ADDISONS

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# Gambling Law & Regulation

Level 12
60 Carrington Street
SYDNEY NSW 2000

DX 262 SYDNEY
Tel +61 2 8915 1000
Fax +61 2 8916 2000

# Overview

Welcome to the June 2015 Addisons' Gambling Law & Regulation Newsletter.

There have been numerous developments in the gambling space since our last Newsletter. These developments are varied and relate to, for example, litigation proceedings involving two of Australia's largest gambling industry operators, the monitoring of gaming machines, product fees imposed on wagering operators and the development of new casinos.

Additionally, we cover in detail a variety of issues that will be of interest to our readers.

- Last month, the Federal Government passed legislation that would cause Norfolk Island to become a municipality of New South Wales. The Federal Government has since abolished the Norfolk Island Legislative Assembly.

  As a result of these changes, which were foreshadowed by the Federal Government last year, Norfolk Island is no longer able to self-govern.

  These developments are of particular interest to Australian gambling operators, given that the Norfolk Island Gaming Authority (the **Authority**) has numerous wagering licensees, including Ladbrokes.

  In April 2015, we discussed these changes with Rod McAlpine, Director of the Authority. At the time of the interview, there was a significant lack of clarity around the impact of the changes on the Authority and its licensees. Despite the passing of legislation since the interview and the abolition of the Legislative Assembly, this lack of clarity remains at the date this Newsletter was finalised.

  We will continue to monitor these changes.

  Please see *'Norfolk Island: Does it have a future as a gambling licensing jurisdiction? Interview with Rod McAlpine, Director of the Norfolk Island Gaming Authority'.*

- Gambling operators and many of their customers alike have a vested interest in the extent to which an operator owes problem gamblers a duty of care. A 2014 decision of the Supreme Court of British Columbia is consistent with recent Australian decisions on the same issue. The most well-known of these cases is the decision of the High Court of Australia in Kakavas v Crown Melbourne Limited. These decisions collectively suggest that, under Australian law (and under Canadian law), operators do not owe a duty of care to problem gamblers to prevent them from suffering gambling loss. However, there always remains a possibility that a duty of care may exist. This will depend on the relevant facts under consideration.

  Please see *'A Duty of Care for Gambling in Australia? Roll the Dice, (and Possibly) Pay the Price'.*

- Foreign gambling operators sometimes overlook the importance of considering how Australian law applies to their business when dealing with Australian customers. There is a common misconception that, because foreign gambling operators are not located in Australia, they are not subject to Australian law. However, these operators should be aware that:

  - if Australian legislation has extraterritorial effect, it will apply outside Australia; and
  - various enforcement mechanisms are available to Australian gambling regulators and law enforcement bodies to enforce any Australian law that applies extraterritorially against an entity located outside Australia.

Please see *'Extraterritorial Application of Australian Law - Enforcement against Foreign Companies and Risk of Extradition in respect of Gambling Offences'.*

- In South Australia, you may not even need to supply gambling services to fall on the wrong side of the law. One of the South Australian Government's most recent proposals is to introduce restrictions on the sale and promotion of toys with gambling characteristics, such as elements of risk and chance, which are analogous to gambling services. For example, a toy bingo set may be caught by these restrictions. This proposal was foreshadowed by the South Australian Government's "gambling starts with games" campaign which seeks to "reduce the exposure of young South Australians to gambling like games."

  Please see *'Fair Trading (Gambling Product Retailer Industry Code) Regulations 2015: South Australia Regulation of "Gambling Style Toys"'.*

- Operators seeking to target the Australian market are often also interested in the New Zealand market, where the wagering law is currently under review.

  For further details, please see *'New Zealand – Review of Offshore Online Betting Regulation'.*

As foreshowed above, there have been many other issues that are of interest to gambling operators in the Australian market. For example:

- The High Court has granted leave recently to each of the State of Victoria and Tabcorp Holdings Limited (**Tabcorp**) respectively for a hearing to take place in respect of appeals against the decisions of the Supreme Court of Victoria (Court of Appeal) relating to claims arising from the Victorian Government's decision to change the regulatory structure relating to gaming machine licensing in Victoria.[1]

  Among the changes effected was the replacement of the duopoly held by Tatts Group Limited (**Tatts**) and Tabcorp relating to the supply and operation of gaming machines with arrangements under which venues would hold operating licences directly. At the same time, it was announced that neither Tabcorp nor Tatts would be entitled to any compensation arising from the expiration of their licences in 2012.

  The State of Victoria has appealed the decision of the Court of Appeal that Tatts should recover $500 million from the Victorian Government.

