ADDISONS

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Gambling Law & Regulation Newsletter

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Overview

Welcome to the December 2018 edition of the Addisons Gambling Law & Regulation Newsletter.

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

The papers cover the following key developments:

1. The long awaited National Consumer Protection Framework was announced on 16 December by The Hon. Paul Fletcher, the Minister for Families and Social Services. This framework (commonly known as the NCPF) reflects the agreement reached between the relevant ministers of the Australian Federal Government and all Australian States and Territories relating to various measures affecting the Australian licensed wagering sector. Many of these measures were recommended in the O'Farrell Review that was conducted in 2015 and is referred to in our previous newsletters and focus papers. Further details are in 'National Consumer Protection Framework: What does this mean for Australian Online Licensed Wagering Operators?'.

2. The introduction of modernised gambling legislation in NSW relating to various "soft" gambling products, such as trade promotions, sweepstakes and raffles. The Community Gaming Act was passed by the New South Wales Parliament in November 2018 and will come into force in 2019. This Act replaces the Lotteries and Art Unions Act 1901 which was long overdue for repeal, having been passed in the pre-Internet era and containing a number of unclear provisions.

   It is hoped that the new Consumer Gaming Act (and the Regulations, which have not yet been released) will provide clarity to businesses conducting trade promotions and other soft gambling products in New South Wales – see 'What is the Chance the Game has Changed? New South Wales Broadens the Regulatory Framework for Games of Chance'.

3. The report of the Senate Environment and Communications References Committee in respect of the use of loot boxes in video games has now been released. The report recommends that further research should be conducted by the Australian Government in respect of these features of video games and any similarities they bear to gambling products (if any) – this is consistent with the approach being taken in the United States and the United Kingdom, both of which are initiating similar reviews – see 'Australian Loot Box Inquiry – Harmless Gameplay Enhancement or Predatory Gambling Scheme?'.

4. As part of the continued enforcement efforts being taken by the Australian Government towards the activities of offshore wagering operators taking bets from Australians, consideration is being given to implementing measures which would require ISPs to restrict access by Australians to websites of overseas online wagering operators.

   Although this is currently the subject of a confidential industry review, it is quite likely that the issue will be given further consideration in the course of 2019 – see 'Australian Government Proposes Scheme to Block Illegal Offshore Wagering Websites'.

5. Finally, various Australian States and Territories have now introduced legislative provisions imposing taxes commonly known as the Point of Consumption (or **POC**) Tax, on licensed Australian wagering operators providing betting services to residents of that particular state. Details of the relevant statutory provisions are summarised in 'A State of Flux: Australia's Point of Consumption Tax – Implications for Wagering Operators'.

Conclusion

We would like to refer you to Addisons Gambling & Gaming Law showcase page on LinkedIn where regular updates appear in relation to the latest developments in gambling law in Australia and events in which members of our team are involved.

You will be able to find copies of previous issues of our Gambling Law & Regulation Newsletters, as well as other Focus Papers on, our LinkedIn page at https://www.linkedin.com/showcase/addisons-gambling-law

We hope you enjoy this 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 and Gaming team.

With best wishes for the holiday season and 2019.

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National Consumer Protection Framework: What does this mean for Australian Online Licensed Wagering Operators?

Authors: Jamie Nettleton and Karina Chong

Overview

Agreement has been reached between the Commonwealth Government and all Australian State and Territory governments to implement the National Consumer Protection Framework (**NCPF**) in respect of online wagering services conducted legally in Australia. The NCPF contains 10 measures to minimise gambling related harm and provide greater protection for Australians. These measures, some of which are already in place, will come into effect gradually across all Australian jurisdictions over a period of 18 months beginning on 26 November 2018. The measures are based on the recommendations of the 2015 Review of Illegal Offshore Wagering (**O'Farrell Review**).[1]

Key Points

The NCPF will apply to Australian licensed online wagering operators. This covers wagering using any remote telecommunication service, such as telephone betting services, but does not apply to land based wagering services, for example, on course bookmaking services or betting system terminals in retail betting shops, pubs, clubs and hotels.

These measures will be mandatory. The means by which each measure will be introduced is prescribed only for some of the measures, for example, through further amendments to the *Interactive Gambling Act 2001* (Cth) (**IGA**) and by virtue of a new rule to Australia's anti-money laundering legislation.[2] We anticipate that other measures will be implemented by virtue of licensing conditions and State/Territory legislation.

Like many other announcements made in relation to gambling by the Federal Government (or under its auspices), scope exists for additional (or more onerous) measures to be introduced at the State/Territory level. Accordingly, the announced measures should be viewed as a minimum standard only.

The NCPF contains 10 measures, which address:

- the prohibition of lines of credit for wagering purposes;
- the discouragement of the use of payday lending for online wagering;
- a reduction in the customer verification period;
- prohibitions on specified inducements;
- greater and clearer accessibility and availability of account closure mechanisms;
- the implementation of a voluntary opt-out pre-commitment scheme;
- the provision of activity statements to customers;
- consistent responsible gambling messaging;
- training of staff in the responsible conduct of gambling; and
- the development and implementation of a national self-exclusion register.

