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Gambling Law & Regulation Newsletter

December 2019

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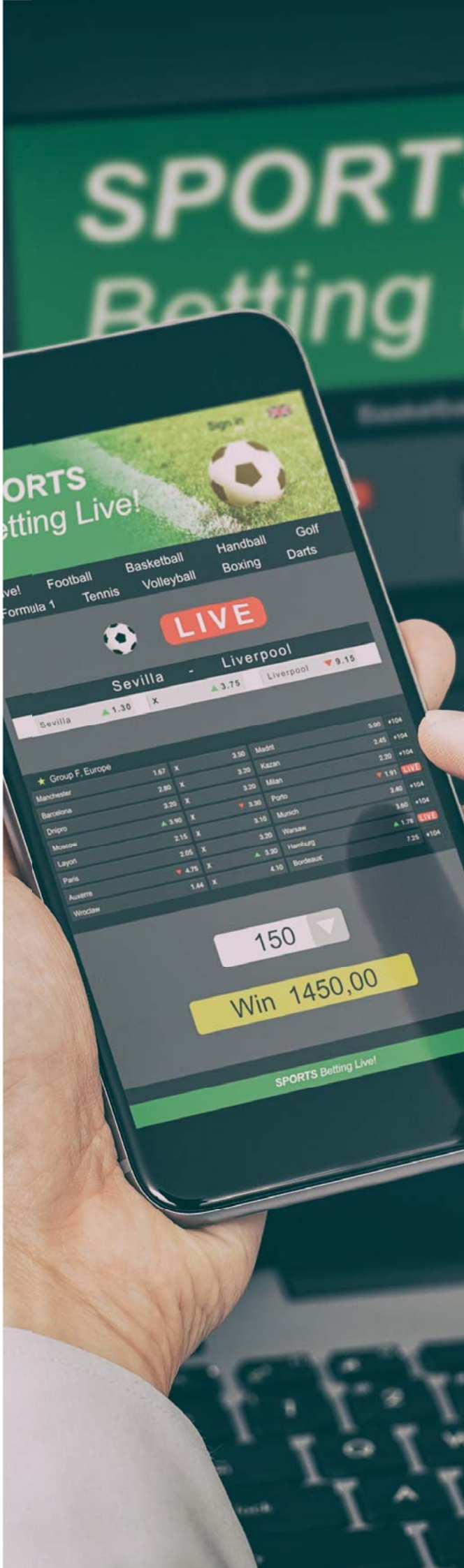

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- Reviewing race field obligations for wagering operators
- Reviewing new concepts and technologies for gambling law implications
- Terms and conditions, website reviews and customer facing contractual arrangements

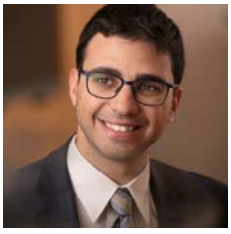
Contact us

Jamie Nettleton
Partner
+61 2 8915 1030
jamie.nettleton@addisons.com

Justine Munsie
Partner
+61 2 8915 1011
justine.munsie@addisons.com

Samuel Gauci
Solicitor admitted in Malta
+61 2 8915 1040
samuel.gauci@addisons.com

Shanna Protic Dib
Solicitor
+61 2 8915 0114
shanna.proticdib@addisons.com



Joseph Abi-Hanna
Solicitor
+61 2 8915 0123
joseph.abi-hanna@addisons.com

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Introduction

Welcome to the December 2019 Addisons Gambling Law & Regulation Newsletter.

This newsletter contains Focus Papers published by Addisons in 2019 concerning various issues relating to gambling regulation in Australia and recent developments that are likely to have an impact on the gambling sector during 2020.

The papers cover the following key developments:

1. Further steps relating to the implementation of the National Consumer Protection Framework (**NCPF**) announced on 16 December 2018 and referred to in our December 2018 Newsletter. A number of measures announced in the NCPF have been implemented in 2019, with the principal measure being the introduction of consistent legislative measures across Australia relating to restrictions on inducements in wagering advertising. Further details are in our Focus Paper entitled "Restrictions on Gambling Advertising – Latest Measures Introduced under the National Consumer Protection Framework".

   Among the measures announced in the NCPF to address harm minimisation concerns arising from participation in online wagering was a prohibition on the provision of credit for betting purposes. Since then, various banks have introduced procedures to restrict the use of credit cards issued by those banks for gambling purposes. Last week, the Australian Bankers Association (**ABA**), released a consultation paper inviting submissions relating to the use of credit cards in gambling transactions and whether restrictions should be placed on their use. A copy of the consultation paper is available here.

   Other measures which have been implemented during 2019 include the introduction of ISP blocking measures (see below) and the passage of legislation in the Federal Parliament relating to the establishment of a National Self-Exclusion Register.

2. While Australia has been taking formal steps to implement the NCPF (which itself reflected recommendations made in the Review of Illegal Offshore Wagering in the O'Farrell Review), New Zealand has also reviewed recently its policy relating to interactive gambling and particularly the steps that should be taken to ensure appropriate returns are made by offshore wagering operators. This has focused on the use of New Zealand race fields information and sporting fixtures information, as well as the imposition of a Point of Consumption Tax (**POC**) relating to bets taken from persons who are present in New Zealand. A copy of our Focus Paper entitled "New Zealand – Development in Online Gambling Regulation", published in July, concerns the first stage of the legislative reforms. A second Bill has just been released (available here).

3. There have been a considerable number of reviews which have considered the effectiveness of enforcement of prohibitions contained in the *Interactive Gambling Act 2001* (Cth) (**IGA**). These reviews have been covered in a number of our previous Focus Papers.

   Last month, the Australian Communications and Media Authority (**ACMA**) announced that it had reached agreement with Communications Alliance (the industry body relating to the Internet sector) on a regime that would allow directions to be issued by the ACMA to Australian ISPs to block access to

offshore gambling sites. Further details are in our Focus Paper entitled "Australia: ISP Blocking of Illegal Offshore Gambling Websites".

4. While more restrictive measures targeting online gambling have been put in place in Australia and New Zealand, there continues to be substantial growth in the online gambling market in Asia. A number of operators have approached us concerning the location of their operations in various countries. In some cases, consideration has been given to Australia being a base for those operations. For further information, see our Focus Paper entitled "Australia: Gateway to Asia for gambling operators".