  Tabcorp has appealed the seemingly contradictory decision of the Court Appeal that it is not entitled to recover $650 million from the Victorian Government.

  We will monitor the outcome of developments in these proceedings in the High Court.

- Recently, the gambling regulator in New South Wales released information relating to the tender process for the licence to operate the monitoring of the 9,500 electronic gaming machines in New South Wales. The current licence is due to expire in November 2016 and is held by a subsidiary of Tatts. Unlike some of the other developments discussed in this article, this call for tenders has received limited attention from the mainstream press.
- The National Rugby League has become the first Australian sports controlling body to levy a product fee based on turnover. This was announced recently in press articles relating to the 2015 version of the NRL's product fee and integrity agreement. A product fee applied on turnover is charged commonly by racing bodies in connection

[1] We have previously written about these proceedings here: http://www.addisonslawyers.com.au/knowledge/Gambling_Licences-_With_One_Hand_a_Licence_May_Be_Given_By_Government__with_the_Other_Hand__the_Licence_May_Be_Taken_Away674.aspx

with the use of race fields; however, until the NRL's 2015 agreement, Australian sporting bodies all charged product fees based on gross revenue.

- Crown Resorts' construction of a new VIP only 'gaming facility' at Barangaroo in the Sydney CBD continues to be the subject of media attention. Most recently, modifications to the plans for the proposals have been the subject of high profile objections. We will continue to monitor the developments relating to the proposed casinos in Sydney, Brisbane, Cairns and the Gold Coast.[2]
- The voluntary pre commitment policy relating to the use of gaming machines in Victoria goes live in December 2015. The Victorian government has decided to pursue this policy notwithstanding the decision by the current Federal Government not to pursue the mandatory pre commitment system policy proposed by the previous Federal Government.
- Also in Victoria, the Department of Justice and Regulation in that state released earlier this year, as part of its "Lotteries Licensing Project", a paper asking for submissions in relation to the Victorian lottery licensing regime. Submissions were due in May. It will be interesting to see the outcome of this process and whether it will include any changes to the licensing of lotteries in that state.

Also since our last Newsletter, Jamie Nettleton and Professor I Nelson Rose co-presented the Gambling Law course at the University of Melbourne.[3] This course is likely to be presented again in future and is recommended to readers of this Newsletter.

Please contact one of Addisons' Media and Gambling Team if you have any questions or require more information relating to the issues covered by this newsletter or otherwise relating to gambling law issues.

[2] We have previously written about the proposed casinos here: http://www.addisonslawyers.com.au/knowledge/Australia__23_million_people_and_FOUR_new_casinos_!713.aspx

[3] http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/11690

# Contact Us

**Jamie Nettleton**
Partner
Telephone +61 2 8915 1030
Facsimile +61 2 8916 2030
E-mail jamie.nettleton@addisonslawyers.com.au

**Justine Munsie**
Partner
Telephone +61 2 8915 1011
Facsimile +61 2 8916 2011
E-mail justine.munsie@addisonslawyers.com.au

**Richard Keegan**
Special Counsel
Telephone +61 2 8915 1075
Facsimile +61 2 8916 2075
E-mail richard.keegan@addisonslawyers.com.au

**Cate Sendall**
Senior Associate
Telephone +61 2 8915 1027
Facsimile +61 2 8916 2027
E-mail cate.sendall@addisonslawyers.com.au

**Jessica Azzi**
Solicitor
Telephone +61 2 8915 1083
Facsimile +61 2 8916 2083
E-mail jessica.azzi@addisonslawyers.com.au

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# Norfolk Island: Does it have a future as a gambling licensing jurisdiction? - Interview with Rod McAlpine, Director of the Norfolk Island Gaming Authority

Author (s): Jamie Nettleton, Jessica Azzi

Until recently, Norfolk Island was a self-governing territory of Australia. It had its own Legislative Assembly and was not part of the Australian taxation and welfare systems. Norfolk Island also operated its own customs and quarantine services.

Relevantly for Australian gambling operators or operators seeking to enter the Australian market, the Norfolk Island Gaming Authority (the **Authority**) had the power, under Norfolk Island legislation, to grant wagering licences and other categories of gambling licences.[1] Accordingly, it was a licensing jurisdiction considered by potential online gambling licensees wishing to conduct a licensed online wagering business in Australia. Ladbrokes, for example, is a licensee of the Authority. The Authority has been particularly popular with start-ups or overseas brands seeking to enter the Australian market.