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[1] O'Farrell Final Review Report: *Review of Illegal Offshore Wagering* (2015), available here.

[2] See Addisons focus papers entitled "A National Consumer Protection Framework for Australian Online Licensed Wagering Operators: Proposed Changes", and "Australia – Release of Report on Illegal Offshore Wagering – Australia Missed Opportunity for Reform on Australia's Prohibitions on Online Gambling".

Implementation

The measures in the NCPF will come into effect progressively over 18 months, beginning from 26 November 2018. Some measures, such as the prohibition of credit and the discouragement of payday lending are in effect already through the enactment of the *Interactive Gambling Amendment Act 2017*, on 17 February 2018. Others are likely to come into effect reasonably soon, for example, the reduction in the customer verification period[3] and the prohibition relating to open account inducements. For many of the measures, such as the voluntary opt-out pre-commitment scheme, the requirement to provide activity statements and the obligations related to gambling messaging there will be a trial period before the relevant measures come fully into effect. The most complex measure, the national self-exclusion register, will come into effect on or before 26 May 2020 (through an amendment to the IGA), but only after the completion of a successful testing process.

The introduction of these measures constitutes the implementation of many of the recommendations of the O'Farrell Review. The primary objective is to provide Australian wagering customers with the means to protect themselves from losses that may result from excessive wagering, as well as to place restrictions on Australian licensed wagering operators with the same objective.

Some observations

- These measures apply only to online wagering. They do not apply to land-based wagering or other forms of gambling. Further, they do not apply to lotteries or online lotteries (this is because those forms of gambling were outside the scope of the O'Farrell Review).
- Offshore wagering operators will not be subject to these restrictions. Although these services may still be capable of being accessed by Australians, Australia has introduced measures targeting those offshore operators and is considering further measures to restrict the availability of those wagering and betting services.[4]
- Land-based wagering operations will not be subject to these restrictions, save to the extent relevant services are provided online.
- The measures are a minimum. It will be interesting to see whether individual States/Territories reach the view that additional harm minimisation measures are required. Theoretically, the implementation of these measures could result in legislative changes taking place in South Australia, Western Australia and New South Wales, for example, to remove restrictions which are inconsistent. We consider it more likely that many existing restrictions, which are more onerous, will remain in effect. It is to be hoped, however, that certain inconsistent measures (for example, in relation to gambling messaging) are changed to promote consistency across Australia.
- Considering the recommendations made in the O'Farrell Review, a large number of these have now been implemented. If measures are introduced which require greater controls to be put in place by ISPs to target offshore wagering[5], there will be very few of the 18 recommendations made in the O'Farrell Review that have not been implemented.
- Does this mean that it is now appropriate to revisit the one recommendation made by the O'Farrell Review which was not accepted by the Federal Government, namely, should consideration be given to the regulation of in-play betting? Although it was suggested in the Wood Review[6] that the regulation of in-play betting should be

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[3] AUSTRAC released draft amendments to Chapter 10 of the AML/CTF policy on 13 December 2018 to address this issue. Comments have been requested by 24 July 2019.

[4] See Addisons Focus Paper entitled 'Australian Government Proposes Scheme to Block Illegal Offshore Wagering Websites.'

[5] Ibid.

[6] See Addisons Focus Paper entitled "Report of the Review of Australia's Sports Integrity Arrangements: How should Wagering in Australia be Regulated?".

reconsidered, we have considerable doubt whether there exists any appetite by the Federal Government (or the Opposition) to permit online in-play betting in relation to sports.

Way Forward

The introduction of the NCPF is a material development in the regulation of wagering and gambling in Australia. It demonstrates the Australian Government's collaborative commitment to addressing harm minimisation in respect of gambling in Australia.

We are expecting that, as various steps are taken to implement the measures in the NCPF, further publicity will be given to its achievements. But the real question is - will it lead to greater national regulation in the gambling sector?

For further information, please do not hesitate to contact us.

What is the Chance the Game has Changed? New South Wales Broadens the Regulatory Framework for Games of Chance

Authors: Jamie Nettleton, Shanna Protic Dib and Carmen Massey

Overview

In October 2018, the New South Wales government introduced the *Community Gaming Act 2018* (NSW) (**CGA**). This replaced the *Lotteries and Arts Union Act 1901* (NSW) (**LAUA**). The CGA will come into effect in 2019.

The CGA provides a revised framework for the conduct of gaming activities for charitable, not-for-profit and trade promotion purposes.

In effect, the CGA broadens the scope of the LAUA by prohibiting the conduct of certain *gaming activities* and providing scope for a greater range of *gaming activities* to be conducted legally. These *permitted gaming activities* are likely to extend beyond the gaming activities currently contemplated by the LAUA (such as lotteries, raffles and games of chance (trade promotions)).

