

THE GAMBLING LAW  
REVIEW

FOURTH EDITION

Editor  
Carl Rohsler

THE LAWREVIEWS

THE  
GAMBLING LAW  
REVIEW

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This article was first published in July 2019  
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Carl Rohsler

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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ISBN 978-1-83862-028-8

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

A KARITZIS & ASSOCIATES LLC

ADDISONS

ANDERSON MÖRI & TOMOTSUNE

BIRD & BIRD

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# PREFACE

Welcome to the fourth edition of *The Gambling Law Review*.

One of the issues I have been wondering about while reviewing the fourth edition of *The Gambling Law Review* is what might be described as the Sorites paradox in reverse.<sup>1</sup> First editions of books may well be the ones that are the most collectable, but they are probably not the most valuable for the reader. In years two and three, as an edition gathers size and age, it becomes established. But at what point does it stop being a project and become a tradition, an institution or (the ultimate accolade for any legal study) an authority?

I think it would be wrong to say that we are an authority yet. But, there are some very encouraging signs. We have new and notable contributions from Austria, Hong Kong and Cyprus. One must also mention those who have had to perform substantial re-writes, as with Malta, since the legislation there has been subject to considerable change.

This year, therefore, I am pleased again to say that the scope of coverage has increased to 30 chapters. So we may not yet be 'authoritative', but I hope that readers will agree that we are very well established. I am delighted to welcome the new authors and thank them each for their very valuable contributions, as I am also very pleased to thank those who have had found the time and resources to continue contributing to this work.

The primary purpose of this work is to provide a short summary of the gambling law of a wide range of jurisdictions and, so far as possible, to achieve that through a format that is both uniform enough to allow a comparison of the different legal systems but is also flexible enough to recognise that gambling law finds its home in different places depending upon the legal system in question. In some countries, it is founded in the criminal law, in other places it forms part of civil or administrative law. It is sometimes rooted in a common law and sometimes in a civil code tradition.

The second aim is to allow practitioners in the field to be updated on developments over the course of the year – with a section in each chapter dealing with both the main milestones of the last 12 months and the likely developments to come. And last, of course, it is a good way to bring together some of the leading lawyers in this fascinating field, so that they can stay in touch and communicate with each other – forming a network of knowledge and contacts upon which I hope our respective clients will rely.

Looking back, it feels as though the world has been a very busy place over the last 12 months. It is tempting to say that such a statement is just an error of perspective, and that

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<sup>1</sup> Eubulides of Miletus is said to have conjectured about taking consecutive grains away from a pile of sand. When does the heap cease to be a heap and become merely a pile? The Sorites paradox takes its name from the Greek word for 'pile'.

in fact every year has its fair share of excitement – but events in America (both in the world of gambling and also more widely in politics), and the chaos of Brexit, which still surrounds me as I write, seem to justify putting 2018/19 into a special category.

But while the political environment seems to have been particularly fraught, political matters are often cyclical, reflecting movements between different ideologies and oscillating social attitudes. The more important changes have actually been technological, since they almost always lead to dramatic and irreversible changes.

So, let us focus on some important statistics. During 2018, the number of internet users in the world exceeded 4 billion (a 7 per cent year-on-year increase). Pausing there, that means that in 2018, more than 280 million people went online for the first time. Those new internet users, if brought together geographically, would form the fourth largest national population in the world.

In the same 12-month period the number of social media users increased by 13 per cent to 3.1 billion. Furthermore, during 2018 the world reached a total of more than 5.1 billion unique mobile phone users, meaning that two thirds of the world's population has access to mobile communication, with more than half of the handsets being smartphones. Mobile use has indeed eclipsed laptops and desktop computers. Internet penetration in Western Europe is at 92 per cent and in North America it is 88 per cent. Soon, everyone will have access to everything. And the everything is being delivered much more quickly. Average fixed internet speeds increased between 2017 and 2018 from 22Mbps to 46.12Mbps, an average of 26 per cent.

The amount of data we produce each year (about 16 zettabytes<sup>2</sup>) is already much more than would be necessary to record every word ever spoken by our species. In other words, the technology, and the ability to process, manipulate and model the universe mathematically has gone well beyond a tipping point, and is rapidly creating the environment for databases and networks of neurological scale, and a whole new way of thinking – artificial intelligence.

Those changes have created new possibilities in many fields, including the development of the worldwide gambling industry. Distributed ledger technologies and, in particular, bitcoin was first created in 2009. Ten years later, they have already become sufficiently prominent that gambling regulators have been forced to consider and regulate their use. Given that acceleration, it will surely be only a matter of four or five more years before they become a mainstream form of consumer currency. Second, artificial intelligence is beginning to show its worth as a way of automating some of the processes that most concern operators and regulators: social responsibility, player verification and anti-money laundering. To give one example, automated age verification by use of facial recognition technology is likely to become a practical reality in the next 12 months. At present, many operators are still using some fairly crude flags to indicate when a player is gambling unwisely or acting suspiciously and most of these have ultimately to be judged by fallible humans. We can expect, as the number of data points increases and the ways of assessing behaviour become more subtle, that standards will be able to be created through the use of automated tools to make player identification, monitoring and self-exclusion a much more scientific, accurate and objective process.

