

Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

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Gaming 2021

Contributing editor**Behnam Dayanim**

Paul Hastings LLP

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Gaming*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, China, Macao and Portugal.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Behnam Dayanim of Paul Hastings LLP, for his continued assistance with this volume.



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For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	Nigeria	47
Behnam Dayanim Paul Hastings LLP		Yahaya Maikori and Osayamen Ojo Law Allianz	
Gambling activities and EU law	4	Norway	52
Philippe Vlaemminck and Mathilde Thibault Pharumlegal		Brede A Haglund and Alexander Mollan Brækhus Advokatfirma	
Australia	7	Poland	58
Jamie Nettleton, Joseph Abi-Hanna and Brodie Campbell Addisons		Piotr Dynowski and Michał Sałajczyk Bird & Bird Szepietowski i wspólnicy sp.k.	
Belgium	14	Portugal	65
Philippe Vlaemminck and Robbe Verbeke Pharumlegal		Pedro Cortés Rato, Ling, Lei & Cortés Advogados	
Brazil	20	Spain	72
Luiz Felipe Maia, Flavio Augusto Picchi and Maria Luiza Kurban Jobim Franco, Yoshiyasu & Maia Sociedade de Advogados		David López Velázquez Uría Menéndez	
China	28	United Kingdom	78
Mark Cheng Chen Gan Jincheng Tongda & Neal		Jessica Wilson Harris Hagan	
Japan	34	United States	88
Takashi Nakazaki Anderson Mōri & Tomotsune		Behnam Dayanim, Jeremy Gordon and Rachel Miller Paul Hastings LLP	
Macao	40		
Pedro Cortés Rato, Ling, Lei & Cortés Advogados			

Australia

Jamie Nettleton, Joseph Abi-Hanna and Brodie Campbell

Addisons

GENERAL LEGAL FRAMEWORK

Legal definition of 'gambling'

1 | What are the legal elements required for an activity to be regarded as gambling?

In order for an activity to be regarded as gambling under Australian law, the activity must generally involve all of the following elements:

- the staking of money or any other provision of consideration of real-world value (the consideration element);
- the outcome of an event determined by an element of chance or mixed chance and skill (the chance element); and
- the purpose of winning a prize (the prize element).

If an activity does not involve one or more of the above elements, it is unlikely to be considered gambling. However, in some cases, it is unclear if a particular type of activity falls within the scope of this definition. This issue often arises in relation to social games. For example, it is unclear under Australian law if:

- in-game purchases offered in the course of free-to-play games satisfy the consideration element; and
- additional play prizes, and other prizes that do not have real-world value, satisfy the prize element.

Remote activity

2 | With respect to remote or other cross-border activity, where is the wager deemed to take place?

Australia is a federation in which legislative power is divided between the federal government and the eight states and territories. Each state and territory retains the power to make laws regulating gambling conducted within its jurisdiction. However, under the Australian Constitution, which provides for the freedom of interstate trade, gambling operators that offer online services under a licence issued in one jurisdiction are permitted to offer their services to customers in other states and territories.

In relation to cross-border gambling in Australia, a bet will be considered to have been made in the jurisdiction in which it was received and processed by the gambling operator. For example, a bet placed by a person in South Australia will be deemed to have taken place in the Northern Territory if it is received and processed by a bookmaker in the Northern Territory. This principle was upheld by the Federal Court in *The State of Victoria v Sportsbet Pty Ltd [2012] FCAFC 143*. For some purposes, the location of the consumer will also be relevant (eg, in order to calculate the point of consumption taxes payable by a gambling operator).

However, under the Interactive Gambling Act 2001 (IGA), which is the federal legislation that governs the provision of offshore gambling services to Australian residents, gambling services will be deemed to be provided to Australian customers where there is an Australian customer link – that is, where a service is provided to a person located in Australia.

Age restrictions

3 | What is the minimum age for participating in lawful gambling?

The minimum age for lawful participation in gambling activities, including opening an account with a gambling operator, placing a bet with a gambling operator, placing a bet in a licensed venue and being employed by a gambling operator, is 18.

Penalties

4 | What are the penalties for offering unlawful gambling?

Penalties for offering, providing or facilitating the provision of unlawful gambling services vary between the states and territories, and depend upon the seriousness of the offence. It is outside the scope of this chapter to outline the complete framework of liability for the various offences that exist under Australian law, however, generally, penalties are much lower for contravention of the state and territory laws than under the federal law (ie, the IGA).