In March 2015, the Federal Government announced a number of changes would take place in relation to Norfolk Island, including that:

- the Norfolk Island Legislative Assembly would be dissolved and, from 1 July 2016, there would be a Regional Council in its place. This Regional Council would operate within the jurisdiction of New South Wales in a manner similar to the way in which Lord Howe Island, for example, is part of NSW.
- Norfolk Island residents will also be part of the Australian federal tax and social security systems.
- Norfolk Island residents would have access to the Australian health care system, including Medicare and the Pharmaceutical Benefits Scheme.

A number of Bills reflecting these changes, together with an Explanatory Memorandum, were introduced to Australian Federal Parliament on 26 March 2015. These laws have the effect that laws reflecting these changes would commence on 1 July 2015.

Given the likely effect of these changes, we interviewed Rod McAlpine, the Director of the Norfolk Island Gaming Authority, in April 2015 to seek more information about these changes and, importantly, the likely effect of these changes on existing licensees and the future of Norfolk Island's licensing regime as administered by the Authority. This interview is summarised below.

**a) What is the reason for these changes?**

The Joint Standing Committee on the National Capital and External Territories recently delivered a report titled *"Same country: different world – The future of Norfolk Island"*.[2] This Report highlighted the urgent need to address critical governance, infrastructure and economic issues affecting Norfolk Island. The purpose of the Federal Government's proposed changes is to address these issues.

**b) When will these reforms take place? The media reports suggest that 1 July 2016 is the relevant date. Is this correct?**

It is anticipated that the Bill for amendments to the Norfolk Island Act 1979 will pass through both Houses of Australian Parliament in May/June 2015 and a transition process will

[1] Please also see a Focus Paper we have previously written about Norfolk Island: http://www.addisonslawyers.com.au/knowledge/Ladbrokes_Acquires_Australian_Betting_Operator_bookmaker-com-au_which_is_Licenced_by_Norfolk_Island-_Where__10_Frequently_Asked_Questions_About_Norfolk_Island_as_a_Gambling_Jurisdiction509.aspx

[2] See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Capital_and_External_Territories/Norfolk_Island/Report

commence in July 2015. This will provide a transition period of 12 months prior to the commencement of the operation of the Norfolk Island Regional Council on 1 July 2016.

c) **None of the information available, whether it is the official information released by the Federal Government or media reports, makes any reference to the Authority. At this stage, how will the Authority be impacted by these changes?**

Very little detail is available at this stage. It remains business as usual for the Authority and we are working to ensure that we are included as part of the transition from the existing Legislative Assembly to the Norfolk Island Regional Council and that our licensees can, post 1 July 2016, continue to conduct business under their licences.

d) **Is the Authority currently accepting applications for licences?**

The Authority is very busy at present and under its "business as usual" approach will continue to accept applicants. The Authority intends to continue doing business for Norfolk Island. However, all applicants will be made aware of these impending changes.

e) **At this early stage, do you see any benefits that may be incurred by the Authority and/or its licensees as result of these reforms?**

We see some major benefits for licensees of the Authority and for Norfolk Island. However, we will need to work with the Federal Government to finalise the details of these benefits before we can be in a position to publicly announce these benefits.

Certainly, it is envisaged that each licensee will be able to continue to conduct its business as an Australian licensed business.

f) **Is it likely that the current requirements around tax that apply to the Authority's licensees will change?**

The Authority's licensees have always been liable to pay tax under the Australian taxation system, on the basis that, under this system, tax is payable in the jurisdiction where a company earns its profits. Our duty rates and charges have always been attractive and very competitive. This is unlikely to change.

g) **Should the Authority's licensees be doing anything different following the announcement of the reforms?**

It remains business as usual for the Authority and its licensees. The Authority and our licensees are currently working closely together, and will continue to work in this manner going forward, to ensure a viable and prosperous future.

h) **Prior to the announcement of these changes, did the Federal Government consult with businesses that operate on Norfolk Island or, in the case of gambling operators, under licences granted by the Authority?**

The Authority has not been approached by the Federal Government for our views. The Authority, through its licensees, makes a substantial financial contribution to Norfolk Island's revenue and economy. The consultation process undertaken by the Federal Government appeared to be aimed at the residents of Norfolk Island, rather than government enterprises such as the Authority and its licensees.

Nonetheless, the Authority intends to engage with its licensees and the Federal Government to ensure that it is in a position to transition smoothly once the changes take effect, and that its licensees continue to enjoy all the benefits of a licence from the Authority, including the benefits which attracted existing licence-holders to Norfolk Island initially.

We thank Rod McAlpine for his participation in this interview. See the introduction to this newsletter for subsequent developments.