General prohibition

The CGA, much like the LAUA, imposes a blanket prohibition on the conduct of *gaming activities* in New South Wales.

Notably, this prohibition will have extra-territorial application. This means that, the prohibition will apply to any person outside of New South Wales (either in a different Australian state or territory, or outside of Australia) that conducts a *gaming activity* (other than permitted gaming activities) in which persons present in New South Wales can participate.

What is a gaming activity?

A *gaming activity* includes:

- a game of chance; or
- a game partly of skill and partly of chance; or
- where a prize is awarded on the basis of a chance contingency that is related to a horse race, sporting event or competition; or
- any activity, events, scheme or other matter prescribed as a *gaming activity* in the Regulations.

The scope of a *gaming activity* under the CGA is broad. What is new is the term “chance contingency” – the scope of this terminology is unclear and no guidance is given. Does it cover contingencies, such as the outcome of a sporting event? Or only chance occurrences relating to a contingency? Or does it cover guessing competitions?

Exception to the prohibition: permitted gaming activities

The CGA provides for certain gaming activities (**permitted gaming activities**) to be excluded from the blanket prohibition on the conduct of *gaming activities*. The CGA also provides for a person to be granted authorisation to conduct a *permitted gaming activity*.

The CGA does not set out specific examples of *permitted gaming activities*. Rather, the CGA specifies that the Regulations may set out specific *permitted gaming activities*.

However, importantly, the legality of any *gaming activity* that is currently permitted or authorised under the LAUA, and which does not conclude before the commencement date of the CGA will not be affected.

What's new in the CGA?

The Regulations

As indicated above, the CGA broadens the scope of the LAUA by prohibiting the conduct of *gaming activities* and providing an opportunity for a greater range of *gaming activities* to be conducted legally, to be known as *permitted gaming activities*. The CGA achieves this by providing in the Regulations a mechanism to prescribe various matters relating to *gaming activities*, including;

- those activities, events or schemes that will be considered a *gaming activity;*
- specific *gaming activities* which can be excluded from the scope of the prohibition; and
- specific requirements for, or conditions that may apply to, the conduct of *permitted gaming activities.*

It is important to note, however, that the Regulations have not yet been released. Accordingly, it is unclear what will considered a *permitted gaming activity*, or the level of detail that will apply to the specific requirements for, or conditions that may apply to, the conduct of *permitted gaming activities*. It is therefore premature to ascertain the impact that the introduction of the CGA will have on businesses in New South Wales.

Advertising defences

Under the CGA, and similar to the LAUA, it is an offence to publish an advertisement or otherwise promote a *gaming activity* that is prohibited.

However, in connection with this prohibition, the CGA introduces two defences for a person who has published an advertisement relating to a *gaming activity* that is prohibited under the Act.

A defence may be available to a person who has published an advertisement or promoted a prohibited *gaming activity* if:

- that person did not know, or could not reasonably have known, that the *gaming activity* was prohibited; and
- the advertisement was approved by the person conducting the *gaming activity*, and the person who published the advertisement was not notified that the publication of the advertisement was prohibited.

This reflects a similar policy behind NSW legislative prohibitions in respect of the publication of wagering advertising[1].

Enforcement powers

The CGA also makes a number of changes to the investigatory and enforcement powers of the officers authorised to administer the CGA.

Amongst other things, the CGA will:

- allow an authorised officer to issue compliance notices where a person is believed to be in contravention of a provision of the CGA;
- allow the Secretary to accept enforceable undertakings in respect of a contravention of the CGA; and
- empower the court to impose, suspend, vary or revoke any authorisation for a gaming activity granted under the CGA.

[1] See Addisons Focus Paper entitled "Rising stakes in NSW: Everything you need to know about the overhaul of NSW gambling advertising laws"

How will the introduction of the CGA impact your business?

Generally, most businesses that operate outside the gambling industry would not normally expect their activities to be subject to gambling laws.

However, to the extent that businesses across a range of industries engage in the promotion in New South Wales of their products or services by way of trade promotions, raffles or other similar activities, the CGA may be particularly relevant.

A trade promotion is a type of *gaming activity* that is used to promote goods or services provided by a business, and often takes the form of sweepstakes, competitions or giveaways that provide the winning participant with a prize. A trade promotion can be conducted in various ways, including through activations at specific locations and on various media platforms (such as traditional media platforms (radio and television) and social media platforms (Instagram and Facebook).

A trade promotion that is a game of chance (rather than a game of skill)[2] is an example of a *gaming activity* that is regulated currently by the LAUA, and will continue to be regulated by the CGA.

Under the LAUA, a trade promotion that is a game of chance can only be conducted by a business when certain conditions are met, and a permit has been obtained from NSW Fair Trading. This includes, for example, the requirement for a set of terms and conditions for the trade promotion (which themselves must comply with various prescriptive requirements that are fairly rigorous to be submitted to the regulator).