5. Perhaps the most significant industry development in Australia in the gambling sector during 2019 related to the various allegations made involving Crown Casino, particularly with respect to its junket arrangements. This publicity occurred on, or around, the investment by Melco Entertainment in Crown Resorts and the acquisition of a material shareholding.

   These issues are the subject of a formal inquiry to be chaired by former Supreme Court Justice Bergin, commissioned by the New South Wales Independent Liquor & Gaming Authority (**ILGA**) which is to hold its first hearing on 21 January 2020. As one of the matters being considered at that inquiry relates to the manner in which casinos should be regulated in New South Wales as a matter of best practice, it is quite possible that this inquiry will have longstanding implications for the regulation of the gambling sector in Australia and internationally.

   It is probable that the inquiry will have regard to the decision of the Massachusetts Gaming Commission, involving Wynn Resorts. For further information about this decision, and its implications for Australia (which are likely to be relevant to the issues being considered in the Bergin inquiry), please see our Focus Paper entitled "Massachusetts' Wynn Decision – Analysis from an Australian perspective".

6. Finally, the scope of the enforcement provisions in the IGA was considered by Australian Courts for the first time earlier this year. In an application brought by Lottoland against the ACMA, the NSW Supreme Court ruled that Lottoland's product offering fell within the scope of the *"excluded wagering services"* exemption in the IGA. This case contains discussion regarding the distinction between a "bet" and a "game". For further details, see our Focus Paper entitled "Australia – Online Gambling What is a Bet? Decision in Lottoland v ACMA".

There have also been a number of global and local industry meetings and conferences in which members of the Addisons Media and Gaming Team have been involved. This included the attendance at G2E by Jamie Nettleton in his capacity as President of the International Masters of Gaming Law, (**IMGL**), as well as the IMGL 2019 Conference in Munich. Sam Gauci attended recently the SiGMA conference in Malta.

We refer you to the Addisons Gambling Law Showcase page on LinkedIn which can be viewed here. We hope you enjoy this December 2019 edition of our Gambling Law & Regulation Newsletter. If you have any queries relating to the issues discussed in this Newsletter or you wish to discuss any of these matters, please do not hesitate to contact any member of Addisons Media & Gaming Team.

With best wishes for the holiday season and 2020!

Restrictions on Gambling Advertising – Latest Measures Introduced under the National Consumer Protection Framework

Authors: Jamie Nettleton and Shanna Protic Dib

Overview

Over the last year, each Australian state and territory government has commenced the implementation of the National Consumer Protection Framework (**NCPF**).

The NCPF provides for ten (10) minimum measures to be considered, and adopted, by Australian state and territory governments in relation to the conduct of online betting by licensed operators. The purpose of the NCPF is to introduce various regulatory standards across Australia over a period of 18 months (beginning on 26 November 2018), which focus on responsible gambling and harm minimisation in the conduct of online betting.

In December 2018, we reported on the agreement reached between the Commonwealth Government and all Australian state and territory governments to implement the NCPF in respect of online betting services conducted legally in Australia.[1] It has now been almost twelve (12) months since the NCPF was agreed and each Australian state and territory government has introduced laws, regulations and guidelines to give effect to the agreed measures (specifically with respect to restrictions on inducements in gambling advertising). However, at this stage, the practical result is an array of restrictive and inconsistent laws across Australia. Effectively, this presents difficulty for licensed sports bookmakers to adopt a uniform approach to business practices that satisfies the responsible gambling and harm minimisation objectives that the NCPF aims to achieve.

Gambling inducements

As part of the NCPF, it was agreed that each Australian state and territory would introduce laws that prohibit inducements in gambling advertising before 26 May 2019.

Although each Australian state and territory now has in place laws which restrict the offering and/or advertising of inducements by sports bookmakers licensed in Australia, those laws differ from state to state creating a myriad of different restrictions with which bookmakers are obliged to comply. The complexity of these restrictions is furthered by the manner in which the bookmakers must apply the restrictions to the marketing of their gambling services across different media platforms.

Northern Territory

On 26 May 2019, the Northern Territory government introduced a Code of Practice for the Responsible Service of Online Gambling 2019 (the **NT Code**). The Code imposes on all sports bookmakers licensed in

[1] Please see our Focus Paper entitled *"National Consumer Protection Framework: What does this mean for Australian Online Licensed Wagering Operators?"* available in the Gambling Law and Regulation Newsletter – December 2018.

the Northern Territory a prohibition on offering (and advertising) inducements to participate in gambling activity.

Under the Code, any sports bookmaker that is licensed in the Northern Territory is prohibited from:

(a) *offering* a **credit, voucher** or **reward** to a person as an inducement to:

(i) open a betting account (**Sign Up Offer**); or

(ii) refer another person to open a betting account (**Refer a Friend Offer**); and

(b) *offering* a bonus bet to a person unless winnings from a bonus bet can be withdrawn immediately without being subject to a requirement that the account holder continue to bet with those winnings (**Bonus Bet Offer**).

The NT Code allows direct marketing material to be sent to a person if that person provides express consent to receive such material. However, the NT Code makes no express exception for direct marketing which includes any Sign Up Offer, Refer a Friend Offer or Bonus Bet Offer.

Most of the leading online sports bookmakers in Australia are licensed in the Northern Territory. This means that many Australian sports bookmakers are subject to the inducement restrictions imposed by the NT Code.

While sports bookmakers licensed in the Northern Territory are subject to the restrictions imposed by the Code, those bookmakers remain subject to the laws of each other Australian state and territory, in which the bookmaker has customers –many of those states and territories impose restrictions on the manner in which sports bookmakers are permitted to offer and/or advertise their services. These restrictions are broader than those contained in the NT Code. This is where complexity arises.

For example, further restrictions are imposed expressly on sports bookmakers licensed in Australia in advertising their betting services in Western Australia (**WA**), New South Wales (**NSW**) and South Australia (**SA**).

Western Australia

To implement the NCPF, the WA Government amended the Gaming and Wagering Commission Regulations 1988 (WA) (the **WA Regulations**) with effect from 1 June 2019. Under the WA Regulations, sports bookmakers are prohibited from *offering* or *advertising* a benefit, consideration or reward in return for a person to participate, or continue to participate in gambling activity.

In addition to the prohibitions in the NT Code (which are also contained in the WA Regulations), bonus bets in excess of the amount initially deposited by the customer are prohibited.