Another area where technology is creating change is in the environment in which gambling takes place. There was a time when gambling was confined to casinos and other

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2 A zetterbyte is a trillion gigabytes, or 1,000,000,000,000,000,000 bytes.

specific premises. Then the internet allowed gambling to become home-based for the first time, and there were increasing attempts using live-dealer experiences and virtual reality to mimic premises-based gambling but with the comforts of home. Next, we saw the diversification of gambling products and a blurring of the whole entertainment space, with social gaming and e-sports creating completely new kinds of experience, and we have also seen a return to premises-based entertainment, but where a fusion of technologies mean that games can be played seamlessly from device to premises, on a single account. In other words, the ubiquity of gambling behaviour has become like the ubiquity of mobile technology and social media itself.

At the same time as these technological changes are democratising access to gambling, the 'grey' markets are drying up. More and more legislators are addressing themselves to the regulation of international gambling and the creation of models for regulation and taxation. The Wild West of 20 years ago has become a tamer place. Also, while the dominance of certain social media technologies is creating opportunities, it is also effectively restricting diversity of approach down into necessary and fewer effective routes to market. In other words, to be effective, gambling operators need not only the approval of their regulators, but also, increasingly, the companies that allow them to deliver their product. Many opinions on the legality of operations are now being drafted not to convince regulators but more to persuade banks and media providers of a product's legality. The industry faces an ongoing challenge to ensure that big business views gambling operators as a legal and acceptable form of entertainment and commerce. The need for the industry to remain a convincing advocate of its own propriety has never been greater.

In the context of these changes, there is surely an important place for an annual review of the world of gambling law. I close by thanking my co-authors and the editorial team at *The Law Reviews*, for their organisation and encouragement. I very much look forward to our fifth edition, with still more content and diversity, by which time I will formally have decided that the *Gambling Law Review* has indeed developed into an authority.

**Carl Rohsler**

Memery Crystal

London

May 2019

# AUSTRALIA

*Jamie Nettleton, Shanna Protic Dib and Karina Chong*<sup>1</sup>

## I OVERVIEW

### i Definitions

In general terms, for an activity to be classified as gambling in Australia, it must involve the staking of money or other valuable consideration of real-world value on the outcome of an event determined in whole, or in part, by chance and with the objective of winning a prize.

Where an activity does not satisfy these criteria, it is not generally considered to be gambling under Australian law.

'Trade promotions', being free-to-enter competitions for the promotion of trade,<sup>2</sup> are also regulated under gambling legislation in each jurisdiction. These competitions are subject to specific restrictions and, in certain jurisdictions, are only able to be conducted where a permit has been issued by the relevant regulator.

Fantasy sports operators have existed in the Australian market for some years. Initially, they were regulated as a form of trade promotion, whereas now they are treated by regulators as a form of bookmaking.

No specific regulation of 'pool betting' exists in Australia. Exclusive licences are granted to totalisator operators in all Australian jurisdictions. These operators are licensed to accept bets relating to a contingency (generally, the outcome of a racing or sporting event), which are then contributed to a pool that is paid out by reference to successful bets (after the operator deducts a percentage of the pool as commission, as well as various fees and taxes).

Spread betting and betting on financial products are regulated by the Corporations Act 2001 (Cth). To be conducted legally, operators must obtain an Australian Financial Services Licence. These products are regulated under a different regulatory regime to gambling products; however, in certain circumstances, a sports betting licence may also be obtained.

### ii Gambling policy

In Australia, there is a general prohibition in all jurisdictions on the conduct and promotion of gambling. Legislative exemptions exist for gambling activities that are conducted under a licence. These activities include:

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1 Jamie Nettleton is a partner, Shanna Protic Dib is a solicitor and Karina Chong was a senior associate at Addisons. The information contained in this chapter is current as at March 2019. Since the writing of this chapter, there have been various developments in Australian gambling law that may update some of the matters referred to in this chapter. One key development is the further implementation of Australia's National Consumer Protection Framework, with various measures being brought into effect on 26 May 2019.

2 It is possible for the purchase of a product or service (at normal retail value) to be a condition of entry.

- a* lotteries (both in venue and online);
- b* wagering and sports betting (both in venues and online);
- c* electronic gaming machines, slot machines, or 'pokies' (just in venues); and
- d* land-based casinos where casino games, including poker, baccarat and blackjack (among others) can be played.

The paternalistic approach to the regulation of gambling services by Australian state and federal governments is a response to the concerns that arise from the adverse social consequences associated with gambling.

However, gambling has long been a part of Australia's culture and identity and, together with racing and sport, is well established in the national consciousness. State and territory-based regulation of gambling in the early 20th century marked the beginning of the legislative regime in place today. With the introduction of online wagering in the late 20th century, the industry continues to flourish, despite the continuing conflict between the economic returns provided by the gambling sector to state and territory governments, and sporting and racing bodies, and the pressure for governments to take action to minimise problem-gambling behaviour.

### **iii State control and private enterprise**

Historically, lottery and totalisator operators were government-owned entities. Almost all states and territories (Western Australia being the exception in respect of its totalisator and lottery) have corporatised and privatised these gambling operators. All leading gambling businesses in Australia (many of whom are listed) conduct business under a licence granted by a state or territory government (or regulator).