# A Duty of Care for Gambling in Australia? Roll the Dice, (and Possibly) Pay the Price

Author (s): Jamie Nettleton, Alexander Selig

**Overview**

The concept of a duty of care continues to be a contentious legal test. The existence of a duty of care in the gambling sector is often presumed, wrongly, to apply in cases of problem gambling losses.

This is illustrated by a recent decision in the High Court of Australia.[1] A similar finding was reached in Canada in *Ross v British Columbia Lottery Corporation*.[2] In Ross, the Supreme Court of British Columbia determined that, while casinos may have a positive duty to seek help for problem gamblers[3], there is no duty to "guarantee or ensure" that the plaintiff would cease gambling altogether. This case continues the debate on whether or not gambling providers can be held liable for excessive gambling by problem gamblers. Although Australian case law suggests there may be instances where a successful negligence claim can be brought, it is generally understood that no duty of care is owed to problem gamblers to prevent them from suffering gambling loss.

**Duty of care**

In tort law, a duty of care is a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established in order to proceed with an action in negligence.

Currently, the 'salient features' approach is the test widely accepted in Australia for determining the existence of a duty of care. This adopts an incremental approach based on the relevant facts of individual cases.[4] As it stands, the salient features test includes, but is not limited to:

- the foreseeability and nature of harm;
- the control and assumption of responsibility;
- vulnerability and reliance; and
- the physical, temporal and relational proximity of both parties.[5]

***Ross***

The issue for consideration by the Canadian Courts in Ross was whether the relevant gambling operators, being British Columbia Lottery Corporation (**BCLC**) and local casinos, were liable to problem gamblers who, after enrolling in a voluntary self-exclusion program, nevertheless continued to gamble. The Plaintiff, Joyce Ross, a problem gambler, enrolled in the BCLC Voluntary Self-Exclusion Program in 2007 for a three-year period, but proceeded to breach the terms of that Self-Exclusion Program by entering casinos during that period. The Court rejected the Plaintiff's claims.

The Court reasoned that:

- The BCLC and the two casino defendants had acted appropriately and in accordance with the applicable standard of care in their implementation of the BCLC Voluntary Self-Exclusion program.

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[1] *Kakavas v Crown Melbourne Limited* [2013] HCA 25 (Kakavas).
[2] *Ross v. British Columbia Lottery Corporation* [2014] B.C.J No. 612 (Ross).
[3] Ibid, [533].
[4] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [597]–[598] (Gummow and Hayne JJ).
[5] Ibid.

- The "person enrolling in the program has to retain the primary obligation to control their gambling or cease it all together." The Court found the primary responsibility to remain out of the casinos rested with Ms Ross, not the defendants. Moreover, the Court found that the Plaintiff was the "author of her own misfortune" because, during her period of self-exclusion, she took steps deliberately to avoid being identified by casinos.
- The policies and practices in place, and the comprehensive surveillance and security systems employed by the defendants were found to be appropriate and reasonable[6], and were applied non-negligently in the case of the Plaintiff.

The Court found that a narrow duty of care exists, but held that the duty is limited to implementing a voluntary self-exclusion program that requires casinos to exercise due diligence to prevent and not permit knowingly any person who has been barred from the casino to enter. However, the Court considered that the duty to cease gambling remained with the individual gambler, not the gambling operator.

**Australian Case Law**

Australian case law has rejected on various occasions the notion that gambling operators owe a duty of care. In *Reynolds v Katoomba RSL All Services Club Ltd*[7] ('*Reynolds*'), it was recognised that problem gamblers cannot recover economic losses suffered from gambling. In Reynolds, the plaintiff brought a claim against the Katoomba RSL Club to recover substantial losses incurred while gambling on poker machines on the Club's premises.

Spigelman CJ found that, unless "extraordinary"[8] circumstances arise, "economic loss occasioned by gambling should not be accepted to be a form of loss for which the law permits recovery."[9] Further, he stated that a duty of care to a gambler should only be held to exist after careful consideration as "loss of money by way of gambling is an inherent risk in the activity and cannot be avoided."[10] His Honour concluded that the facts before the Court in *Reynolds* indicated that it was an ordinary case where the duty of care should not be recognised as the loss occurred following a "deliberate and voluntary act on the part of the person to be protected." However, it was held that whether a duty of care exists turns on the "whole of the circumstances".[11] This leaves open the possibility that a claim of negligence in an "extraordinary" case may be successful.

*Foroughi v Star City Pty Limited*[12] ('*Foroughi*') followed the reasoning of Reynolds. Sydney's Star City Casino was found to not owe Mr Foroughi (a gambler) a duty of care to prevent self-inflicted economic loss from gambling, as he independently breached his voluntary exclusion order. Jacobson J held that the duty of care argument in Foroughi was weaker than that argued in *Reynolds*, as Mr Foroughi "voluntarily undertook responsibility for his own conduct in agreeing not to enter Star City and to seek assistance and guidance of a qualified and recognized counselor."