Notably, some of the restrictions in the WA Regulations do not apply to certain lower risk gambling activities, such as trade promotions.

An exception in WA to the restriction on gambling inducements exists for any advertising that is communicated directly by a sports bookmaker to persons who hold an account with that sports bookmaker (subject to those customers providing express consent to receive those communications). Importantly, the

WA Regulations **do not** permit those communications to be sent by third parties (such as affiliates). However, this exception does not include direct marketing which includes a Sign Up Offer, a Refer a Friend Offer, or a Bonus Bet Offer.

A further exception exists in respect of the advertising of certain inducements which are published on platforms that provide racing content **exclusively (Racing Platform Exemption)**.[2]

New South Wales

For some time now, the law in NSW has prohibited sports bookmakers from *publishing* gambling advertising that is visible in NSW, and which offers an inducement to participate, or to participate frequently in gambling activity.[3]

Notably, the laws in NSW have imposed, for some time, restrictions on bookmakers licensed in Australia that are broader than those imposed by the NT Code.

On this basis, NSW did not consider any change to its laws was required to implement the NCPF. However, on 7 August 2019, the NSW Government, in response to the recent case involving Ladbrokes and the advertising of its 'Odds Boost' product[4], introduced the *Gambling Legislation Amendment (Online and Other Betting) Bill 2019* (the **Bill**) into NSW Parliament. The Bill was passed on 20 November 2019 (now the **Act**).

The Act expands the definition of 'inducement' to capture the offering of a gambling product (or the offer of a condition or other aspect of a gambling product) that:

(a) includes additional benefits or enhancements; or

(b) is declared by the regulations to be a prohibited inducement (collectively, a **Gambling Product Offer**).

Also, the NSW regulator, Liquor and Gaming NSW, has issued a revised version of its guidelines (first issued in May 2018) to clarify the gambling advertising prohibitions in NSW.

These guidelines confirm that the advertising of gambling products like the Ladbrokes 'Odds Boost' product is intended to be captured by the manner in which the NSW prohibition on gambling inducements will be enforced.

Like WA, an exception exists in NSW in respect of direct marketing communications. This means that any advertising that is communicated directly by a sports bookmaker to persons who hold an account with that sports bookmaker (subject to those customers providing consent5 to receiving a communication of this type) would not be subject to the inducement restrictions. However, this is subject (under the Act) to the relevant customer having logged into their betting account within the last 12 months.

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[2] On 21 November 2019, the Northern Territory Racing Commission recognised the racing platform exemption. For further information, please contact the authors.
[3] For further information, please see our Focus Paper entitled *"Rising stakes in NSW: Everything you need to know about the overhaul of NSW gambling advertising laws"*.
[4] For further information, please see our Focus Paper entitled *"What are the odds that your gambling advertisement is an inducement?".*

NSW also provides a racing platform exemption. This is similar to WA and allows certain inducements to be published or communicated on an existing platform which **predominantly** provides racing content.

In summary, there is a blanket prohibition in NSW law which will apply irrespective of the direct marketing exception referred to above. This prohibits bookmakers from offering to customers an inducement:

(a) to open a betting account; or

(b) to invite another person to open a betting account; or

(c) not to close a betting account; or

(d) to consent to receive gambling advertising from a betting service provider; or

(e) to not withdraw consent to receive gambling advertising.

South Australia

SA has not considered it necessary to amend its laws to introduce additional restrictions on the offering and/or advertising of inducements to the world-at-large by sports bookmakers licensed in Australia. This is due to the fact that the SA authorities consider that the existing laws impose restrictions on sports bookmakers licensed in Australia with respect to the advertising of inducements that are broader than those imposed by the NT Code.

The restrictions on inducements in SA are substantially similar to those of NSW. However, they **do not** capture Gambling Product Offers, nor do they provide a racing platform exception.

Victoria

Prior to the implementation of the NCPF, only Sign Up Offers were prohibited in Victoria. However, from 26 May 2019, the Victorian prohibition was extended to include Refer a Friend Offers and Bonus Bet Offers. This applies to 'wagering service providers' which includes, among others, sports bookmakers regardless of whether they carry on business in Victoria or elsewhere.

Tasmania, Queensland and the Australian Capital Territory

In response to the NCPF, Tasmania, Queensland and the Australian Capital Territory have introduced inducement restrictions which apply to bookmakers licensed in that particular state or territory.

Consistent gambling messages, activity statements and the national self-exclusion register

The NCPF also introduces measures including:

- the implementation of consistent mandatory responsible gambling messages across all states and territories on all media platforms including direct marketing, websites and other direct communications to customers;

- the provision of activity statements by sports bookmakers to customers which allow customers to track and monitor their online wagering spending and behaviour; and
- the development and implementation of a national self-exclusion register which ensures that those experiencing gambling harm can exclude themselves immediately from the services offered by all interactive wagering service providers.

It is anticipated that each of these measures will come into effect by 26 May 2020.

Way forward

With the recent introduction of further gambling inducement restrictions in various states and territories, it is crucial that Australian licensed sports bookmakers (and their agents, including affiliates and media agents) understand the ramifications of the restrictions and, more importantly, ensure that their gambling advertising and direct marketing communication strategies comply with these restrictions.

As key deadlines approach, we will continue to monitor the implementation of the NCPF and report in future Focus Papers on the implications of these measures for sports bookmakers and other industry stakeholders.

New Zealand – Development in Online Gambling Regulation

Author: Jamie Nettleton

Overview

New Zealand has joined the list of countries in introducing a regulatory regime that will require offshore gambling operators to pay fees in respect of both gambling services provided to New Zealand residents and bets taken in respect of New Zealand racing and sporting events.

Racing Reform Amendment Act

Various online gambling operators have received a letter from the Deputy Prime Minister of New Zealand, informing them of the introduction of the *Racing Reform Amendment Act 2019 (NZ)* ("**the Act**").

Introduction of Point of Consumption Tax and Product Fee Regime

This Act (which came into force on 1 July 2019), requires offshore betting operators to:

(a) before using New Zealand racing and sports betting information:

(i) obtain permission from the Department of Internal Affairs (DIA) (or its delegated authority); and

(ii) enter into a betting information use agreement under which the operator pays an information use charge (NZ product fee); and

(b) pay a point of consumption charge for bets taken from people resident in New Zealand (NZ POC charge).