The principal licensed gambling operators are:

- a* Tabcorp Holdings Limited, which, since combining with Tatts Group Limited (Tatts) (see Section VIII, below) has the exclusive right to conduct both lotteries and totalisators (and off-course betting) through retail outlets in Queensland, Tasmania, New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory;
- b* The Star Entertainment Group Limited, which operates casinos in Sydney and in South East Queensland;
- c* Crown Resorts Limited, which operates casinos in Melbourne and Perth (and Sydney from 2024) and also conducts the Australian Betfair betting exchange;
- d* Sportsbet Pty Limited, a sports bookmaker;
- e* BetEasy Pty Limited (formerly, CrownBet, now owned by The Stars Group), a sports bookmaker that acquired William Hill's Australian operation in 2018; and
- f* Aristocrat Leisure Limited, Ainsworth Game Technology, Scientific Games Australia, Konami Australia, International Game Technology (IGT) and Aruze Australia (all being suppliers of gaming machines).

In Western Australia, the totalisator and lottery are conducted through state-owned corporations, respectively operated by Racing and Wagering Western Australia and LotteryWest. However, the Western Australian government announced in late 2018 that it is conducting a tender process in respect of the exclusive licence to operate the state's totalisator.

Separate exclusive licences are also issued in each state and territory in respect of the conduct of Keno games in land-based retail venues.

The right to operate a casino has been the subject of an exclusive licence in the relevant jurisdiction, save for Queensland, New South Wales and the Northern Territory. The recent issue of new casino licences in New South Wales and Queensland is discussed further in Section II, below.

Wagering services are not only provided by totalisator operators (who also provide fixed-odds betting services) but also by on-course bookmakers (some of whom also operate online) and corporate bookmakers (mostly licensed in the Northern Territory).

#### **iv Territorial issues**

As mentioned in subsection iii, above, licences to conduct gambling are issued by the relevant state or territory government (or regulator) including those listed in Section II, below. Traditionally, gambling was conducted solely in venues. However, as a result of new technologies and the challenges posed by gambling monopolies in most Australian states and territories, a number of gambling businesses (particularly in the wagering sector) are licensed to conduct gambling remotely. This includes corporate bookmakers, most of whom are subsidiaries of leading European online betting companies.

However, it is generally understood under principles of Australian constitutional law that gambling services provided under a licence issued in any state or territory of Australia are able to be provided to residents of other Australian states and territories. This principle was confirmed by the decision of the High Court of Australia in *Befair Pty Ltd and another v. Western Australia* (2008) 244 ALR 32.

Each licensing jurisdiction imposes different licence conditions on its licensed operators, by reference to the relevant legislation. Most online corporate bookmakers, for example, are licensed in the Northern Territory by the Northern Territory Racing Commission (NTRC).

#### **v Offshore gambling**

In 2001, the federal government enacted the Interactive Gambling Act 2001 (Cth) (IGA) which prohibits the provision of 'interactive' (or online) gambling services with an 'Australian customer link'. The IGA is enforced by the Australian Communications and Media Authority (ACMA) and the Australian Federal Police. In September 2017, the IGA was amended by the Interactive Gambling Amendment Act 2017 (Cth) (IGA Amendment Act) in response to claims that the existing legislation was ineffective as a means of deterring unlicensed offshore gambling operators from providing services to Australian residents.

The amendments, among other things, increased penalties, expanded existing aiding and abetting offences, clarified the prohibition on the use of VoIP technology by licensed wagering operators to facilitate in-play betting services, banned the provision of lines of credit by wagering operators and granted the ACMA greater investigative and enforcement powers, including the power to issue formal warnings and infringement notices.

Broadly speaking, the IGA prohibits the provision of 'prohibited interactive gambling services' (the Section 15 Offence) and 'regulated interactive gambling services' without an Australian licence (the Section 15AA Offence), to persons present in Australia (together, the Operational Prohibitions). Regulated interactive gambling services include wagering services (with the exception of in-play sports betting services provided via an internet carriage service, including VoIP technology, which is prohibited) and lottery services (with the exception of instant or scratch lotteries, which are also prohibited). In addition, the IGA prohibits the

advertising in Australia of ‘prohibited interactive gambling services’ and, unless the relevant party is licensed in Australia, ‘regulated interactive gambling services’ (the Advertising Prohibition).

The IGA targets the supply of online gambling to residents of Australia by offshore operators, but does not prevent Australian residents from accessing those offshore services, or the provision of services by Australian operators to customers in other countries.

A defence is available for an alleged breach of the IGA where the operator did not know, or could not reasonably have known, that their service had an ‘Australian customer link,’ that is, that any or all of the customers of the service were physically present in Australia.

## II LEGAL AND REGULATORY FRAMEWORK

### i Legislation and jurisprudence

Australia is a federation. In practice, this means that legislative power is divided between the federal government and the eight constituent states and territories. Traditionally, the power to regulate gambling activities in Australia was reserved by the states and territories.

This changed in 2001 with the enactment of the IGA.

The IGA prevails over state and territory legislation to the extent of any inconsistency. That is, even where certain conduct does not contravene the IGA, it may nonetheless be in breach of state and territory gambling laws.

Whereas the IGA regulates interactive (or online) gambling services, state and territory legislation continues to regulate land-based gambling activities<sup>3</sup> and sets out different regulatory frameworks for different types of gambling, including casinos, sports betting, poker machines and lotteries.

In addition to regulating the manner in which land-based gambling is conducted, legislation in each state and territory also establishes separate regulatory bodies.

Even though the federal government’s proposed poker machine regulation in November 2012 was unsuccessful, there remains the possibility that the federal government may intervene in the future to regulate further land-based gambling, particularly poker machines, or direct state and territory governments to reform particular regulatory frameworks for other types of gambling.