Penalties for contravention of the IGA are significant: for an individual up to 5,000 penalty units per day for a criminal offence (equivalent to A\$1.11 million) or up to five times that for a corporation (equivalent to A\$5.55 million) and, for an individual, up to 7,500 penalty units per day for a civil offence (equivalent to A\$1.665 million) or up to five times that for a corporation (equivalent to A\$8.325 million). Liability for an offence under the IGA may also be extended to, for example, directors and officers, agents, and business-to-business service providers.

5 | Does the law penalise the gambler directly for participating in unlawful gambling?

At the state and territory level, liability is generally placed on the person or company providing the gambling service, rather than on the customer for participating in the relevant services. In limited circumstances, liability will be placed on the individual; however, from a policy perspective, we consider that it is unlikely that a regulatory authority would prosecute an individual under these provisions.

Social and non-profit gambling

6 | Are there exceptions for social gambling, or charitable or non-profit gambling?

Gambling will be unlawful unless provided under a licence issued by an Australian regulatory authority. However, exceptions from the requirement to obtain a gambling licence are provided for in most states and territories for specified activities (eg, raffles, bingo, football tipping, sweeps and lucky envelopes), where those activities are conducted for fundraising purposes (eg, to benefit the community or charity) in accordance with a permit issued by the relevant regulatory authority.

Free-play games of chance for the promotion of trade, known as trade promotions, are also permitted, provided that certain conditions are met.

Regulatory authorities

7 | What entity regulates land-based and remote gambling, and what are the regulator's powers?

The key regulators in each jurisdiction are:

- New South Wales – Liquor & Gaming New South Wales, the Independent Liquor & Gaming Authority and the Department of Customer Service;
- Victoria – the Victorian Commission for Gambling and Liquor Regulation, and the Department of Justice and Community Safety;
- Australian Capital Territory – the ACT Gambling and Racing Commission;
- Northern Territory – the Northern Territory Racing Commission;
- Western Australia – the Department of Local Government, Sport and Cultural Industries;
- South Australia – Consumer and Business Services;
- Tasmania – the Liquor and Gaming Commission;
- Queensland – the Office of Liquor and Gaming Regulation; and
- Australia-wide – the Australian Communications and Media Authority.

Each of the state and territory regulators is responsible for granting licences under, ensuring compliance with, and enforcing, legislation prohibiting certain unlawful gambling activities. In some jurisdictions, a different regulator to those listed above is responsible for the regulation of casinos, or the regulation of charitable or community gaming and trade promotions.

There are also situations where agreement is reached between the federal government and the state and territory governments for the implementation of regulatory measures in all the states and territories. A recent example is the implementation of the National Consumer Protection Framework (NCPF) whereby the federal government and all eight states and territories agreed to introduce into their legislative structure, over a period of 18 months commencing from November 2018, 10 mandatory consumer protection measures applicable to online wagering operators. The 10 measures in the NCPF are a minimum standard and the individual states and territories may introduce further or more onerous measures.

Anti-money-laundering regulations

8 | Are gambling licensees considered financial institutions for purposes of anti-money-laundering and similar financial services regulatory requirements or are they otherwise subject to such requirements?

Gambling licensees are not considered to be financial institutions; however, the provision of gambling services is deemed to be a designated service to which federal anti-money laundering (AML) and counter-terrorism financing (CTF) laws apply. Under AML and CTF legislation, gambling operators are required to, for example:

- verify the identity and conduct ongoing due diligence of all customers who open an account with the gambling operator;
- develop, update, maintain and enforce an AML/CTF programme that outlines the measures that the gambling operator will take to identify and mitigate AML/CTF risks;
- report regularly to the Australian Transaction Reports and Analysis Centre; and
- keep detailed records of all customer transactions, fund transfers, identification procedures, and due diligence assessments.

LAND-BASED GAMBLING

Types

9 | What types of land-based gambling are permitted in your jurisdiction, and is gambling regulated at a national or subnational level?

Land-based gambling is regulated at the state and territory levels. Permitted forms of land-based gaming include wagering (including totalisator betting), lotteries, casino gaming and gaming machines (known as poker machines).

Only licensed casinos are permitted to provide table gaming services. The principal licensed casino operators are:

- the Star Entertainment Group Limited, which operates casinos in Sydney and in South East Queensland; and
- Crown Resorts Limited, which operates casinos in Melbourne and Perth.