The NZ product fee and the NZ POC charges are yet to be decided, and no agreements are available. These charges and penalties for non-compliance are to be set out in regulations.

The Deputy Prime Minister's letter indicates that:

- the DIA is commencing the drafting of the regulations and offshore betting operators are expected to be consulted in the process; and
- offshore betting operators which commenced negotiations with the Racing Industry Transition Agency (RITA) (formerly the NZ Racing Board)
- before 1 July 2019 have a limited period of time to finalise these agreements.

It is not clear what steps offshore betting operators which have provided services to NZ customers can do to put in place formal arrangements with NZ authorities to enable them to provide these services in accordance with New Zealand law. However, this is likely to be clarified once the regulations are released.

One of the key issues that will require clarification is how the New Zealand authorities will enforce the obligations of offshore gambling operators to pay NZ product fees and NZ POC charges. This difficulty was highlighted in the course of the review of the proposal to introduce a NZ POC charge (and indeed it was recommended that no such charge be introduced until this difficulty was considered further). We note that this difficulty has not limited the implementation with effect from 1 July 2018 of the requirement for offshore gambling operators to pay GST in New Zealand in respect of gambling services provided to NZ customers.

Consultation Paper – Online Gambling Licensing Regime?

Further, NZ has released a consultation paper relating to the manner in which online gambling should be regulated. The consultation paper here, sets out four potential options, one of which involves a potential online gambling licensing regime. The consultation period closes on ***Monday 30 September 2019***.

If you have any queries relating to the NZ position relating to online gambling, and particularly if you are interested in making a submission in respect of the consultation relating to online gambling in New Zealand, or have any queries relating to the letter from the Deputy Prime Minister, please do not hesitate to contact us.

Thanks to Joe Edwards of Russell McVeagh, Auckland for his comments in relation to this Focus Paper.

Australia: ISP Blocking of Illegal Offshore Gambling Websites

Authors: Jamie Nettleton and Samuel Gauci

The Australian Communications and Media Authority (**ACMA**), on 11 November 2019, issued a statement confirming that it will be implementing measures, through Australian internet service providers (**ISPs**), to block illegal offshore gambling websites from being offered to persons located in Australia[5].

The introduction of this measure is the result of the Australian Federal Government's review of measures it can introduce to combat gambling by Australians on illegal offshore websites. Refer to our focus paper, *Australian Government Proposes Scheme to Block Illegal Offshore Wagering Websites*[6], for background information.

Contrary to what had been originally contemplated, it is now intended that all offshore online gambling websites may be blocked and not solely offshore online wagering websites.

How the Website Blocking Will be Implemented:

The blocking of offshore illegal gambling websites will be implemented by means of the powers under the *Telecommunications Act 1997* (Cth) (the **TeleCom Act**). The ACMA may make, by notice to the ISPs, a disruption request to block a nominated offshore illegal gambling website, and the ISPs, in accordance with the provisions of section 313(3) of the TeleCom Act, are required to give the ACMA such help as is reasonably necessary to, among others:

- enforce the criminal law and laws imposing pecuniary penalties;
- protect public revenue; and
- safeguard national security.

Section 314 of the TeleCom Act provides further that a person who is requested to give help must comply with the requirements of the request on the basis that the person:

- does not profit from nor bears the costs of giving the help; and
- complies with the terms and conditions as are agreed between the person and the Commonwealth.

[5] The ACMA notification may be accessed at: https://www.acma.gov.au/articles/2019-11/acma-begin-blocking-illegal-offshore-gambling-websites

[6] Our Focus Paper may be accessed here: https://addisons.com/knowledge/insights/australian-government-proposes-scheme-to-block-illegal-offshore-wagering-websites/

The ACMA has issued a document entitled *"Policies and procedures for the lawful disruption of access to online services"*[7], which contains Guidelines that outline the process and considerations which the ACMA will adopt when evaluating if a disruption request will be issued.

The Guidelines specify thresholds that must be met in order for a disruption request to be made. The relevant circumstances must:

- involve a serious criminal or civil offence, or a threat to national security; and
- carry a maximum prison term of at least two years, or if the offence does not carry a prison term, a financial penalty of at least 120 Commonwealth penalty units.

By offering illegal offshore gambling services to persons located in Australia, there will be a contravention of the *Interactive Gambling Act 2001* (Cth) in a manner which falls within the latter category.

As Australia is committed to promoting an open, free and secure internet, the ACMA will also take into account certain other factors when considering whether to issue a disruption request, including:

- the availability of other enforcement tools;
- the services available on the site;
- the likely effectiveness of the proposed disruption;
- the views of the ISPs;
- technical feasibility and costs involved in the proposed disruption;
- potential consequences and/or damage to the government;
- the nature of the offence or contravention;
- whether there is a public or national interest in the proposed disruption; and
- any other factor considered relevant by the ACMA.

The Guidelines state that the decision to block a website is not one that the ACMA will take lightly. Further to the considerations already mentioned, the ACMA will also have regard to:

- technical expertise to ensure that the disruption is:
    - responsible;
    - effective;

[7] This ACMA document may be accessed at: https://www.acma.gov.au/publications/2019-11/publication/acma-s313-policies-and-procedures

- as targeted as possible; and
- able to be executed appropriately;

- consultation with ISPs;
- agreed terms and conditions with ISPs.

Once the decision is made for a disruption request to be issued, the ACMA will provide ISPs with a stop page which will be seen by persons who access the affected website and which will contain:

- confirmation that the ACMA has requested the disruption;
- the ACMA's contact details;
- a high-level reason for the disruption request; and
- information about the ACMA's complaint and review mechanisms.

The stop page, therefore, provides Australians who access the relevant offshore gambling website with information to confirm that the ACMA has requested the relevant website to be blocked and the general reason why the website is blocked. Contact details will also be provided which enables the person who is affected by the disruption to lodge a complaint with the ACMA for a review of the disruption to be conducted (where necessary).

An expiration date for the disruption will be determined once it is implemented. Furthermore, the ACMA will monitor the effectiveness of the disruption and any feedback it receives regarding the disruption.

Considerations:

From the ACMA's Guidelines, it would appear that a decision to block a website is a measure of last resort which the ACMA will adopt solely once it considers that other enforcement measures are not effective.

How the website blocking measure will be implemented in practice is not yet clear. However, the ACMA views the implementation of website blocking by ISPs as an effective tool to further combat the offering of illegal offshore gambling websites to Australians.