This is clear from the federal government’s critical role in developing and passing the National Consumer Protection Framework (the NCPF), a framework of 10 mandatory minimum standard measures, which is intended to minimise gambling related harm for Australian consumers (see Section VII, below).

### ii The regulator

The key responsibilities assigned to the state and territory regulators include granting licences, monitoring compliance of gambling operators and enforcement of legislation where necessary. The key regulators in each jurisdiction are:

- a New South Wales: Liquor and Gaming NSW;
- b Victoria: Victorian Commission for Gambling and Liquor Regulation and the Department of Justice and Regulation;

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3 There is also specific state and territory legislation regulating interactive gambling, for example, Chapter 7 of the Gambling Regulation Act 2003 (Vic).

- c* Australian Capital Territory: ACT Gambling and Racing Commission;
- d* Northern Territory: the NTRC;
- e* Western Australia: Department of Racing, Gaming and Liquor;
- f* South Australia: the Consumer and Business Services Department (which, from 1 December 2018, took over all of the regulatory and policy functions that were previously the responsibility of the Independent Gambling Authority);
- g* Tasmania: Liquor and Gaming Commission;
- h* Queensland: Office of Liquor and Gaming Regulation; and
- i* Australia-wide: the ACMA.

In certain states and territories, a different regulator is responsible for the regulation of casinos. For example, the Independent Liquor and Gaming Authority is responsible for determining the regulatory arrangements that apply to the operation of casinos in New South Wales. Additionally, separate government departments are responsible for regulating lower-risk gambling activities such as trade promotions, and certain racing and sporting bodies have been given the right to regulate certain activities of individual and corporate licensed bookmakers.

### **iii Remote and land-based gambling**

The Australian legislative framework for the gambling sector distinguishes between remote and land-based gambling; both are regulated at the federal and state and territory levels.

As indicated in subsection i, above, interactive (or online) gambling services are regulated at the federal, and state and territory levels, while land-based gambling is regulated mostly at the state and territory level.

At the state and territory level, the distinction is due in part to the different regulatory frameworks that exist for the different types of gambling services, such as casinos and gaming machines. In addition, the distinction can be attributed to the rapid evolution of the market and the often outdated legislation at the state and territory level. For example, in New South Wales, the Unlawful Gambling Act 1998 (NSW) (NSW UGA) does not contemplate online gambling. However, the preferred position of Liquor and Gaming NSW, the New South Wales regulator, is that the NSW UGA applies equally to both online and offline forms of gambling.

### **iv Land-based gambling**

Land-based gaming is regulated largely by state and territory legislation, which is principally directed at gambling products or services that are venue-based. These include operators of wagering and lottery terminals, and poker machines. However, certain federal laws apply to land-based gambling, such as the laws relating to anti-money laundering and counter-terrorism financing (see Section IV, below).

Generally, an exclusive licence has been granted in each state or territory to conduct off-course betting in retail venues. Similarly, an exclusive licence has been granted to provide lottery products (which are made available for purchase by consumers from retailers, principally in newsagents).

Further, licensed venue operators are permitted to conduct land-based machine gaming (such as slot machines, known in Australia as poker machines). These venues include casinos, pubs and clubs. The sole exception to this principle is in Western Australia, where poker machines are only permitted in casinos. Certain restrictions are imposed on the operation

of gaming machines by licensed venue operators, such as caps on the total number of poker machines in any particular venue, locality or in the jurisdiction as a whole. The regulatory regime in respect of poker machines differs substantially from jurisdiction to jurisdiction with Victoria, for example, having a mandatory pre-commitment system in place (which players can opt out of).

Until recently, there was a limited number of casino licences granted in each state and territory. However, in recent years, this exclusivity has been relaxed. Previously, in New South Wales, the exclusive casino licence was held by Echo Entertainment Group Ltd (now The Star Entertainment Group Ltd). In 2015, the New South Wales state government granted a licence to Crown Resorts Limited for the construction and operation of Crown Casino at Barangaroo in Sydney (which is scheduled for completion in 2024). Similarly in Queensland, the government is in the process of granting additional casino licences to various private entities.

#### **v Remote gambling**

The IGA prohibits the supply of online gambling services to persons present in Australia, unless they are wagering or lottery services and the service provider is licensed by a regulatory authority in an Australian jurisdiction. However, the ability of wagering operators to provide remotely in-play sports betting is restricted to bets placed over the telephone via a voice call or via a 'place-based betting service', that is, using 'electronic equipment' at the venue of a licensed operator.

Generally speaking, licensed operators may offer remote or online gambling services and no distinction exists between the online platforms or devices on which a gambling product may be offered to customers.

Licences granted to Australian operators to provide gambling services online often impose restrictions on the location and manner in which the licensed operator may conduct its gambling business. For example, gambling operators licensed by the NTRC are required to locate various aspects of their operations in the Northern Territory. In addition, the conditions of the licence have the effect that bets are deemed to be placed, received and accepted in the Northern Territory for the purposes of the licence, irrespective of where the customer placing the bet is located.

Various restrictions and requirements exist at the state or territory levels that apply to licensed online wagering operators (even where based in another state or territory). These restrictions set out mandatory requirements relating to advertising, warning messages and pre-commitment and, in many jurisdictions, there exists the requirement to pay a product fee in respect of races and some sporting events that take place in that state or territory and a point of consumption tax (PoC Tax) in respect of revenue generated by customers of a particular state or territory (see Section VII, below).