Under the CGA, there is no guidance, at this stage, with respect to the requirements with which a business must comply when conducting a trade promotion. Although it is not anticipated that the Regulations under the CGA will differ greatly from the LAUA, any slight difference between the LAUA and the Regulations under the CGA with respect to the specific requirements and conditions that apply to the conduct of a trade promotion may give rise to changes to the ways in which businesses can promote its goods or services in NSW by way of a trade promotion.

Addisons will continue to monitor the release of the relevant Regulations and will provide updates at the relevant time.

If you have any queries regarding how the CGA will affect your business, please do not hesitate to contact us.

[2] See Addisons Focus Paper entitled "Trade Promotions: Potential Legal Issues – Checklist for businesses: what you should consider before you conduct a promotion"

Australian Loot Box Inquiry – Harmless Gameplay Enhancement or Predatory Gambling Scheme?

Authors: Jamie Nettleton, Karina Chong and Despina Bouletos.

Introduction

Australia's Loot Box inquiry has handed down its report, with the majority not recommending any change to the current regulatory regime. The view for the moment at least – is there does not need to be any regulatory intervention to address loot boxes.[1]

Last Tuesday, 27 November 2018, the Senate Environment and Communications References Committee (the Committee) handed down its Report on Gaming Micro-Transactions for Chance-Based Items.[2] The Committee was tasked with investigating the extent to which gaming micro-transactions for chance-based items, more commonly known as 'loot boxes', may be harmful, with particular reference to:

a) whether the purchase of chance-based items, combined with the ability to monetise these items on third-party platforms, constitutes a form of gambling; and

b) the adequacy of the current consumer protection and regulatory framework for in-game micro transactions for chance-based items, including international comparisons, age requirements and disclosure of odds.

42 submissions were made to the Inquiry by stakeholders including statutory bodies, state legislators, representatives of the games sector, prominent individuals and academics, and held two public hearings to assist its inquiry.[3]

Findings

The Committee reviewed a number of submissions as to whether loot boxes fell within the legal and psychological definitions of gambling. Ultimately, given the breadth of game features that might constitute loot boxes, the Committee was unable to reach a definitive conclusion as to whether loot boxes constitute gambling. However, the Committee did acknowledge the broad consensus that where real-world currency is exchanged (that is, when loot boxes are purchased, where virtual items are bought and sold, or where both occur), those loot boxes most closely meet the definitions of gambling (both regulatory and psychological). In those circumstances, a range of risks to players may exist. These risks include the potential for loot boxes to cause gambling-related harm, (for example, unhealthy obsession and spending more money and/or time than is affordable). The Committee noted that particular demographic groups were especially vulnerable to the risks posed by loot boxes, including children, people with impulse control issues and people with mental health issues.

In recognition of these risks, the Committee considered a variety of potential regulatory reforms, including the imposition of a MA15+ or R18+ rating for video games containing loot boxes, a mandatory descriptor on all video games containing loot boxes, self-imposed and/or parental controls on interactions with loot boxes, compulsory disclosure of odds associated with loot boxes and an outright prohibition on loot boxes.

Recommendation – Another Inquiry?

Ultimately, the Committee chose to make a single recommendation, that is, that a comprehensive review be conducted of loot boxes in video games. The Committee

[1] For more information about loot boxes, please see our previous Focus Papers, 'Are Loot Boxes Gambling? The War over Loot Boxes Continues – Australia Joins the Battlefield' and 'The gloves are off on the gaming Battlefront: International and Australian gambling regulators weigh in on loot boxes'.

[2] A copy of the Report is accessible here.

[3] Full details of the Senate Committee inquiry are accessible here.

recommended that the review be led by the Department of Communications and the Arts in conjunction with the Australian Communications and Media Authority, the Australian Competition and Consumer Commission, the Office of the e-Safety Commissioner, the Classification Board, and the Department of Social Services.

The purpose of the review would be to:

- conduct further research into the potential for gambling-related harms to be experienced as a result of interaction with loot boxes;
- identify any regulatory or policy gaps which may exist in Australia's regulatory frameworks;
- examine the adequacy of the Classification Scheme as it relates to video games containing loot boxes;
- consider if existing consumer protection frameworks adequately address issues unique to loot boxes; and
- ensure that Australia's approach to the issue is consistent with international counterparts.

Minority View

The Australian Greens disagreed with the majority view and proposed a number of recommendations to modify the current regulatory regime, including:

- a review of the definition of 'gambling service' in the *Interactive Gambling Act 2001* (Cth) to ensure that it continues to be fit for its purpose, particularly with regard to micro-transactions for chance-based items;
- a mandatory R18+ rating for games which contain loot boxes that meet the psychological definition of gambling and where virtual items can be monetised;
- a mandatory MA15+ rating for games which contain loot boxes that meet the psychological definition of gambling but where virtual items cannot be monetised;
- the inclusion of the words ‘Contains Simulated Gambling’ in the video game content rating label for games containing loot boxes; and
- the development of a consumer protection framework, in collaboration with the video game industry and community groups, that would include risk assessment processes to identify risks to children, reporting mechanisms for safety concerns, policies and processes for developers and publishers to respond to safety concerns, and information to assist consumers, parents and guardians.