We assume that these steps will only be taken due to the other enforcement measures against offshore gambling sites only being effective to a certain extent. We understand that, although many offshore gambling websites have received warning notices sent by the ACMA to cease providing online gambling services to Australians and have ceased to provide those services, a number have not. It is these parties against whom we anticipate this measure will be exercised.

The ACMA has already announced that it was taking the necessary steps to implement this measure in respect of two online casino websites[8].

One other point to note is that it is only consumers that will be aware directly of ISP blocking measures having been put in place. It does not appear that the affected offshore gambling sites will be given notice, nor is it clear what steps are available to be taken to contest the implementation of ISP blocking measures.

[8] The ACMA's notification may be referred to at: https://www.acma.gov.au/articles/2019-11/acma-moves-block-emu-casino-and-fair-go-casino

Australia: Gateway to Asia for gambling operators

Authors: Jamie Nettleton and Samuel Gauci

The Asian market has always been of interest to the gambling sector. The exponential development of online gambling has made this form of entertainment more accessible and many operators, today more than ever before, are researching and reviewing the best manner in which to offer their services to the Asian market.

Operators are accustomed to being licensed and regulated, and this is the operators' desired modus operandi due to the reputational benefits that a regulated operation provides. However, it is difficult for an operator to find a licensing jurisdiction in Asia which administers the high regulatory standards that they are accustomed to in other regulated markets. This requires operators to consider their risk appetite on whether to commence operations in Asia and, if so, how best to do so with limited and acceptable risk.

The regulatory environment relating to online gambling throughout Asia varies. There are jurisdictions which consider online gambling to be illegal, other jurisdictions which license it, and others which do not actively take enforcement action against operators that make their services available in their jurisdiction.

Many operators have sought a licence in jurisdictions such as Curacao, Belize, Panama, Philippines, and used those licensed operations to target the Asian market. This solution has worked relatively well for operators and provides the operator the comfort of being licensed and having a seal of approval.

This, however, does not come without possible reputational risk in view of the evolving online gambling environment, with regulators in leading first world jurisdictions wary of regulatory jurisdictions that are perceived to be lax in their licensing and compliance requirements. As a result, other licensed operations within the group of companies could possibly be jeopardised if the Asia facing version of the operation is reviewed by regulators in the US and/or Europe and perceived to be based in a less reputable jurisdiction.

The main challenge that the Asian gambling environment presents is that a different gambling culture exists when compared to that which the European and US markets are accustomed to.

Solutions which the Australian regulatory environment could provide:

Licensing of Online Gambling Services:

Australia has a prohibitionist online gambling regulatory regime at the Federal level set out in the *Interactive Gambling Act 2001* (Cth) (the 'IGA'). The IGA provides for a general ban on the offering of online gambling to persons located in Australia unless the relevant activity is licensed in a state or territory in Australia. (This is only possible for betting and lotteries.)

An operator may, however, be licensed in Australia to offer online gambling services which are solely provided to persons located outside of Australia. There are few limitations on which types of gambling services may be offered in this manner.

An operator who wishes to offer sports-betting services, casino games, lotteries, or any other type of game to Asian jurisdictions may consider applying for an online gambling licence in a state or territory in Australia. The Northern Territory is the jurisdiction in Australia where most leading Australian online operators are licensed.

Ancillary Services:

Ancillary services are fundamental for all gambling operations, and this is no different for an operator providing services to Asia. Ancillary service providers provide knowledge, experience, the relevant contacts, and expertise in their respective area of services. Connecting with and using the right ancillary service providers is necessary for the growth of the business, minimising strategic and operational errors, and allows the gambling operator to focus on the core purpose of the business.

It is generally not necessary to hold a licence to conduct services ancillary to gambling in Australia; however, it is advisable and good business practice for each operator to conduct a detailed review of the services to be offered from Australia to verify that they comply with the laws of the state or territory where the business is conducted.

Benefits of Operating from Australia:

Australia provides an attractive environment for gambling service providers and for ancillary service providers. The benefits of setting up operations in Australia to provide services to the Asian market include:

- the availability of staff and expertise required to provide the services;
- an English speaking jurisdiction with a large Asian community;
- Australia's geographical proximity to Asia for better management and efficiency of operations;
- a favourable regulatory regime for operations targeted outside of Australia;
- a jurisdiction that is well regulated;
- clear financial and tax requirements; and
- legal certainty.

Considerations:

Operating from Australia to target the Asian market is a viable option which operators should consider when evaluating the best structure on how to operate in the attractive Asian market.

Massachusetts' Wynn Decision – Analysis from an Australian perspective

Authors: Jamie Nettleton and Samuel Gauci

Introduction

When reviewing a licence application, a regulator carries out a due diligence process which is a fundamental step in the procedure towards granting a licence. It is important to remember that this is only the first step – the Wynn case illustrates the necessity for there to be ongoing due diligence from the perspectives of both the regulator and the operator.

The due diligence process and requirements vary between jurisdictions; however, the gambling industry has become accustomed to providing voluminous and detailed documentation, certification, and evidence to prove that the applicant (usually a company) is suitably qualified to be granted a licence.

The analysis consists typically of a due diligence review of:

- the applicant company;
- all the persons who own the applicant (this is a review of the ultimate beneficial owners and other companies in the applicant's corporate structure); and
- all the persons who have control over and manage the operations of the applicant.

The above persons are reviewed to confirm that they are all of good character, have relevant skills and qualifications, and that there is financial security and stability behind the proposed gambling operation.

The recent decision by the Massachusetts Gaming Commission (**MGC**) concerning its investigation relating to Wynn Resorts highlights how crucial such an analysis is and how important it is to continue to conduct reviews after the grant of the licence.

The Facts

The MGC carried out a detailed review of the applicant, when it granted a casino licence (**Licence**) to Wynn MA, LLC (**Wynn**).

Wynn, Wynn Resorts and the individual qualifiers (referred to together as the **Qualifiers**) were granted a positive determination of suitability by the MCG on 27 December 2013. This meant that Wynn qualified for the competitive process which resulted in the grant of the Licence. Wynn prevailed in the competitive process and was granted the Licence on 17 September 2014.

The determination of suitability also applied to those key persons proposed by Wynn as being the key persons to be involved in the operation of the Licence which, at the time, included its co-founder, Steve Wynn, and members of its Board of Directors.