#### **vi Ancillary matters**

Depending on the gambling service, ancillary licences may be required in addition to the principal licence granted to the operator to conduct the gambling business.

For example, in addition to licences granted to operators that conduct gambling activities in a casino or other land-based venue, separate licences are required to be held by manufacturers and suppliers of poker machines, as well as testing agents.

In most cases, key employees or close associates of licensed operators are required to hold a separate licence, or at least be approved by the regulator prior to commencing their role.

**vii Financial payment mechanisms**

There are a limited number of financial mechanisms that are prohibited in Australia for use as payment in connection with gambling services. For example, the IGA prohibits licensed online wagering operators from providing to Australian customers, or facilitating the provision through third parties, credit for use in connection with the operator's services.

Additionally, Australian gambling laws do not, at either the federal or state and territory level, contemplate the use of cryptocurrency as a mechanism for payment in connection with online gambling services. However, the NTRC has imposed a restriction on all online wagering operators licensed in Australia accepting cryptocurrency as a form of payment for bets placed with the operator.

**III THE LICENSING PROCESS**

**i Application and renewal**

The process involved in applying for a licence to conduct a gambling business in Australia depends on the type of licence and the jurisdiction in which it is sought. For example, in respect of remote wagering, the Northern Territory is the leading licensing jurisdiction in Australia and licences are granted by the NTRC. While other states and territories have their own licensing regimes, these regimes have not been 'tried and tested' in the same way as the Northern Territory regime.

There are a number of licensing options, depending on the nature of the gambling service to be provided. Licences may be granted to conduct bookmaking and online lotteries. For simplicity, we have limited our response to the process relating to the grant of sports bookmaking licences.

In order to be eligible to obtain a licence, applicants must be registered in Australia as a corporate entity under the Corporations Act 2001 (Cth). The company and key personnel must also meet suitability and probity requirements prescribed by the relevant licensing authority.

In addition to satisfying the eligibility requirements, an applicant will generally need to provide the following information:

- a* the applicant's certificate of registration and a copy of its constitution;
- b* police check documentation for each key employee;
- c* a business plan;
- d* prescribed financial and personal information, both for the applicant and key employees;
- e* the current prescribed licence fee; and
- f* a deed of release and authorisation to enable the regulator to conduct all necessary inquiries.

The licensing process will typically last for up to nine months.

The duration of the licence will depend on the nature of the gambling service being provided and the agreement reached between the licensing authority and the operator, as set out in the licence conditions.

In light of the investment required in respect of land-based gambling operators, exclusive totalisator and casino licences typically remain in effect for a term exceeding 10 years.

## **ii Sanctions for non-compliance**

Restrictions on the manner in which a gambling business may be conducted are usually contained in the terms and conditions of a licence and the underlying legislation. Failure to comply may lead to sanctions for breach of the licence, contravention of prohibitions set out in the relevant legislation, or both.

This most frequently arises as a result of periodic reviews conducted in connection with the operation of a casino. In many cases, the casino may be found not to have complied fully with the terms of its licence, resulting in the imposition of a fine and other penalties.

As it is beyond the scope of this chapter to outline the full framework for liability, our analysis is set out in general terms. Offences and sanctions in respect of non-compliance with licence conditions and the relevant laws vary between the states and territories.

At the federal level, the operational prohibitions under the IGA carry significant penalties of up to 5,000 penalty units for a criminal offence (equivalent to A\$5.25 million for a corporation) and 7,500 penalty units under the new civil penalty provision introduced by the IGA Amendment Act (equivalent to A\$7.875 million for a corporation).

### ***Individuals***

Generally, liability is placed on the operator of a prohibited gambling service rather than the customer for the participation in such services. However, liability may be placed on individual users of gambling services in limited circumstances. For example, gambling legislation in New South Wales and Western Australia prohibits the placement of a bet on an Australian race with an unlicensed wagering operator. Notwithstanding these prohibitions, we consider it unlikely from a policy perspective that authorities will prosecute individuals under these provisions.

### ***Overseas operators***

An overseas operator may be found liable where an offence provision is stated expressly to have extraterritorial effect. The offence provisions in the IGA are expressed to apply extraterritorially. However, the practical difficulties that exist in enforcing Australian legislation against overseas operators under the IGA were addressed by the IGA Amendment Act. New powers were conferred on the ACMA, including the ability to notify international regulators of licensees acting in contravention of the IGA.

### ***Directors and officers***

There is no general principle extending liability to directors or officers of a gambling operator for the acts of a company. However, in cases where there is a prohibition on certain activities, certain legislation extends these prohibitions to the directors and officers of the company in line with the aiding and abetting provisions of Australia's criminal laws. For example, Section 53 of the NSW UGA stipulates that a director of a corporation that is in breach of the NSW UGA will commit an offence where the director 'aids, abets, counsels or procures the commission of the corporate offence'.

At the federal level, directors and officers of operators acting in contravention of the IGA can also be nominated by the ACMA to a 'Movement Alert List' maintained by the Department of Immigration and Border Protection, with the aim of restricting their travel to or from Australia.

### ***Agents***

As a general principle, various parties may be found liable under the aiding and abetting provisions of Australia's criminal laws. The broad language of the advertising prohibition also extends liability to marketing affiliates.