The High Court decision in *Kakavas* related to a claim brought by a gambler to recover gambling losses from Crown Casino. Harry Kakavas, a 'high roller' gambler, sought to recover monies in excess of $20 million that had been spent gambling at Melbourne's Crown Casino between 2004 and 2006.

Kakavas claimed that Crown Casino had engaged in 'unconscionable conduct'.[13] He argued that Crown Casino incentivised his gambling by providing the use of a jet, various gifts, and a line of credit.

The Court made a variety of general observations in its overview of Kakavas' claim but concluded that this was a case based on 'unconscionable conduct', meaning that a duty of care for gambling, which has previously been deliberated, may still be possible. Moreover

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[6] Ibid, [539]-[541].
[7] [2001] NSWCA 234.
[8] Ibid, [17].
[9] Ibid, [9].
[10] Ibid, [17].
[11] Ibid, [27].
[12] [2007] FCA 1503.
[13] *Kakavas* [2013] HCA 25, [5]-[6].

the decision in *Kakavas* does not rule out the possibility of unconscionable dealing being successfully argued in other cases involving problem gamblers. One suspects the likelihood of success will be increased by the presence of a more conventionally disadvantaged victim, whose vulnerability should be obvious to the gaming venue. In the Supreme Court, Harper J posited that problem gambling could be classified as an 'impairment' that 'could be classified as a special disability for the purposes of the doctrine of unconscionable dealing'.[14] The subsequent judgment of the High Court in *Kakavas* does not change the possibility that a particular set of circumstances can still give rise to a successful claim of a duty of care.

**Conclusion**

What may amount to an "extraordinary" set of circumstances that permit recovery of economic loss via gambling, remains to be seen in Australian law. The case of *Ross* followed the same line of reasoning as the current Australian case law, being that the duty to cease gambling activity still resides with the individual, as opposed to the gambling provider. Whether a duty of care will eventually be imposed on gambling providers to monitor and stop excessive gambling by problem gamblers remains to be seen.

[14] *Paradise Enterprises Inc v Kakavas* [2010] VSC 25, [12].

# Extraterritorial Application of Australian Law - Enforcement against Foreign Companies and Risk of Extradition in respect of Gambling Offences

Author (s): Jamie Nettleton, Mary Huang and Elizabeth Cameron

**Overview**

Foreign companies sometimes overlook the importance of considering how Australian law applies to their business when dealing with Australian customers or establishing a presence in Australia (**Australian Link**). There is a common misconception that, because foreign companies are not located in Australia, they are not subject to Australian law. However, this is not the perspective of Australian governmental authorities nor the law, and foreign companies should be aware that Australian law applies where the relevant law has extraterritorial effect.

In an environment where various Australian jurisdictions enact laws to regulate the Internet and the provision of goods and services to Australian customers by foreign companies, it is important for foreign companies with an Australian Link to consider whether their conduct is prohibited expressly by Australian law, and if so, whether the relevant law applies extraterritorially.

If Australian law is contravened and the relevant law applies extraterritorially, the contravening entity will be at risk of:

a) facing enforcement action by the relevant enforcement body; and/or

b) having its directors or officers extradited to Australia for criminal prosecution (where the prohibited conduct constitutes a criminal offence and liability extends to directors or officers).

**Extraterritorial Application of Australian Statutes**

Australian statutes are restricted generally in their operation to activities that take place within the relevant jurisdiction.[1] In effect, this means that statutes are presumed to have no extraterritorial application. Unless, either by express words or necessary implication a statute applies beyond the boundaries of the relevant jurisdiction, it must be construed as limited in its operation to the relevant jurisdiction and not applicable to any person, thing or circumstance not within the relevant jurisdiction.[2] For example, in *Kay's Leasing Corporation Pty Ltd v Fletcher*[3], it was held that the provisions of the *Hire Purchase Act* (NSW) only apply to contracts entered into in New South Wales.

However, the presumption against extraterritorial application may be rebutted if:

a) by express words, the statute applies extraterritorially[4]; or

b) the statute implies a contrary intention, which may be achieved by demonstrating that, if the statute were only to apply within the territorial limits of the jurisdiction, its object would be defeated.