After being granted the Licence, Wynn commenced work to construct the casino premises with the intended launch date of the casino being mid-2019.

A *Wall Street Journal* (**WSJ**) article published on 26 January 2018, detailed various allegations of workplace sexual misconduct and sexual harassment of subordinate employees by Wynn's co-founder, Steve Wynn.

Following the publication of the WSJ article, the MGC asked the Investigation and Enforcement Bureau (**IEB**) to conduct an investigation into the allegations. The MGC indicated that there were 4 focus areas which it wished the IEB to address in its report:

- a review of the suitability of the individual qualifiers, especially those who potentially had knowledge of the allegations;
- a review of the company action, or lack thereof, taken by senior or executive level managers upon learning of the allegations;
- Wynn's response regarding the alleged misconduct following the publication of the WSJ article; and
- a review of the potential impact of the allegations upon Wynn's financial stability.

The IEB's investigation included interviews of over 100 persons who had knowledge of the sexual misconduct allegations, including victims of the alleged misconduct. Consultants were engaged to assist with the investigation to advise on Wynn's handling of the claims, and to review Wynn's financial stability and business practices and the impact (if any) of the allegations.

The investigation confirmed that there had been various allegations of sexual misconduct by Mr Wynn dating back to 2005 and these had not been disclosed to the MGC during the initial investigation process. Furthermore, there were also allegations made after the MGC had issued its initial determination of suitability which Wynn had failed to disclose to the MGC. The MGC noted that Wynn had notified the Nevada Gaming Commission (**NGC**) prior to publication of the WSJ article but did not notify the MGC.

The IEB found that members of the executive management of Wynn were aware of the allegations but had not informed the Board of Directors and had failed to follow company policies which required that an investigation be conducted into allegations of this nature.

Following the WSJ article, a number of executives and directors, including Mr Wynn, resigned and a restructure of the board and executive management took place. There was also a change in approach implemented relating to the recognition of employees' rights.

MGC's Considerations and Decision

Under Massachusetts gaming legislation, Wynn has the obligation to continue to maintain its integrity and financial stability.

The MGC is constituted with the responsibility of ensuring the integrity of the gaming industry and its licensees.

Based on the above premises, the MGC determined that, although there had been numerous serious instances where the Qualifiers had failed in their obligations, measures had been taken to address the shortcomings. The main measures taken were:

- a special committee had been formed to investigate the allegations and to examine the relevant policies and procedures;
- changes in the executives and the executive structure, moving away from a founder-led organisation to one where there was a separation of the roles of the Chairman and the CEO;
- changes in the Board of Directors with the appointment of new, gender diverse, competent directors;
- the updating of policies and procedures;
- the implementation of new channels for reporting and filing employee complaints;
- training for employees; and
- more regular staff and manager briefings and meetings.

Wynn submitted applications for new individual qualifiers to replace persons no longer involved with Wynn, and the MGC approved all these new persons as suitable.

Despite the remedial action taken by Wynn, the MGC determined that Wynn should be penalised for their shortcomings. The MGC:

- imposed a US$35 million fine on Wynn for its breaches and to deter it from future breaches;
- imposed a US$500,000 penalty on the CEO for his previous failings;
- criticised approved persons for their shortcomings; however, ultimately considered that they remained suitable;
- imposed various conditions on Wynn, and its Board of Directors, such as:
    - the appointment by the MGC (at Wynn's expense) of an independent monitor to report to the MGC;
    - that timely reports of directors' attendance records be provided to the MGC;
    - that the role of the Chairman and the CEO remain separate throughout the term of the Licence; and
    - that any actions in any court or administrative tribunal filed against a Qualifier be notified immediately to the MGC; and
- imposed a condition that an executive coach be appointed by the Board of Directors to train the CEO on leadership, communication, enhanced sensitivity to human resources matters, and team building.

Considerations from this Case

This case highlights various matters relevant in determining the suitability of a gambling sector applicant and its continued suitability as a licensee.

A regulator needs to, first and foremost, ensure that it complies with its legal obligations and acts within the parameters established by its governing legislation. The MGC was very careful to refer to the legislation which established its obligations in conducting its review to ensure that it acted in making its determination subject to its powers and functions. This is also an important consideration for legislators when drafting legislation, so that they ensure that they provide a regulator the required autonomy to conduct its functions effectively.

A regulator needs also to consider other matters (together with its legal obligations) when deciding which course of enforcement action to take. Matters such as the licensee's past performance, its reaction to the breaches and the commitment the licensee demonstrates in implementing relevant obligations are all matters which should be taken into consideration when a regulator reviews a licensee's good standing. A regulator needs to also consider and evaluate the financial commitments and investments of the licensee in the licensed operation. These are all indications of how serious and committed an operator is to the licensed operation.

Remaining of good character is a continuing obligation and a licensee should make every effort to continue to be in good standing. If a licensed operator is aware of any matter which could taint its good standing, notification to the gaming regulator should always be a priority consideration. In essence, there is a requirement of continuous disclosure. Notification to the regulator, as is emphasised by the MGC in its report, indicates that a licensee understands its obligations and takes them seriously. If possible, it is always better for the licensee to notify the regulator before the latter becomes aware of a matter of concern through a third party, such as 'the press'.

This Wynn investigation confirms how important being of good character is for a gambling licence holder. Being licensed means not only remaining compliant with technical and financial obligations, but also remaining of good character. Although Wynn is licensed in Massachusetts, it was not yet operating the casino when these events occurred, however, it was still accountable for ensuring that it remained compliant with the laws and requirements of Massachusetts and the MGC.

The decision taken by the MGC is similar to that taken by the NGC, which imposed a US$20 million fine on Wynn Las Vegas in respect of the same issues. This confirms that regulators take a similar approach when evaluating matters of concern. Unless a licensed entity commits a serious breach of its licence obligations, regulators opt to impose fines rather than choosing to suspend or cancel the licence. This, however, depends on the nature of the breach and each issue is to be reviewed on its own merits. If, however, there is a negative impact on the players or the fairness of the game, or there is a suggestion of serious criminal behaviour (for example, money laundering), it is more probable that the licence would be suspended or cancelled.