The IGA Amendment Act also extended liability under the IGA to parties such as business-to-business (B2B) service providers, who may be considered to have 'aided and abetted' the commission of either civil or criminal offences under the IGA (see Section I, above). This will also extend to include directors and officers.

### ***Payment processors and internet service providers***

Although the statutory prohibitions do not extend liability expressly to entities involved in money transfers where money is used for gambling purposes, payment processors need to be aware that there is risk in certain circumstances that liability may arise under the aiding and abetting provisions of Australia's criminal laws, as set out above.

There is currently no legislative requirement placed on payment service providers and internet service providers (ISPs) to implement technical measures (such as geo-blocking) to prevent Australians from accessing a site permitting access to prohibited gambling content (including services provided by an illegal, unlicensed offshore operator).

However, in 2015 the federal government ordered a review of the IGA (the O'Farrell Review) in advance of the introduction of the IGA Amendment Act. In its response to the recommendations of the O'Farrell Review, the government indicated that it would discuss with banks and ISPs options for the introduction of payment blocking and ISP blocking technologies as a means of restricting the access of persons located in Australia to illegal interactive gambling services as part of a three-stage plan proposed by the federal government to implement the recommendations of the O'Farrell Review.

In October 2018, it was revealed that the federal government was reviewing the possibility of introducing an internet filtering scheme which would result in participating ISPs being required to block illegal offshore gambling websites which have been referred to the ISPs by the ACMA.

## **IV WRONGDOING**

### **i Money-laundering**

Under the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) (2006) and corresponding regulations (collectively the AML/CTF Law), gambling operators in Australia are required to comply with a number of strict reporting and procedural obligations, including, but not limited to:

- a* verification and ongoing due diligence of the identity of all customers who open an account with the operator;
- b* maintaining an anti-money laundering and counter-terrorism financing programme (AML/CTF programme), which outlines how they will comply with their obligations under the AML/CTF Law;

- c* regular reporting to the Australian Transaction Reports and Analysis Centre (AUSTRAC), the body responsible for enforcing the AML/CTF Law, of all suspicious matters, threshold transactions, compliance reports and international fund transfers; and
- d* keeping records of all transactions, electronic funds transfers, customer identification procedures, AML/CTF programmes and due diligence assessments.

Penalties for non-compliance with the AML/CTF Law are significant. In 2015, AUSTRAC filed an action in the Federal Court against three Tabcorp Group companies for ‘extensive, significant and systemic non-compliance’ with the AML/CTF Law. In March 2017, the Federal Court approved a settlement agreement under which Tabcorp agreed to pay to AUSTRAC a A\$45 million penalty (and costs) for contravention of the AML/CTF Law.

## **ii Organised crime and match-fixing**

In Australia, match-fixing is dealt with under relevant criminal legislation in most jurisdictions, (e.g., in New South Wales, Part 4ACA of the Crimes Act 1900 (NSW)). Under legislation in most Australian jurisdictions, wagering operators are required to enter into integrity agreements with each relevant racing controlling body and the leading sporting bodies on which they offer betting products.<sup>4</sup> These agreements allow the operator to use the statistical information relating to the sporting or racing events (and participants) in return for a fee and on the condition that they agree to cooperate with these bodies by providing information about their customers’ betting patterns and behaviour to assist in the investigation of match-fixing.

## **V TAXATION**

All Australian companies, including gambling operators, are required to pay corporate income tax (currently 30 per cent<sup>5</sup>) and goods and services tax (GST) of 10 per cent on all sales. GST is also payable by overseas suppliers of goods and services, including offshore gambling services, to Australian customers.

In addition, a number of additional taxes are imposed specifically on gambling operators. These taxes are imposed by the relevant licensing jurisdiction and represent a significant source of revenue for state and territory governments. The nature and extent of these taxes vary significantly, and include:

- a* direct gambling taxes calculated by reference to the gambling revenue of the company (as set out in the laws of the licensing jurisdiction);
- b* licence fees paid initially or on a periodic basis (depending on the licence held). In the case of exclusive licences such as retail totalisators, there is usually a sizeable upfront fee payable;

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4 Generally, these agreements are entered into by wagering operators with the leading sporting bodies on a national basis.

5 It is proposed that this will be reduced to 25 per cent for businesses whose annual turnover is less than A\$50 million by 2026–27.

- c* fees charged by sports or racing control bodies in consideration for the use by wagering operators of race field and sports fixture information. This fee is generally calculated by reference to a percentage of gross revenue or turnover of the wagering operator in connection with the relevant sporting or racing event; and
- d* in the majority of states and territories, a PoC Tax, payable as a percentage of revenue derived from customers located in specific jurisdictions (see Section VII, below).

## VI ADVERTISING AND MARKETING

The extent to which advertising of gambling is prohibited (or restricted) depends on the type of gambling in question, the form of the advertising and the jurisdiction in which the advertising is conducted.

There is a complex arrangement of rules that regulate the advertising of gambling, including in state and territory legislation, which varies from jurisdiction to jurisdiction. In addition, there are industry codes (such as the Australian Association of National Advertisers Wagering Advertising & Marketing Communication Code), as well as more broadly applicable laws, such as federal consumer laws (which prohibit misleading and deceptive conduct).