Where To From Here?

The Federal Government is yet to comment on whether it will implement the sole recommendation of the Committee and conduct a review into loot boxes in video games. However, in light of the growing international discussion surrounding loot boxes and the fact that a number of governments have finalised their position, it is likely that the Government will request the Department to conduct a review in order to come to a conclusion on the legality of loot boxes. A review may be followed by any or all of the regulatory reforms considered by the Committee, depending on the review’s findings.

A review is now more likely given that the U.S. Federal Trade Commission (the FTC) will also review the issue. On 27 November 2018, the FTC announced that it would launch an investigation into loot boxes in video games, following a request made to the Entertainment and Software Ratings Board by Senator Maggie Hassan that the practice be looked into. The primary concerns raised were the use of psychological principles and enticing mechanics in loot boxes that closely resemble those found in casinos and games of chance.

Addisons' Media and Gaming team will continue to monitor the issue closely and will keep you updated on any further developments. If you have any queries, please do not hesitate to contact us.

Australian Government Proposes Scheme to Block Illegal Offshore Wagering Websites

Authors: Jamie Nettleton, Karina Chong and Despina Bouletos

Overview

The Australian Federal Government is reviewing the possibility of introducing an Internet filtering scheme which would result in participating internet service providers (**ISPs**) blocking illegal offshore wagering websites which have been referred to the ISPs by the Australian Communications and Media Authority (**ACMA**).

Under the *Interactive Gambling Act 2001* (Cth) (**IGA**), the provision of unlicensed wagering services (including overseas-based interactive gambling services) to Australians is prohibited. It is intended that the proposed scheme for blocking illegal offshore wagering websites (the **Proposed Scheme**) would be part of a raft of additional measures to be implemented to minimise the provision of illegal offshore wagering to Australian residents and to deter Australian consumers from accessing those websites.

The Proposed Scheme is a further response to the Federal Government's 2018 Black Economy Taskforce Final Paper[1] and the 2015 O'Farrell Review into Illegal Offshore Wagering[2].

At present, a confidential consultation in respect of the Proposed Scheme is underway and a consultation paper has been released to selected communications industry and online gambling stakeholders but has not been released for public consideration. Among the industry stakeholders which have provided a submission is the Communications Alliance (**CA**). CA's submission in response to the consultation has been released publicly[3].

In its submission, CA indicates that its members (principally the leading ISPs) have expressed "in-principle agreement" to the Proposed Scheme, with some reservations and concerns.

Outline of the Proposed Scheme

Addisons understands that the Proposed Scheme will seek only to target offshore online wagering websites and would not, at this stage, target websites which provide other online gambling services (such as online casinos), although those services are prohibited under the IGA.

The Proposed Scheme will rely primarily on the major Australia ISPs participating voluntarily. It is expected that this participation would result in the Proposed Scheme capturing at least 75% of Australia's Internet users[4]. However, one concern raised by the CA submission is that it is unclear how the participating ISPs will be determined and whether the Proposed Scheme will extend to mobile internet users.[5]

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[1] Black Economy Taskforce, *Final Report* (2017) <https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce_Final-Report.pdf >.

[2] Please see our previous Focus Paper, Australia – Release of Report on Illegal Offshore Wagering – Another Missed Opportunity for Reform of Australia's Prohibitions on Online Gambling?

[3] Communications Alliance, Submission to Department of Communication and the Arts, *Possible Scheme for blocking Illegal Offshore Wagering Websites*, 21 September 2018 <https://www.commsalliance.com.au/__data/assets/pdf_file/0013/61411/180921_CA-submission_Blocking-Illegal-Offshore-Wagering-Websites_SUBMITTED.pdf >.

[4] Martin John-Williams, 'Australian Offshore Wagering Blocking Scheme Secures Telco Support', *Gambling Compliance* (online), 12 October 2018 <https://gamblingcompliance.com/premium-content/insights_analysis/australian-offshore-wagering-blocking-scheme-secures-telco-support >.

[5] Communications Alliance, above n 3, 1.

In terms of the operation of the Proposed Scheme, the CA submission suggests that it is proposed that the ACMA will investigate the legality of offshore wagering websites on a case-by-case basis, based on complaints it receives or on its own initiative. If ACMA determines that a website is in breach of the IGA, it may direct a participating ISP to block the infringing website.

The CA submission indicates that it is proposed there would be a grace period permitted before participating ISPs would be required to block a specified offshore wagering website to allow any Australian customers to raise concerns or complaints about the blocking of that website and to enable those customers to claim any funds held in accounts with the offshore wagering operator.[6]

The CA submission indicates that, where a website is blocked, pop-up pages will be displayed when that website is accessed or viewed to alert customers of the imminent blocking of the website to ensure that the customer is adequately informed.

The CA submission also notes that it is proposed that, once a website has been blocked, this block will remain in place for two years before a determination is made as to whether it can be lifted. When Australian customers seek to access a blocked website, pages will be displayed containing information on why the website has been blocked and to assist users with potential gambling issues, including for example, links to Gambling Help and other problem gambling assistance materials.