The approach taken by the MGC and the NGC does not mean that they are being lenient. A fine is still a significant deterrent and enforcement tool, not only because there is a negative economic aspect of a fine but also the black mark it leaves on the reputation and good standing of the gaming operator. A fine needs to be disclosed to all other regulators by whom the operator (or other members of its group) is licensed and/or it

needs to be included in the details submitted in applications for future licence/s. This disclosure could result in the operator's good character being reviewed more closely by other regulators.

Wynn's proactive approach to change and the actions it took to implement changes were relevant in the MGC's (and NGC's) determinations to issue fines and conditions instead of suspending/cancelling the relevant Licence. Wynn's past failings were mitigated by the approach taken once the allegations were made public.

Lessons from this Case for the Australian Gambling Sector

Although the facts of the Wynn case relate to a US operator and its obligations in US States, the decision is applicable internationally, including in Australia. Australian regulators always conduct a thorough due diligence investigation and review of gambling operators, since this is a crucial element in the licensing process for a gambling operation.

One of the main principles arising from the Wynn case is that the obligation of being of good character does not cease once the licence is granted but is an ongoing requirement throughout the term of the licence (irrespective of whether or not the licence is operative).

Suitability of casinos in Australia has been monitored through the conduct of regular reviews of a casino, and a casino's operations to ascertain whether issues have arisen in the case of the casino's business which have not been dealt with in an appropriate manner. Traditionally, reviews had been conducted of each of Crown and Star (respectively, the Melbourne and Sydney casinos) every 5 years.

For example, in the case of the most recent review of Crown Melbourne, the Victorian Commission for Gambling and Liquor Regulation (**the Commission**) was required to investigate and form an opinion about:

- Crown's suitability to hold a casino licence;
- Crown's compliance with the Casino Control Act 1991, the Casino *(Management Agreement) Act 1993*, and the *Gambling Regulation Act 2003* and the regulations made under those Acts;
- Crown's compliance with transaction documents relating to the casino and the casino complex, and any other agreements between Crown and the State, or a body representing the State, that impose obligations on Crown in relation to gaming; and
- whether it was in the public interest that the Crown casino licence continue to be in force, having regard to the creation and maintenance of public confidence and trust in the credibility, integrity, and stability of casino operations.

On completion of the review, the Commission affirmed each of the matters outlined above, but also made 20 recommendations concerning Crown's operations.

The Casino Modernisation Review NSW (**the Review**), finalised in 2017, made a recommendation that the mandatory review of the casino licence required by the *Casino Control Act 1992* (NSW) (**the CCA**) be abolished. The NSW Government, in response to the Review, noted this recommendation and indicated that it proposed to amend the CCA to allow for one further review of The Star, and to undertake one initial review

of Crown Sydney after a reasonable period of operation. Subsequently, consideration would be given to the abolition of the review provision, an extension of the existing five year time frame, and other amendments to its operation, as appropriate.

In any event, we have no doubt that circumstances that may affect a casino's reputation (for example, inappropriate actions by a senior executive, allegations of wrongful conduct) will lead to investigations being conducted by the relevant Australian State regulator/s.

Below we consider the lessons which regulators and operators can take from the Wynn case.

Regulators

In the Wynn case, the Qualifiers considered that they did not have to notify the MGC of the allegations when submitting their initial applications. This might have been because the application forms were not worded to require disclosure of those matters. Asking the right questions during the due diligence phase is crucial since the information and documentation collected are the basis upon which the decision on whether to grant a licence is made. A regulator, therefore, needs to ensure that all situations that could be influential to its review are covered in its investigations.

It is difficult to include in an application form all questions to cover all matters that may be of concern. A regulator should consider listing matters about which it must be notified and then ensure that questions are asked of those remaining matters in a more general manner so that it is informed of all the matters of interest.

Application forms should be a living document, such that they continue to apply when an operator becomes aware of a matter which might have not been considered previously and was not addressed in the current form. Consideration should be given by Australian regulators to amending the application forms in respect of these matters. The updating of an application form should be communicated on the regulator's media channels (and directly to licensees) to ensure that licensees and prospective applicants are informed of the amendments.

It is essential for a regulator to be updated with developments and for all licensees (existing and prospective) to notify the regulator of any relevant changes.

Initiatives which could assist a regulator include:

- keeping an open communication line with licensees. This could be achieved in various ways, such as periodic meetings with licensees, or appointing a licensee relationship officer to each licensee who has a more direct and regular relationship with the licensees assigned to him/her;
- monitoring the media, especially specialised, industry focused sources;
- liaising with other regulators (both gambling and others, e.g. financial) to share information (where possible and permissible);
- periodic updating requirements;

- periodic re-evaluation of licensees; and
- risk rating licensees depending on their probity and activities.

When a regulator becomes aware of matters, whether through press articles or otherwise, it needs to be in a position to act decisively and in a timely manner to ensure that a detailed investigation is initiated to enable it to make an informed decision on what action to take, if any.

Operators

The reality of the gambling sector is that it is highly regulated. If an operator fails to adapt to this reality, it will inevitably fall foul of its obligations (whether or not stated expressly) and face enforcement action from a regulator (or regulators).

The best way for an operator to address this reality is to ensure that it has a strong compliance function within its structure. This function will depend on the size of the operator, with the larger operators requiring a compliance team within the organisation to be involved in all matters which could affect the operator's good standing.

Smaller operators should still have a compliance function within the organisation. However, to minimise costs, these operators may choose to outsource their compliance function. This will enable them to have expert advice available in a timely manner. As the organisation grows, the operator could introduce a compliance role within the organisation, which could be trained and assisted initially by the outsourced service provider.

Retaining the services of persons who are not employed by the operator (for example external members of its compliance committee) could also be beneficial. A properly experienced person (or persons) without a vested interest in the operator can provide impartial observations which might not always be raised by persons employed by the operator. This could be achieved through establishing a compliance committee which periodically meets to discuss and review compliance issues.

A licensee could also consider appointing a key member of its compliance team as the liaison person with regulators, so that there is a direct communication line. This would also ensure that regulators are informed of a notifiable matter and that notifications are consistent for all regulators.

The compliance team should have an autonomous role with access to all the relevant functions within the organisation, including the board. Internal corporate governance procedures should provide the compliance team with the powers required to conduct its functions.

Ultimately, the effectiveness of the compliance team could be the determining factor in maintaining the operator's reputation. If the compliance team does not perform its role well, the operator could face enforcement action which is costly, not only for the fines that may be imposed but also for the resources required to address the breaches and the negative effects of any enforcement action. Needless to say, an extreme failure could have extreme consequences, such as a loss of the licence.

