dying-or-killing-on-screen-something-worse-came-along-20160728-gqfp5x.html>

¹⁶ ABC, 'SA Government bans betting on computer gaming following rise of eSports' (online) 6 August 2016 <http://www.abc.net.au/news/2016-08-06/sa-government-cracks-down-on-esports/7696864>

¹⁷ Joshua Brustein and Eben Novy-Williams, 'Virtual weapons are turning teen gamers into serious gamblers', *Bloomberg* (online) 20 April 2016, <https://www.bloomberg.com/features/2016-virtual-guns-counterstrike-gambling/>

This inadvertent secondary market, which was not created or regulated by Valve, allocated a real world market value to each "skin", and allowed these skins to be used as real currency to bet on the outcome of eSports games or games unrelated to video games entirely, such as online jackpots and roulette.¹⁸

Following this, a number of lawsuits were brought against Valve alleging that Valve had "knowingly allowed an illegal online gambling market"¹⁹ and had been "complicit in creating, sustaining and facilitating that market."²⁰

In October 2016, the Washington State Gambling Commission (the **WSGC**) became the first American regulator to order Valve to take action on unlicensed betting websites. It was reported that the WSGC had sent Valve a cease and desist letter in an attempt to remove these illegal secondary market websites.²¹ This would have occurred despite the fact that, as early as July 2016, Valve had indicated that it would be using all available remedies to end skins betting and order known skins betting websites to cease operations.²²

In August 2016, the UK Gambling Commission released a paper confirming its view that skins that are tradeable and convertible into real money are virtual currency which would cause the websites to fall within the regulation of UK gambling law.²³

While the issues have been discussed and received considerable attention in the Australian press and from Australian politicians, no formal legislation or regulation in respect of "skins" as a virtual currency or "skins betting" has yet been introduced in Australia. However, there is no doubt that there is a risk that certain elements of skins betting would require close analysis under Australian law to determine whether they constitute prohibited gambling.

Conclusion

Until Australia's regulatory regime addresses specifically the eSports industry and its innovative and unique features, there will inevitably be concerns raised in respect of eSports in relation to integrity concerns, consumer protection and harm minimisation and the protection of young people and further, whether greater regulation is required.

Despite this, the Australian eSports industry remains one of the fastest growing online industries in Australia with considerable business opportunities for online technology companies, physical gaming venues and online gambling operators alike.

¹⁸ Isabel Davies, 'The future of skins gambling' (2016) 15(11) *Online Gambling Lawyer*, 15.

¹⁹ Mark Doman, 'Counter-Strike developers Valve face lawsuit over 'unconscionable, illegal' online skins gambling', *ABC* (online) 28 June 2016 <http://www.abc.net.au/news/2016-06-28/counter-strikes-valve-face-lawsuit-over-skins-gambling/7546646>

²⁰ *Ibid.*

²¹ Will Green, 'Washington State Gambling Commission Orders Valve to Stop Skin Gambling Via Steam', *eSports Betting Report* (online) 5 October 2016 <http://www.esportsbettingreport.com/washington-state-valve-skin-betting/>

²² Chris Grove, '23 Skin Gambling Sites, Spanning Casino and Sports Betting, Targeted with Cease and Desist from Valve', *eSports Betting Report* (online) 19 July 2016 <http://www.esportsbettingreport.com/valve-skin-betting-cease-desist/>

²³ UK Gambling Commission, 'Virtual currencies, eSports and social gaming – discussion paper' (online) August 2016 <http://www.gamblingcommission.gov.uk/pdf/Discussion-papers/Virtual-currencies-eSports-and-social-gaming-discussion-paper-August-2016.pdf>

AANA Wagering Code Decisions – Trends in Complaints and Enforcement

Authors: Jamie Nettleton and Nicola Austin

On 1 July 2016, the Australian Association of National Advertisers (**AANA**) introduced the AANA Code of Practice for Wagering Advertising and Marketing (**Wagering Code**), which binds Australian licensed wagering operators in their marketing across all platforms and channels.

Further background to the Wagering Code is set out in our Focus Paper entitled “Self-Regulation for Australian Wagering Operators: the AANA Code of Practice for Wagering Advertising and Marketing”, which was published in the September edition of our Gambling Law & Regulation Newsletter.¹

The AANA had high hopes for the Wagering Code, stating that it would assist in promoting a level of social responsibility in wagering advertising in the face of widespread criticism of the proliferation of wagering advertising on mainstream media. Others criticised the Wagering Code as lacking teeth, with the Victorian Responsible Gambling Foundation (**VRGF**) stating that “any code or regulation is only as good as its enforcement”.

We look back at the various decisions of the Advertising Standards Board (**ASB**) under the Wagering Code and consider just how sharp the “teeth” of the Wagering Code have been.

Wagering Code Determinations

Since the Wagering Code was introduced in July 2016, the ASB has considered eight complaints under the Wagering Code. We set out below each of the most common principles in the Wagering Code which have been considered.

Of these complaints, only one was upheld by the ASB. This was a complaint made against Tabcorp, which the ASB considered to have breached the Wagering Code by depicting excessive wagering.