Crown Sydney was scheduled to open in December 2020. However, following an inquiry into Crown's suitability to hold a casino licence in New South Wales (NSW), the gaming floor at Crown Sydney remains closed as at March 2021.

Licensed venue operators, including casinos, pubs and clubs, are permitted to operate poker machines, although the regulatory authorities limit the number of machines in circulation at any given time. In Western Australia, poker machines are only permitted in casinos.

Historically, government-owned entities were the sole providers of retail wagering and lottery services. However, these entities have been privatised in all states and territories except Western Australia. The Western Australia totalisator is in the process of being sold to the private sector, although negotiations have been postponed. Tabcorp Group, a publicly listed company, holds exclusive licences for the provision of these services in most states and territories.

Establishment licensing

10 | Please describe the licensing criteria and procedures to operate land-based gambling of each type or classification. Does your jurisdiction limit the number of available licences?

The licensing process for operators of land-based gambling activities varies greatly depending on the jurisdiction in which the services are being offered and the type of services being offered.

For example, in NSW, a liquor licence issued to a pub or club will specify the maximum number of poker machines that are permitted to be operated in the venue. To own and operate a poker machine, a liquor licensee must obtain a Gaming Machine Entitlement (GME) or Poker Machine Permit (PMP). The number of GMEs and PMPs are limited by the NSW regulator. However, pubs and clubs can negotiate the purchase or use of a GME or PMP from an existing permit holder (or through a broker). Any such arrangement must be approved by the NSW regulator.

Land-based wagering services and lotteries are conducted under long-term exclusive licensing arrangements in each state and territory. Historically, only a limited number of casino licences were granted in each jurisdiction. Recently, a number of new licences were the subject of a tender process in Queensland in 2017, but that process has now been discontinued. Crown Sydney was granted a licence following an unsolicited proposal. It is unlikely that any new casino licences will be considered in the short to medium term. The licensing process for casino operators is particularly onerous. Prior to licensing, applicants for the licence will generally be required to undergo a lengthy and competitive tender process, during which they will be required to

provide evidence of, for example, their suitability, financial position, the impact of the proposed casino on tourism, employment and economic development, and expertise in the provision of gambling services.

Director, officer and owner licensing

11 | Must individual directors, officers or owners of licensees also be licensed or reviewed for suitability?

Generally, the regulatory and licensing authority in each jurisdiction will require any person who is associated or connected with a gambling operation to be investigated to determine his or her suitability. The investigation is commonly referred to as 'probity'.

Whether a person is sufficiently associated or connected with the gambling operation is usually at the discretion of the authority and may include an investigation of directors, officers, employees, and any person or company with a direct or indirect ownership interest (in some cases, as low as 5 per cent). In some instances, employees or persons involved in the day-to-day operation of the company will need to undergo a separate licensing process (eg, as a key employee).

Probity investigations can be onerous and will usually require the person or company being investigated to disclose sensitive information, including in relation to litigious matters and, in some cases, complete financial records including a current statement of assets and liabilities.

Location

12 | May a gambling location be part of a resort, restaurant or other multi-purpose location? What limitations apply?

Land-based gambling activities are usually offered in conjunction with the provision of other services. For example, a casino is usually only one part of a larger resort that provides hotel or residential accommodation (or both), restaurants and shopping facilities. The integration of these services is limited by the requirement to restrict gambling activities to designated areas. Among other limitations, access to designated areas must be limited to persons over 18, the service of food and alcohol is not permitted, and responsible gambling warning messages must be displayed at all times. Similar restrictions apply to retail betting shops.

Casino development

13 | What considerations arise in developing a casino resort project that are not typical to other resort development?

Approval for the development of a major new resort that includes a casino may be granted in one of two ways.

- The relevant state or territory government will announce their intention to rezone or pass relevant laws to allow a site to be developed as a resort. In some cases, the government will propose that a casino licence be included in the package awarded to the party that is successful at the end of the tender process. This may also be the subject of negotiations between the government and private parties, and will generally determine the type of applicants that will tender for the opportunity to be granted the rights over the development. An example of this was the Queensland government's proposed Global Tourism Hub development concept (an integrated resort), which was ultimately abandoned by the Queensland government in July 2020.
- A private operator may approach the government with a proposal for a casino resort development. This process will usually involve an extensive period of lobbying and negotiation, and will generally require the proposal to show significant financial and community benefit (eg, see the Crown Casino development at Barangaroo in Sydney, NSW).