The compliance function itself needs to operate in an efficient manner across the operator's organisation. The following are actions it can implement:

- educate the organisation on the importance of compliance;
- be accessible to the organisation;
- set periodic meetings with the board and other departments within the organisation;
- create checklists to distribute internally, to assist other functions within the organisation to understand and comply with requirements;
- analyse issues in a diligent manner to determine what action needs to be taken;
- have a good relationship with the regulators;
- keep the management and directors updated with any compliance issues (with compliance being an agenda item at all board meetings);
- be proactive within the organisation;
- assist in determining the operator's risk appetite; and
- review and ensure that policies and procedures are compliant with legal obligations, and amend them when required.

Management and the compliance team need to operate hand-in-hand because a business cannot operate without negative consequences unless a compliance approach is adopted. Business growth which fails to take into account its legal obligations will ultimately be subject to review by regulators and possible enforcement action.

Conclusion

The Wynn case gives a clear message that licensed operators need to operate in a manner which is consistent and takes into account its legal obligations, its internal policies and procedures, and which respects its regulators. Operators must remember that it is necessary to maintain ongoing vigilance in its compliance functions to ensure that its regulators are kept informed; likewise, regulators should ensure that this occurs and at the same time keep themselves informed of matters which may affect the suitability of their licensees. This requires continuing investigations of the licensee and its associates, including as to their ongoing probity.

For a better understanding of probity please refer to Addisons' focus paper entitled: *Probing "probity": What you should know about suitability investigations in the gambling sector*.[9]

[9] Accessible *here.*

Australia – Online Gambling What is a Bet? Decision in Lottoland v ACMA

Authors: Justine Munsie, Jamie Nettleton and Joseph Abi-Hanna

Overview

Addisons acted for Lottoland in Lottoland's recent successful application to the Supreme Court of New South Wales in which it sought declarations that various of its products were not "prohibited interactive gambling services" under the *Interactive Gambling Act 2001 (Cth)* (**IGA**). The decision of Sackar J., which was handed down on 26 July 2019, is the first time that provisions of the IGA have been considered by a superior court in Australia. The decision is contrary to the earlier findings made by the Australian Communications and Media Authority (**ACMA**) that the relevant products of Lottoland contravened the IGA.

Legal Background to IGA

The IGA is a statute introduced into the Australian Federal Parliament in 2001 targeting offshore gambling operators. Until 2017, the IGA attracted limited attention due to the relative inaction on the part of the Australian authorities. Also, the prohibitions were of limited effect as they did not prohibit offshore gambling operators providing betting services (save for in-play betting services) and online lottery services (save for online instant lotteries) to Australian customers. Indeed, the principal actions taken by the ACMA prior to 2017 were to ensure that Australian licensed online wagering operators did not provide betting services considered to be contrary to the policy prohibiting online in-play betting on sports and TV stations did not promote offshore gambling sites.

The focus changed in 2017 following the passage of the Interactive Gambling Amendment Act. Since then, the ACMA now targets offshore gambling operators providing services to Australians. Indeed, the ACMA has announced in its quarterly reports that its activities have been successful in causing many leading overseas gambling operators to cease providing services into Australia.

Despite this, there have been continued efforts by the Australian authorities in targeting the Australian based licensed online wagering operators providing services viewed as inconsistent with new policy underlying the IGA. The most recent amendment to the IGA, which came into effect on 9 January 2019, was to prohibit the supply of lottery betting services online. Indeed, Lottoland's previous business (being derived principally from lottery betting services) ceased upon the enactment of this prohibition.

Accordingly, Lottoland commenced supplying other forms of betting products, which were reviewed by the ACMA and found to constitute prohibited interactive gambling services. To the authors' knowledge, this finding was the first finding made by the ACMA relating to the betting services of an Australian licensed wagering operator.

Until Lottoland's application, there had been no judicial consideration of the provisions of the IGA and the interpretations given by the ACMA in its determinations and findings was unchallenged.

Lottoland's Application

As a result of the application brought by Lottoland, for declarations that its services did not contravene section 5 of the IGA, clarity has now been given in the Court's judgment to various provisions (and definitions) in the IGA judicially.

In essence, in finding for Lottoland, the Court has stated:

(c) provisions within the IGA are not easy to construe;

(d) it is clear that the IGA does not in fact prohibit many forms of gambling;

(e) the extensive exceptions to the prohibition (on providing prohibited interactive gambling services) means that only a select number of services are intended to be restricted;

(f) when interpreting a penal statute (like the IGA), it is arguably appropriate to give relevant prohibitions a restricted meaning;

(g) the exclusion from exclusion process in the IGA is cumbersome; and

(h) in the context and the absence of any specific clarity being given, the natural and ordinary meaning of the terms used in the IGA (for example, in the definitions) should be given.

(i) The questions asked by the Court in considering Lottoland's application were:

(j) were Lottoland's products an excluded wagering service?

(k) do they fall outside the scope of this exception by virtue of being:

(i) services for the conduct of a game; or

(ii) services relating to betting on the outcome of a game of chance.

This lead to considerable analysis by the Court of the distinction between a "bet" and a "game" in the context of the history of the legislation, the wording of the legislation and the cases (being principally Australian and British cases), where these terms (and any distinction) had been considered previously.

The Court held that the relevant provisions had to be given their natural meaning and stated:

(a) both "bet" and "game", should be given their normal meaning;

(b) their use in the IGA meant that they should be construed in a manner to ensure a clear distinction; and

(c) a broad construction of the concept of a "game" would remove any meaningful distinction between a "game" and a "bet".

This lead to the Court's conclusion that Lottoland's products were in fact excluded wagering services. This meant that they fell outside the scope of the prohibition in section 5.

The Court's decision, is, to date, the only Court ruling relating to the IGA. The Court has given a narrower interpretation of the scope of the prohibitions on the supply of prohibited interactive gambling services than the interpretation given by the ACMA in its findings relating to Lottoland's products. However, following the Court's interpretation of the IGA, it should not be assumed necessarily that the IGA will not apply to other categories of online gambling services provided by offshore gambling operators.

The decision offers clarity to some of the torturous provisions in the IGA which set out the scope of the prohibitions on various online gambling services. The decision is also of interest as it is one of the few decisions globally to give a judicial interpretation of the difference between a "bet" and a "game".

Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com