For example, overlapping requirements under state and territory laws make it an offence to publish or otherwise advertise wagering services that, among other things:

- a* encourage a breach of the law;
- b* depict children under the age of 18, or target children under the age of 18;
- c* suggest that winning will be a definite outcome of participating in gambling activities, or exaggerate claims relating to winning;
- d* suggest that participation in gambling activities is likely to improve a person's prospects;
- e* promote the consumption of alcohol while engaging in gambling activities;
- f* are offensive, or are not published in accordance with decency, dignity or good taste; or
- g* offer an inducement to participate, or participate frequently in a gambling activity, including an inducement to open a betting account (the inducement prohibitions).

Strict laws apply specifically to advertisements published in traditional media, such as in print and on television and radio advertising. In 2017, the federal government reformed Australia's media laws and implemented further restrictions relating to the advertising of sports betting in the course of live sports broadcasts. Recently, those laws have been extended both at law and in policy to apply explicitly to digital media advertising.

With the implementation of the NCPF, stricter, state specific advertising laws, particularly with respect to advertisements that are considered to offer an inducement to Australian customers to gamble, are being introduced (see Section VIII, below).

Land-based advertising in pubs, clubs and hotels where retail betting is offered is also subject to restrictions.

There are also strict requirements relating to the display of responsible gambling messages, which vary greatly from jurisdiction to jurisdiction. These messages are required to be included with all advertising material that is published by a gambling operator, including at physical and virtual points of sale.

The Australian Competition and Consumer Commission (ACCC) has also brought a successful action against an Australian online wagering operator for advertising that was deemed to be misleading and deceptive by the Federal Court.<sup>6</sup>

## VII THE YEAR IN REVIEW

### i Point of consumption taxes

Since July 2017, betting operators have been liable to pay a PoC Tax on bets placed by customers in South Australia at a rate of 15 per cent of net wagering revenue. In early 2017, the federal government discussed the possibility of introducing a point of consumption tax for gambling operators that would apply federally. No legislative proposals introducing this tax have been released to date.

Recently, however, various other states have introduced separate PoC Taxes. During 2018, Queensland, Victoria, New South Wales, Western Australia and the ACT announced the introduction of a similar PoC Tax framework. The Northern Territory has expressed opposition to the introduction of a PoC Tax and Tasmania has remained silent.

Under the PoC Tax regimes, 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. Despite initial attempts to harmonise the gambling taxation regime for wagering operators in Australia, the PoC Tax framework in each state and territory varies significantly in relation to the tax-free threshold, tax rate and importantly, the method for calculating taxable revenue.

Generally speaking, the PoC Tax rates range from 8 per cent (Victoria) to 15 per cent (WA, Queensland and ACT which is similar to the SA model). In each of these states, the PoC Tax framework came into effect on 1 January 2019, with the exception of Queensland where the PoC Tax regime came into effect on 1 October 2018. The effect of the PoC tax on the viability of the wagering market in Australia has not been the subject of any significant empirical study. Accordingly, the repercussions for the Australian racing and bookmaking industries are largely unknown; however, it is likely to impact materially on the costs of the smaller Australian licensed wagering operators and is likely to lead to greater consolidation (see Section VIII, below).

### ii Lottery betting

On 28 June 2018, the Interactive Gambling Amendment (Lottery Betting) Act 2018 (the Lottery Betting Act) was passed by the federal Parliament. The Lottery Betting Act has the effect of prohibiting the provision of services for the placing, making, receiving or acceptance of bets on the outcome of Australian and overseas lottery draws to persons located in Australia. Lottery betting services or 'secondary lotteries' are now classified as a 'prohibited interactive gambling service' under the IGA, the provision of which will be a breach of the IGA and may attract both a civil or criminal penalty. The Lottery Betting Act came into effect on 9 January 2019.

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<sup>6</sup> *Australian Competition and Consumer Commission (ACCC) v. Hillside (Australia New Media) Pty Ltd t/as Bet365* [2015] FCA 1007.

## VIII OUTLOOK

### **i National Consumer Protection Framework**

On 16 December 2018, following years of discussion, it was announced that all state and territory Australian federal governments had reached agreement in relation to the implementation of the NCPF. The NCPF will apply to all Australian licensed online wagering operators and, to a certain extent, third party service providers such as payment processors. The NCPF is a regulatory framework that sets 10 mandatory measures and is intended to minimise gambling-related harm through providing greater protection for Australian consumers. The measures are viewed as a minimum standard only and scope exists for the states and territories to introduce additional or more onerous measures.

The measures include, among others, the prohibition on the supply of lines of credit by wagering operators, prohibitions on specific advertising inducements, the implementation of a voluntary opt-out pre-commitment scheme, consistent responsible gambling messages in gambling advertisements and the development of a national self-exclusion register.

These measures, some of which are already in place, will come into effect gradually over a period of 18 months, beginning on 26 November 2018.

### **ii Misleading and deceptive poker machine litigation**

In February 2018, the Federal Court of Australia dismissed an application that sought orders that Aristocrat's Dolphin Treasure electronic gaming machine (EGM) gave rise to misleading and deceptive representations in contravention of the Australian Consumer Law (ACL). The applicant, an individual, argued that features of the EGM gave rise to an inaccurate representation of the likelihood and value of the return that the player could expect from the machine.

Despite the Court's finding, it is likely that EGM suppliers, operators and regulatory authorities will continue to come under scrutiny from anti-gambling activists and media. Return to player information may also become the focus of subsequent campaigns for regulatory reform, and is an area that the industry may wish to address voluntarily, particularly as increasing publicity is given to poker machine reform as a key election issue.