In either instance (and neither is likely to be encouraged in the short to medium term), a casino licence will generally only be granted following an extensive period of public consultation, as well as significant debate (in Parliament and elsewhere). Generally, the standard of proof of the community and economic benefits is significantly higher for the approval of a casino licence than a non-casino resort development. In approving a casino licence, state and territory governments will also consider the weight of public opinion as well as other matters, such as suitability and financial stability.

Passive/institutional ownership

14 | Are there provisions for passive or institutional ownership that allow for exemption or modification of licensing requirements?

The relevant legislation does not provide for a passive or institutional owner to be excluded from applicable licensing requirements. However, in practice, institutional investors may be subject to a lesser level of probity investigation on the basis that they do not have an active role in the operation or management of the licensee.

Responsible gambling

15 | What responsible gambling obligations apply to licensees?

The responsible gambling obligations that apply to a supplier of land-based gambling services vary, depending on the licensing jurisdiction, the conditions attached to the licence, and the type of services being provided. Generally, gambling service providers will be required to provide customers with:

- the option to self-exclude from the services provided by the operator (this is done on an individual operator basis – no centralised system is currently in place, although a centralised system is proposed and will be implemented in relation to online wagering as part of the National Consumer Protection Framework);
- options for imposing voluntary pre-commitment limits; and
- information about responsible gambling support services.

Also, warning material must be displayed in the designated gambling area.

Taxes

16 | What type of tax and what tax rate applies to each form of lawful land-based gambling activity?

Gambling taxes vary greatly depending on the type of gambling service and the jurisdiction in which it is provided. Generally, specific taxes will be payable to the relevant regulatory body as a percentage of net or gross revenue. The tax applied may also be metered for fixed revenue brackets, or increase year on year under the licence conditions.

In addition to specific gambling taxes, operators will also be required to pay corporate taxes and goods and services tax.

REMOTE GAMBLING

Types

17 | Is remote gambling permitted and, if so, what types?

Under the Interactive Gambling Act 2001 (IGA), there is a general prohibition on the supply and advertising of online gambling services to persons present in Australia, unless the service is a regulated interactive gambling service and a regulatory authority in an Australian jurisdiction licenses the gambling service provider.

Regulated interactive gambling services include online sports betting, wagering and lotteries. Online casino gaming, poker and other gaming services are generally prohibited in Australia. Lottery betting

is also now prohibited in Australia after legislation making this type of betting activity illegal came into effect in January 2019. Generally, licensed operators may offer remote or online gambling services without any distinction between online platforms or devices (eg, mobile or tablets) on which the gambling service is offered to customers.

Licensing

18 | What are the criteria for obtaining a licence to operate remote gambling?

The criteria for obtaining a remote gambling licence will depend on the type of licence (and the type of gambling service to be provided) and the jurisdiction in which the licence is sought. For simplicity, we have focused on the criteria required to obtain a sports bookmaking licence.

Generally, in order to obtain a licence, applicants must be a corporate entity registered in Australia under the Corporations Act 2001 (Cth), and must demonstrate financial viability and sustainability (of both the company and shareholders), provide a clear business plan for conducting business in Australia, and meet certain probity and suitability criteria to the satisfaction of the relevant licensing authority.

19 | How do the licensing criteria for remote gambling operators differ from those applicable to land-based operators?

Generally, the licensing criteria for remote gambling operators is the same as for land-based operators, although a higher burden of proof is generally expected of land-based gambling operators as a result of the exclusivity awarded.

Cross-border gambling

20 | May operators located in other countries offer internet gambling to consumers in your jurisdiction without obtaining a licence there?

The IGA strictly prohibits the provision of any online or remote gambling services to residents in Australia unless the operator holds a licence to provide those services granted by a regulatory authority in an Australian jurisdiction. Any provision of 'offshore' internet gambling is an offence under the IGA.

Since November 2019, the Australian Communications and Media Authority (ACMA) has instituted a process under which illegal offshore online gambling operators are blocked from providing services to persons located in Australia. The ACMA occasionally requests that Australian internet service providers block websites of offshore online gambling operators considered to be operating illegally in Australia. This measure has gone further than originally contemplated since, although it was meant to be implemented solely against offshore online wagering providers, it is now being applied to websites associated with illegal offshore online gambling providers. The ACMA maintains a list of illegal gambling websites that have been blocked.