Foreign citizens are clearly subject to a jurisdiction's laws when present in the jurisdiction, subject to special rules such as sovereign immunity.[5] However, where extraterritorial application has been implied into the legislation (rather than being provided expressly in the

[1] *Acts Interpretation Act 1901* (Cth), s 21(1); *Interpretation Act 1987* (NSW), s 12(1); *Interpretation of Legislation Act 1984* (Vic), s 48; *Acts Interpretation Act 1931* (Tas), s 27; *Acts Interpretation Act 1954* (Qld), s 35; *Legislation Act 2001* (ACT), s 122; *Interpretation Act 1978* (NT), s 38.
[2] *Commissioner of Stamps (Qld) v Weinholt* (1915) 20 CLR 531.
[3] (1964) 116 CLR 124.
[4] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 (O'Connor J).
[5] *Walker v New South Wales* (1994) 182 CLR 45.

statute), it will only have the effect of applying to foreign citizens outside the jurisdiction if the acts of the foreign citizen has some harmful connection with the jurisdiction.[6]

If a statute has extraterritorial application, it means that the relevant enforcement body has jurisdiction over the person who engaged in the prohibited conduct, even if that person is located outside the relevant jurisdiction. It also means that the relevant enforcement body may take any enforcement action allowed under the statute against the contravening entity, including seeking monetary penalties.

In the gambling context, relevant legislation exists at both the Australian Federal and State/Territory levels which purports to have extraterritorial application.[7] For example, the Federal gambling legislation, the *Interactive Gambling Act 2001* (Cth) (the **IGA**), extends specifically its application to conduct overseas by stating the following:

> *"[u]nless the contrary intention appears, this Act extends to acts, omissions, matters and things outside Australia"*.[8]

As the IGA applies extraterritorially, the prohibitions contained in the IGA in respect of the provision and advertising of interactive gambling services to Australian customers, also apply to companies located overseas which provide or advertise interactive gambling services to Australian customers.

**Enforcement Action**

While many pieces of Federal, State and Territory legislation purport to apply extraterritorially, there are a number of practical difficulties which exist in commencing proceedings against companies outside Australia, namely:

a) whether the contravening entity can be compelled to appear in an Australian court; and

b) whether the relevant enforcement body is able to meet the pre-conditions required to serve validly a foreign company (such as permission from the Federal Attorney-General).

There are other ways in which enforcement bodies may take action against the contravening entity. In the gambling law context, the following types of enforcement actions have been taken by various gambling authorities:

a) notifying approved providers of family friendly filters[9] of the website hosting prohibited internet gambling content so that the website is blocked for people using family friendly filters (this right is specific to the Australian Communications and Media Authority, the regulatory body responsible for administering the IGA);

b) issuing warning letters to companies perceived to be contravening the relevant gambling law; and

c) adding websites hosting prohibited gambling content to scam alerts.

**Extradition**

If the relevant statute has extraterritorial application and extends liability for the offence to the executives or officers of the contravening entity, those executives or officers face the risk of extradition.

The *Extradition Act 1988* (Cth) (**EA**) governs the process of extradition of persons located overseas to Australia. A person may only be extradited to Australia for an "extraditable offence". An "extraditable offence" is an offence for which the penalty is imprisonment for a period of not less than 12 months[10], although this term may be increased or reduced by

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[6] *Lawson v Fox* [1974] AC 803, 808 (Lord Diplock).
[7] On the State/Territory level, see the *Interactive Gambling (Player Protection) Act 1998* (Qld), s 8; the *Interactive Gambling Act 1998* (ACT), s 8 and the *Gambling Regulation Act 2003* (Vic), s 7.1.6.
[8] *Interactive Gambling Act 2001* (Cth), s 14.
[9] Listed in Schedule 1 to the IGA Industry Code.
[10] *Extradition Act 1988* (Cth), s 5.

regulations.[11] While there are no provisions under the IGA for imprisonment, there are provisions in various State and Territory unlawful gambling legislation which provide for imprisonment as a penalty.[12]

This means that, where a person has committed an offence under the gambling legislation which has extra-territorial effect and gives rise to a potential imprisonment of a term of two years or more, the relevant Commonwealth, State or Territory law enforcement agency may secure an arrest warrant and make an extradition request to the Australian Attorney-General or the Australian Minister for Justice and Customs to prosecute the person in Australia.[13]

If the extradition request is approved by the Australian Attorney-General or the Australian Minister for Justice and Customs, the request will be submitted to the relevant government body in the jurisdiction from which extradition is requested, which will then decide whether or not to surrender the person. One of the factors that may be taken into account by the extraditing country is whether the offence in question has 'dual criminality', which requires the alleged offence to also be a criminal offence under the laws of the extraditing country. Many of the extradition arrangements to which Australia is a party impose a requirement of 'dual criminality'.