Tabcorp Decision²

The Tabcorp advertisement depicts a group of men on a camping trip who appear to spend the entire trip on the TAB App viewing live and replay vision of racing events. When asked by his partner how his trip was, one of the men responds “yeah... loved it”.

Depicting Excess Wagering

A key element of the ASB’s decision relating to this complaint focussed on whether the advertisement fell within Section 2.8 of the Wagering Code. This section provides that advertising or marketing communications for a wagering product must not portray, condone or encourage excessive participation in wagering activities.

The concept of “*excessive participation in wagering*” is contemplated by the Practice Note published by the AANA, which provides that:

“simply depicting regular wagering, for example, as a routine weekend pursuit during a sporting season, does not equate to portraying excessive participation. An advertisement or marketing communication would portray, condone or encourage excessive participation in wagering activities where it depicts... wagering taking priority in a participant’s life...”

Tabcorp argued that the characters are not depicted actively engaging in gambling per se (rather, simply reviewing racing form and viewing live racing) and further, that the weekend trip was clearly depicted as an activity outside the ordinary routine of the characters.

A majority of the ASB found that:

¹ The September 2016 Edition of the Gambling Law & Regulation Newsletter can be found here: <http://bit.ly/2hJW0tk>.

² The ASB’s decision in relation to Tabcorp can be read here: <http://bit.ly/2hJIs9J>.

- although the camping trip may have been a one-off weekend away, the advertisement clearly depicts wagering taking priority during the camping trip, and
- although the advertisement depicts the men using the TAB App to review form and watch races only, “the ASB considered that this can be reasonably interpreted as being engaged in a wagering activity in the context of an advertisement for a wagering product.”

Contrary to prevailing community standards

The ASB also considered whether the advertisement was “contrary to prevailing community standards”. The complaint relating to this claim was dismissed on the basis that, in telling his partner that he “loved” the weekend away, there was no suggestion that the man lied to his partner and concealed his gambling.

Tabcorp has requested an independent review of the decision and, pending resolution of the issue, has ceased to broadcast the advertisement. No further update has been provided by either of Tabcorp or the ASB.

Common Grounds of Complaint

The most common grounds for complaint relating to wagering advertisements under the Wagering Code were on the basis that the relevant advertising or marketing communications:

- state or imply a promise of winning (section 2.5); and
- primarily target minors, having regard to theme, visuals and language used (section 2.1).

Although the complaints made on these grounds were ultimately dismissed, the ASB has applied certain consistent principles.

Promises of Winning

In its CrownBet decision, the ASB found that a “matched bonus bet” offer provided only the opportunity to place another bet and accordingly, does not imply a promise of winning. Similarly, in its William Hill decision, the ASB found that the *conditional* “money back offer” did not amount to a promise of winning, as losing bets would only be “refunded” where certain conditions were met.

In its Unibet decision, the complaint concerned the slogan used in the advertisement: “luck is no coincidence”. The complainant argued that this slogan, within the context of the advertisement, implied that, if you have knowledge about the sport, you can overcome the odds and win. The ASB looked at the whole context of the advertisement and concluded that the slogan only suggested that, if you do your research, you can *increase* your luck, not overcome it.

The findings in relation to these promotions and whether they implied a “promise of winning” are of particular relevance for operators seeking to promote a particular offer.

Targeting Minors

Advertisements of Ladbrokes and CrownBet were the subject of complaints on the basis that the relevant advertisements were aired during times when minors would likely be watching television.

In both of its decisions (in which the complaints were both dismissed), the ASB emphasised that the mere fact that an advertisement is *viewable* by minors is not a relevant consideration; it is more the *content* of the advertisement itself that is relevant in determining whether the advertisement was directed at children in breach of the Wagering Code.

These decisions make it clear that the ASB is not concerned with the placement or the frequency of wagering advertisements. Rather, it is concerned with the actual *content* of the advertisement and whether it might be considered to be targeting minors.

Conclusion

As it is only 6 months since the Wagering Code came into force, it is too soon to determine the long-term effect of the Wagering Code. However, it is clear that the ASB is applying some consistent principles in its consideration of complaints which will provide useful precedent for wagering operators in developing marketing across all platforms and channels in Australia.

Lights Off for the Norfolk Island Gaming Authority – Update

Authors: Jamie Nettleton and Nicola Austin

On 1 July 2016, the transition of Norfolk Island from a self-governing external territory to a regional council of New South Wales took effect, leaving uncertainty around the validity of licences issued by the Norfolk Island Gaming Authority (**NIGA**).

On 5 November 2016, following the long-awaited release of the independent report into the performance of the NIGA conducted by Centium Group, the Federal Minister for Local Government and Territories, the Honourable Fiona Nash, announced the dissolution of the NIGA and with it, the expiration of all licences issued by the NIGA effective 31 March 2017.

This marks the end of the gambling regime administered by the NIGA which facilitated the entry of a number of online gambling operators into the Australian market. These operators included Ladbrokes, TopBetta, Moneyball and MadBookie.

Any Norfolk Island licensee wishing to continue providing gambling services after 31 March 2017 will be required to seek a licence in another Australian jurisdiction. The most popular alternative is the licensing regime in the Northern Territory, which is administered by the Northern Territory Racing Commission.