The CA submission also indicates that, in order to give effect to the Proposed Scheme, the CA would replace the existing *Interactive Gambling Industry Code* (the **Code**) which is registered with the ACMA. The current Code was originally developed by the Internet Industry Association (the predecessor to the CA) to meet the requirements of the original IGA in 2001. The Code set out obligations on ISPs to provide Internet subscribers with access to filtering software or services in order to block overseas gambling sites.

Potential Problems

Despite its overarching support for the Proposed Scheme, the CA, in its published submission, flagged a number of potential issues and concerns for consideration.

One of the key criticisms mentioned is that the proposal to display pop-up pages alerting customers to the blocking of a website will be of limited benefit.[7] In particular, the CA suggests that this feature would not be technically feasible for all ISPs to implement and also may be ineffective to prevent potential on or off-shore court action if a user's funds become irretrievable. The CA submission contends that customers are likely to already have the contact details for the website operator and may be able to request a refund of any funds directly (although, if denied, the customer may be left with no recourse other than legal action).

Concerns have also been raised about the cost of blocking websites which, as proposed currently, would be incurred by ISPs. The CA has proposed that ISPs be reimbursed the direct cost of blocking individual websites as well as any additional costs incurred in implementing the Proposed Scheme. It is the authors' understanding that, to the extent that those costs are reimbursed, the Government would seek reimbursement from those parties likely to benefit most from the Proposed Scheme (e.g. Australian licensed wagering operators).

The CA submission proposes that guidance can be taken from the reimbursement structure and process that has been established under the *Copyright Act 1968* (Cth) in relation to Federal Court orders for ISPs to block websites in the context of online copyright infringement (pursuant to section 115A of the Copyright Act). These cases have

[6] Williams, above n 4.

[7] Communications Alliance, above n 3, 2.

established that the costs involved with blocking copyright infringing websites are about $50 per block.[8]

A third concern raised in the CA submission is the risk of affecting legitimate internet content. Poorly targeted blocking requests may extend beyond the intended wagering website and impact legitimate sites or content, to the disadvantage of consumers. To mitigate this risk, the CA submission recommends that any request to block a website must specify the website's Domain Name, IP Address and URL[9]. Further, the block page that will appear once a website has been blocked should contain information on a complaints mechanism which the website owner can use if they believe the website was blocked without due cause.

Finally, the CA submission notes that it must be recognised that, despite the efforts of ISPs to block offending websites, this may not prevent users who are determined to access offshore wagering sites to do so by circumventing the blocks put in place by the ISPs. A variety of methods exist for circumventing blocked websites, including VPNs, Tor networks and browsers, anonymous proxies, HTTPS access, SSH tunnels, remote desktop clients and purpose-built programs.

Can guidance be taken from the Copyright Act?

As noted, the CA submission suggests that guidance can be taken from Federal Court orders and injunctions which have been delivered to date under section 115A of the Copyright Act.

This site-blocking regime has been utilised successfully by major entertainment companies including Village Roadshow, Foxtel and Universal Music to obtain injunctions which require Australia's major telcos and ISPs to block customers from accessing various domains and websites which provide copyright infringing content and materials.

Further guidance may be provided if the proposed provisions to extend the existing internet blocking provisions under section 115A are passed by the Australian parliament.

The *Copyright Amendment (Online Infringement) Bill 2018* (Cth) (**Copyright Bill**) received Royal Assent on 10 December 2018 and came into effect on 11 December 2018. The entire Bill will come into effect the day after receiving assent. The Copyright Bill proposes notable amendments to the internet blocking regime in s115A of the Copyright Act.

Prior to being passed, the Copyright Bill was subject to an inquiry by the Senate Standing Committee on Environment and Communications (the **Senate Committee**), which published its findings on 26 November 2018.[10] The Senate Committee recommended that the amendments be reviewed two years after their enactment. Both major parties have accepted this recommendation.[11]

The primary purpose of the Copyright Bill is to enable copyright owners to enforce more effectively their rights by disrupting the supply to Australians of material that infringes copyright, or facilitates the infringement of copyright.

The Copyright Bill contains three key changes. First, the Copyright Bill proposes to widen the threshold requirement for an injunction to be issued from websites whose primary purpose is to infringe copyright, to websites whose primary purpose or primary effect is to infringe copyright.[12] This expanded threshold is designed to capture file hosting sites such as "cyber lockers", which enable users to share files via password-protected online hard

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[8] Communications Alliance, above n 3, 3.

[9] Communications Alliance, above n 3, 5.

[10] Further information about the Senate Committee's inquiry into the Bill can be found at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/OnlineInfringementBill

[11] Ibid.

[12] Copyright Amendment (Online Infringement) Bill 2018 (Cth) Sch 1 item 2.

drive spaces. Such sites may not meet the "primary purpose" test, but would meet the new "primary effect" test.