If the extraditing country surrenders the person, the Australian law enforcement agency will escort the person to Australia, where they would be prosecuted for the offence. A person who has been extradited for committing an extraditable offence may only be detained or tried in Australia for that offence.[14]

Detailed regulations exist for almost each country with which Australia has entered an extradition treaty. This means that the specific process to be followed in any given extradition request will depend heavily on the citizenship and location of the executives or officers of the contravening entity.

**Implications**

While it is rare for authorities in Australia to take action against persons located overseas in respect of gambling offences and we are not aware of any extradition requests that have been granted in respect of gambling offences committed in Australia, it does not mean that enforcement or extradition will not occur in the future. (Other offences have been the subject of successful extradition requests, for example, fraud/theft offences, drug offences, and bribery/corruption offences.) As the regulatory landscape changes constantly, there is always the possibility that, if the enforcement of gambling offences becomes a law enforcement priority in the future, gambling authorities in Australia are likely to pursue relevant contraventions vigorously.

Accordingly, to assess the risks that might arise in providing goods and services to Australian customers or establishing a presence in Australia in breach of Australian gambling laws, foreign companies should consider three key issues:

a) whether the relevant goods or services, or the way they conduct their business, are allowed in Australia;

b) if not allowed, whether the relevant law prohibiting the conduct applies extraterritorially; and

c) whether liability in respect of the company's actions could extend to executives, officers, employees or other related parties.

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[11] For example, the *Extradition (Commonwealth Countries) Regulations 2010* (Cth) has amended the definition of 'extradition offence' so that they encompass only those offences where the penalty for contravention is greater than or equal to two years imprisonment.
[12] Offences relating to gambling which carry penalties of imprisonment include: *Unlawful Gambling Act 1998* (NSW), ss 8, 9, 10, 11, 11A, 12, 13, 14, 15, 18, 19; *Gambling Regulation Act 2003* (Vic), s 7.2.2, 7.4.1, 7.4.3, 7.4.8, 7.4.10; *Interactive Gambling (Player Protection) Act 1998* (Qld), ss 16, 17; *Interactive Gambling Act 1998* (ACT), s 14.
[13] *Extradition Act 1988* (Cth), s 40.
[14] *Extradition Act 1988* (Cth), s 6; 42.

# Fair Trading (Gambling Product Retailer Industry Code) Regulations 2015: South Australia Regulation of 'Gambling Style Toys'

Author (s): Jamie Nettleton, Alexander Selig

Recent developments in South Australia continue to blur the lines about what constitutes gambling. The Fair Trading (Gambling Product Retailer Industry Code) Regulation 2015 is the latest example of the South Australian government's objective to target activities which appear to treat gambling as a normalised activity particularly where those activities are directed at or where children are involved. South Australia is seeking to introduce restrictions on the sale and promotion of toys with characteristics, such as elements of risk and chance, that are analogous to gambling practices. This crackdown follows previous efforts in 2013 to protect children from social apps that may contain gambling elements.

It is proposed that the Code will require retailers to comply with certain standards relating to the advertisement, presentation and display of gambling style products where they are positioned next to items targeted at children. A further requirement is that gambling style products are to include statements that they are recommended for use by persons over the age of 18.

These products include:

a) a set or kit containing devices, equipment and accessories to enable a person to play a prescribed game;

b) gambling chips;

c) a roulette wheel;

d) a pack of playing cards that displays prominently the name of a prescribed game on its packaging; or

e) a product, the primary purpose of which is to enable a person to play—

   i. a game for monetary or other stakes; or

   ii. a game involving the making or accepting of a wager.

"Prescribed games" are defined to include any game that resembles baccarat; bingo, blackjack, poker, pontoon, roulette, or two up.

According to the South Australian government, these reforms are "a bid to safeguard children from forming dangerous habits."[1] The press release states that these reforms are driven by concerns over the normalisation of gambling behaviour in children, and the increased probability of gambling habits that could potentially flow after prolonged exposure to any games which have gambling characteristics.

It is unclear whether these proposals are founded on research, or findings from a study that has been conducted, or reflect a concern that anything that has gambling characteristics is harmful per se. To appreciate the practical effect of the South Australian government's approach, it is necessary to reflect on the general understanding of the conduct that constitutes gambling under Australian law. In general terms, for an activity to constitute gambling, the relevant game must satisfy three requirements. First, the game must involve chance, or a mix of chance and skill. Secondly, consideration must be present. Lastly, a prize with a discernible monetary value must be provided.