### **iii Advertising restrictions**

A suite of reforms has been introduced recently that changes the way in which sports betting operators are permitted to advertise their services.

First, the NSW parliament passed legislation to prohibit the advertising of inducements, such as open account offers and bonus bets that can be viewed by persons in NSW. This has the effect of requiring operators to cease advertising inducements completely, as, on some advertising platforms, it is not possible to exclude persons in NSW from accessing the relevant material without removing the relevant information completely. There is, however, an exception for the advertisement of inducements that appear on existing platforms that contain racing-specific content only. These laws came into effect on 2 July 2018.

Secondly, the Victorian government has enacted a law that introduces prohibitions on the display of gambling advertising on public transport, within 150 metres of a school and on public roads, road infrastructure and road reserves. These prohibitions cover both static betting advertising (including billboards, banners, rolling static displays and the like) as well as movable and digital billboards displaying moving or video images.

The ACMA has approved and registered new industry codes banning gambling advertisements during the broadcast of live sports on commercial free-to-air TV, pay-TV and radio. Similar bans have also been introduced for online advertising by the Communications Legalisation Amendment (Online Content Services and Other Measures) Act 2017 (Cth).

Most recently, in January 2019, the Western Australian parliament passed the Gaming and Wagering Commission Amendment Regulations 2019 (WA), which will amend the Gaming and Wagering Commission Regulations 1988. The key changes, which will come into effect on 1 June 2019, include (among other things), a prohibition on 'refer a friend promotions' and prohibitions on the offering and provision to WA customers of an inducement to participate in gambling or open a betting account (in addition to the existing prohibition on the advertising of an inducement offer), and new regulations relating to a prescribed mandatory responsible gambling statement that must be included in all gambling advertising.

All other Australian states and territories will introduce similar legislation during the first half of 2019.

#### **iv Consolidation**

In December 2017, Tabcorp Holdings Limited (Tabcorp) and Tatts Group Limited (Tatts) merged after receiving the approval of the Australian Competition Tribunal.

Facing increasing regulatory costs and the greater competition posed by the merged entity that comprises Tabcorp and Tatts, who hold the exclusive right to offer retail wagering services across Australia, it is likely that many Australian licensed wagering operators will look to the international market for support, which is likely to result in further consolidation. This is evidenced by the acquisition in March 2018 of CrownBet and William Hill Australia by The Stars Group, which is listed on the Toronto Stock Exchange and, more recently, the acquisition in November 2018 of Australian wagering operator Neds by Ladbrokes Australia, whose parent company GVC Holdings is listed on the London Stock Exchange.

## ABOUT THE AUTHORS

### JAMIE NETTLETON

#### *Addisons*

Jamie Nettleton is the partner at Addisons who heads the firm's gambling law practice. Both Australian and international gambling operators rely on Jamie's advice on all aspects of gambling operations, as well as their investments in gambling businesses inbound to Australia and outbound from Australia.

It is Jamie's global reputation in his field that sees him being strongly sought after to advise gaming machine manufacturers, wagering operators, casinos, social media, online gambling and other various forms of gambling service providers. Jamie's advice to these clients includes licensing, regulatory and compliance issues, sports and racing integrity, consumer, advertising and privacy law issues.

Jamie's advice to international gambling operators setting up business in Australia extends to preparation of prospectuses and requirements of the Australian Securities and Investments Commission. Jamie works closely with these clients in developing their Australian business strategies, particularly in connection with the use of new technologies.

The results that he has delivered for his clients and his position at the forefront of gambling law have seen Jamie elected as President of the International Masters of Gaming Law and he is also a senior fellow at the University of Melbourne as a lecturer in Gambling and the Law. He has also been ranked as a leading gambling lawyer by *Chambers Global* every year since 2008.

## **SHANNA PROTIC DIB**

### *Addisons*

Shanna is a solicitor in Addisons' gambling law practice who works closely with both local and international companies on all regulatory, compliance and commercial matters relating to the conduct of their business within the gambling and gaming industries.

Shanna advises gambling operators, media, entertainment and technology companies, and affiliates on the evolving Australia legal landscape relating to gambling and gaming, with clients ranging from start-ups to large multi-nationals. Shanna has a particular focus on regulatory and policy issues, licensing and compliance issues, and general commercial matters. The diverse legal and commercial issues that arise in this context requires her to advise across a broad range of areas of law, including gambling law, consumer law, advertising and marketing, privacy, e-commerce and technology law.

Shanna has previous experience working in-house with one of Australia's leading media companies, providing her with a unique perspective, which allows her to give advice to clients that is both practical and commercially relevant.

## **KARINA CHONG**

### *Addisons*

Karina was a senior associate in Addisons' gambling law practice. Karina left Addisons in February 2019.

## **ADDISONS**

Level 12

60 Carrington Street

Sydney NSW 2000

Tel: +61 2 8915 1000

Fax: +61 2 8915 2000

[jamie.nettleton@addisonslawyers.com.au](mailto:jamie.nettleton@addisonslawyers.com.au)

[shanna.proticdib@addisonslawyers.com.au](mailto:shanna.proticdib@addisonslawyers.com.au)

[www.addisonslawyers.com.au](http://www.addisonslawyers.com.au)



ISBN 978-1-83862-028-8