However, the Copyright Bill offers no guidance on the criteria which would be considered to determine whether a website is in breach of the "primary effect" test. This may lead to uncertainty, particularly for websites that provide access to infringing content but also have a variety of other functions.

The second amendment proposed by the Copyright Bill is to extend the targets of injunctions for copyright infringement under section 115A of the Copyright Act to online search engines.[13] That is, in addition to orders being made against ISPs to block copyright infringing websites, orders could be made against online search engines to take steps to block search results that refer users to the infringing online content. While "online search engine provider" is not defined in the Copyright Bill, it is intended to apply to major search engines such as Google, Yahoo and Bing.

Finally, the Copyright Bill proposes to introduce an adaptive style of injunction.[14] This would allow ISPs and online search engine providers to include additional domain names, URLs, IP addresses and search results to an injunction for blocking which has already been granted by the Court without Court approval or otherwise requiring a fresh injunction to be made by the Court.

This amendment will remove the need for parties to return to Court to vary existing orders where the copyright owner and the ISP or search engine provider agree that a new domain name, URL or IP address has begun to provide access to online infringing content mentioned in the initial order.

Where to From Here?

Both the Proposed Scheme and the changes to the Copyright Act, if implemented, will have a significant impact for a range of stakeholders, particularly overseas online betting operators providing services to Australia, as well as intermediaries, such as ISPs and online search engine providers. Affected parties will need to ensure that they are aware of, and in compliance with, the new requirements to avoid any potential action against them.

As noted, the Proposed Scheme has only been the subject of a confidential consultation between the Australian government and selected industry stakeholders. If the Proposed Scheme is to be progressed, we anticipate that a full public consultation process would be conducted before any formal scheme or framework is implemented.

Certainly, any proposed amendments to the Code or any replacement code would need to be drafted and subject to public consultation before being registered by the ACMA. In both cases, interested stakeholders and parties would have the opportunity to make submissions.

Changes to the underlying legislation (the IGA), is likely to be required. This would require a Bill to be proposed and passed in Australian Parliament.

Importantly, while it is proposed that the Proposed Scheme will apply initially only to offshore wagering websites, we would anticipate that it will later be expanded to apply to online casino and gaming websites if the Proposed Scheme is implemented and proves successful.

Commentary

Australia's online gambling regulatory regime has objectives that correspond with the objectives in other countries, namely to protect Australians from overseas gambling operators.

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[13] Ibid item 3.

[14] Ibid item 2.

Traditionally, Australia's approach was unsophisticated and ineffective. This has changed with the approach taken by the ACMA since the introduction of the IGA amendments in 2017 and the targeting of offshore operators and intermediaries.

The Proposed Scheme is a further illustration of this approach, ultimately to target the means by which Australians can access offshore gambling sites, namely through ISPs. This is consistent with the approach that has been taken in other countries (e.g. Norway, France and Belgium).[15] What is also clear, at least from the experience in Norway, is that blocking measures are not necessarily effective in causing access to the offshore sites to cease completely (as is pointed out in the CA Submission), but more a means of making that access less available.

We will be monitoring these issues with interest and will report on developments in further newsletters.

For further information about how either the Proposed Scheme or the Bill may affect your business, please contact the Addisons Media and Gaming Team.

[15] See ACMA October 2018 quarterly report .

A State of Flux: Australia's Point of Consumption Tax – Implications for Wagering Operators

Authors: Jamie Nettleton, Shanna Protic Dib and Despina Bouletos.

Overview

The South Australian government introduced in July 2017 Australia's first Point of Consumption Tax (**'POC Tax'**) on wagering operators; throughout 2018, Queensland, Victoria, New South Wales, Western Australia and the Australian Capital Territory have each followed suit to implement a similar POC Tax framework in those respective jurisdictions. The Northern Territory, however, has expressed opposition to the introduction of a POC Tax and Tasmania has remained silent.

Under the POC Tax, betting operators are required to pay tax on revenue generated from the state in which bets are placed, rather than from the state in which the operator is licensed.[27]

Although the introduction of POC Tax in a majority of Australian states and territories seeks to harmonise the tax regime for which wagering operators are subject in Australia, the POC Tax framework in each state and territory varies significant in respect of the of the tax-free threshold, tax rate and most notably, the calculation of taxable revenue.

This paper updates readers on the current position in regards to the implementation of a POC Tax in Australia.[28]

Queensland

In June 2018, Queensland passed the *Betting Tax Act 2018*.

This Act introduces a QLD POC Tax, effective from 1 October 2018, under which betting operators are liable to pay 15% of taxable wagering revenue in excess of $300,000 in each financial year. The tax free threshold of $225,000 applies for the first financial year on a pro rata basis (1 October 2018 to 30 June 2019). The QLD POC Tax is payable monthly.

The taxable wagering revenue of a betting operator is its total wagering revenue, less total eligible payments. The taxable wagering revenue of a betting operator is calculated differently depending on the category of betting operator.