However, many of the products to which the proposed Code will apply do not involve necessarily a monetary prize, nor any spending beyond the initial purchase. It is merely the

[1] Government of South Australia, "NEWS RELEASE: New code to protect children from gambling promotion", 2 March 2015 http://www.cbs.sa.gov.au/assets/medicomms/20150302-MR-GG-gamblingproductstargetingchildren.pdf

characteristics of the product that gives rise to the concern. On this basis, it could be argued that these reforms are too stringent.

However, these proposals are indicative of the policy approach of the current South Australian government towards gambling. The "Gambling starts with games" campaign, the Children and Gambling Watch List (the Watch List), and the introduction of the classification system for gambling related products are further examples of the South Australian government's policies to "reduce the exposure of young South Australians to gambling like games".[2]

The proposed Code imposes obligations on a broad range of retail outlets in South Australia, including Big W, K Mart and Woolworths. However, it does not appear to cover online shopfronts or products being supplied online. Also, the proposed Code does not appear to restrict references to these products in media, nor in films or advertisements which may be broadcast to, or capable of being viewed by, persons in South Australia.

This approach may reflect an understanding of the difficulties that would exist in enforcing obligations of this nature in these circumstances. Also, it may be the case that the government considers that it is better to target activities of concern which can be controlled and are within their jurisdiction, rather than putting in place legislative proposals that are too ambitious and difficult to enforce.

The draft Code can be found with this link http://www.cbs.sa.gov.au/wcm/business-and-traders/business-advice/proposed-gambling-product-retailer-industry-code/. The closing date for submissions was Friday, 27 March 2015. The submissions are being considered by the South Australian Government. We will report on the outcome of the government's review in due course.

[2] South Australian Government website "Gambling is NO GAME" http://nogame.com.au/.

# New Zealand - Review of Offshore Online Betting Regulation

Author (s): Jamie Nettleton, Alexander Latu

**Overview**

New Zealand has announced a review of its legal approach towards online betting services provided by offshore operators to New Zealand residents. This announcement was made on 16 April 2015 by New Zealand's Racing Minister, Nathan Guy. The review is to be conducted by a Working Group in accordance with specified Terms of Reference.

**Current Legal Position in New Zealand**

New Zealand's current regulatory regime concerning gambling is largely set out in the Gambling Act 2003 and the Racing Act 2003 (the **Acts**). It has the following key features:

- Gambling is prohibited generally unless authorised under the Acts.
- The Gambling Act makes illegal "remote interactive gambling". This includes gambling by a person at a distance through a communications device (which would cover gambling online).
- The New Zealand Racing Board (**NZRB**), to the extent it provides gambling services authorised under the Racing Act, is exempt from this prohibition. The NZRB is statutorily obliged to use betting profits to benefit the racing industry and sporting organisations.
- Exempt from the prohibition in the Gambling Act are gambling providers located overseas. This is because the definition of "remote interactive gambling" **excludes** "gambling by a person in New Zealand conducted by a gambling operator located outside of New Zealand".
- Advertising to New Zealanders by these gambling providers are prohibited.

The overall effect of the Acts is that the NZRB has a monopoly and is the only New Zealand based entity entitled to conduct sports and racing wagering. The NZRB runs the TAB - this is the customer-facing portal for wagering and provides services both online and through outlets. However, the TAB competes against online wagering-providers located outside of New Zealand in providing betting services to New Zealand-based customers.

The perceived difficulties with this approach (and the basis) of the review announced recently by Mr Guy include whether offshore betting operators are making money on New Zealand racing and sports without:

- being taxed;
- 'giving back' to the racing industry or sporting bodies; and
- adhering to harm-mitigation requirements under New Zealand law.

These issues are reflected in the Terms of Reference.

The review aims to "clarify the extent of the problem and work towards developing solutions". Its announcement follows a speech given by Mr Guy to the NZRB's Annual General Meeting in November 2014. In estimating $300 million as the amount wagered with online offshore bookmakers, he referred to 'combating' this issue as his number one priority for the coming term. He referred positively to developments in Australia concerning 'cracking down' on offshore bookmakers.

The Working Group comprises a former Minister of Internal Affairs, current officials of the Department of Internal Affairs (which bears responsibility for gaming regulation in New Zealand); the Chief Executive of the NZRB; the Chair of Sport New Zealand, and a breeder and racehorse owner who also serves as the NZRB's Thoroughbred representative.

We note that reviews of offshore online betting have occurred recently in Singapore and the United Kingdom. In Singapore, the supply and use of online gambling services has been prohibited; while, in the UK, a point of consumption tax has been introduced in an attempt to generate a 'level playing field'.

The New Zealand Working Group's final report is expected by 30 September 2015. It will be interesting to see which approach, if either, is the subject of the recommendations of the Working Group.