Victoria

In September 2018, Victoria passed the *Gambling Regulation Amendment (Wagering and Betting) Act 2018*.

This Act introduces a Victorian POC Tax, effective from 1 January 2019, under which betting operators will be liable to pay 8% of net wagering revenue in excess of $1,000,000 in a financial year. The Victorian POC Tax will be payable monthly.

Net wagering revenue will be calculated differently, depending on the category of betting operator:

The Victorian POC Tax will be reviewed by the Victorian Treasurer, in consultation with the Minister for Consumer Affairs, Liquor and Gaming Regulation, Minister for Racing and the Victorian Racing Industry, within 18 months of its commencement. The purpose of the review will be to assess the implementation of the Victorian POC Tax and its impact on the Victorian Racing Industry (**VRI**).

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[27] While the POC Tax is payable by wagering operators in each state and/or territory in which bets are placed, wagering operators are also required to pay a bookmakers tax in the state or territory in which the wagering operator is licensed (as well as other taxes, including Australia's goods and services tax).

[28] For further information regarding the South Australian POC Tax, please see our focus paper: Pay Where You Play: Introduction in Australia of a Point of Consumption Tax for Wagering Operators.

The scope of the review will include the tax rate, the tax-free threshold, the VRI funding arrangements, the broad definitions and application of the tax and other policy and administrative considerations.

New South Wales

In October 2018, New South Wales (**NSW**) passed the *Betting Tax Amendment (Point of Consumption) Act 2018*.

This Act introduces a NSW POC Tax, effective from 1 January 2019, under which betting operators will be liable to pay 10% of net wagering revenue in excess of $1,000,000 in a financial year.

Net wagering revenue is calculated differently, depending on the category of betting operator.

The NSW POC Tax will be reviewed by the NSW Treasury within 18 months of its commencement.

Australian Capital Territory

In September 2018, the Australian Capital Territory (**ACT**) passed the *Betting Operations Tax Act 2018*.

This Act introduces an ACT POC Tax, effective from 1 January 2019, under which betting operators will be liable to pay 15% of net betting revenue in excess of $150,000 in each financial year. The ACT POC Tax is payable monthly.

Net betting revenue is the total amount of all bets placed with the betting operator (including fees and commissions), less the total amount of all winnings paid by the operator (including refunds and prescribed costs).

Western Australia

In December 2018, Western Australia (**WA**) passed the *Betting Tax Assessment Bill 2018* and the *Betting Tax Bill 2018*. Both Bills are currently awaiting Royal Assent.

Together, the Bills introduce a WA POC Tax, effective from 1 January 2019, under which betting operators will be liable to pay 15% of taxable betting revenue in excess of $150,000 in each financial year.

Taxable betting revenue is the betting operator's betting revenue less their eligible payments. Betting revenue and eligible payments are calculating differently, depending on the category of betting operator.

Tasmania

On 1 November 2017, the Tasmanian Labour Government expressed a commitment to introduce a POC Tax, if successful in the 2018 Tasmanian election. However, in 2018, the Liberal Party was elected as the majority government.

The current Tasmanian Government has not announced their position in relation to a POC Tax.

Northern Territory

The Northern Territory (**NT**) Government is opposed to the imposition of a POC tax, given that it licenses most of the corporate bookmakers in Australia, and most bets are placed with those operators by residents in other Australian jurisdictions.

The NT has indicated that its preference would be for a POC Tax to be implemented as a national tax scheme.

Consequences of the Disparity in POC Tax

Now that the POC Tax has been introduced in most Australian states and territories, the scheme is likely to have significant practical implications for all betting operators licensed in Australia.

The introduction of the POC Tax means that, in combination with other existing taxation obligations, Australian licensed betting operators are likely to be in a position that over 50% of their profits will be payable in wagering taxes and imposts. Such a large tax liability is unique to Australia and may have significant consequences for the sustainability of both individual and corporate betting operators, as well as the wagering sector as a whole (with limited exceptions).

The variations in the POC Tax obligations for each Australian state and territory may also make it difficult for betting operators to ensure full compliance. Betting operators must ensure that they understand their obligations in each Australian state and territory, including how to calculate net wagering revenue for the purposes of each state and territory's POC Tax regime, noting differences in regards to the inclusion or exclusion of free bets, commission and fees (amongst others). Betting operators will also need to be aware of the different tax-free threshold in each state and territory. Finally, different reporting obligations apply.

The introduction of the POC Tax has also resulted in upheaval in the racing sector – for example, there has been a strike by racing industry participants in Queensland to ensure a greater return of the revenues to the racing sector. Similarly, there is considerable commentary around the extent to which the introduction of the POC Tax in South Australia has been successful.

Addisons has been monitoring the progressive introduction of the POC Tax in each Australian jurisdiction and has a comprehensive understanding of the complex POC Tax obligations and the steps required to ensure that betting operators achieve full compliance with their obligations under the POC Tax regime.

For further information about POC Tax, or for any information about how it may affect your business, please contact Addisons' Media and Gaming Team.