21 | May operators licensed in your jurisdiction offer internet gambling to consumers in other countries?

The IGA contains a prohibition on the provision of online gambling services to residents in specified overseas jurisdictions. However, to date, no countries have been specified on this list of prohibited countries. As a matter of Australian law, Australian licensed operators can provide their services to consumers in other countries, but will need to consider the extent to which local laws may be applicable. For example, an Australian licensed operator would still need to obtain a remote gambling licence from the UK Gambling Commission if it offers its services to UK customers.

Taxes

22 | What tax rate applies to each form of remote gambling?

General Australian taxation requirements apply, including the requirement to pay corporate tax where an enterprise is being carried on. Rates vary but the current corporate tax rate is between 26 per cent and 30 per cent depending on the size of the enterprise and what activities are carried on. Other taxes include a goods and services tax of 10 per cent on net gambling income, and state payroll tax (which may be payable in respect of payments to employees and contractors). The rate of state payroll tax varies from state to state and is subject to certain thresholds. The annual payroll tax thresholds in place for New South Wales, Queensland and Victoria, for example, are A\$1.2 million, A\$1.3 million and A\$650,000 respectively.

Remote gambling operators are also required to pay gambling taxes calculated as a percentage of revenue (as set out in the licence conditions and legislation, and enforced by the relevant licensing authority). In all states and territories, except for the Northern Territory, a point of consumption tax is payable by online wagering operators as a percentage of the gambling revenue derived from customers located in the specific jurisdiction.

Wagering operators accepting bets on sporting and racing events are also required to pay product fees charged by the relevant controlling bodies for the use of race field and sports fixture information.

INTELLECTUAL PROPERTY

Patents

23 | Are gambling games – land-based or remote – patentable in your jurisdiction?

For a gambling game to be a patentable invention, it must be sufficiently novel and inventive. A game that is simply a set of codified rules or processes conducted using an existing apparatus will not meet these criteria. However, if the invention relates to an improvement to the technical operation of gaming equipment, then that feature may be patentable.

Trademarks

24 | Are there limitations on how brands, logos or other types of marks may be used in promoting gambling games?

Intellectual property rights, such as rights conferred by registered trademarks, may subsist in brands, logos, words and other marks used by gambling operators in Australia. These marks cannot be used in connection with the provision of certain categories of services for which a trademark has been used, except where permitted to do so by the rights holder.

ADVERTISING

Restrictions

25 | What types of restrictions apply to advertising gambling games?

The advertising of gambling services, whether online or land-based, is regulated at the state and territory level, and the requirements vary greatly from jurisdiction to jurisdiction. Industry codes of practice also specify the manner in which gambling services can be advertised on various media platforms.

Generally, gambling advertising is prohibited or unlawful if it, among other things:

- relates to a gambling service that is unlawful;
- targets persons under 18 years old;

- represents gambling as a means of financial betterment;
- misrepresents the likelihood of winning;
- depicts the consumption of alcohol; or
- does not include the requisite responsible gambling messages.

Additional restrictions are placed on wagering operators in relation to, among other things:

- the advertising of live odds during sporting events (including during live sporting events streamed over the internet);
- the promotion of gambling services on television and radio during peak times; and
- the offering of inducements to participate in wagering activities, or open a betting account, or refer a friend to open a betting account.

The restrictions have been further clarified by the National Consumer Protection Framework. Additional requirements are also expected with the eventual implementation of the National Self-Exclusion Register, which will prohibit the provision of services and promotions to any person who requests to be excluded.

Federal laws, including the Australian Consumer Law and the Spam Act 2003 (Cth), also apply to the gambling operators advertising in Australia.

SUPPLIERS

Licensing

26 | What types of suppliers to gambling operators require licences?

Most suppliers of goods and services to gambling operators are not required to hold a licence. For example, affiliates and odds comparison sites are not required to hold a licence from a state or territory licensing authority. The exception is for suppliers of services related to the sale, provision and maintenance of casino gaming and poker machine equipment. In some jurisdictions, legislation requires suppliers of these services to hold a licence, permit or other approval from the regulatory body in the state or territory in which the services are being provided. For table games equipment, the general position in most jurisdictions is that the casino themselves (rather than the supplier or manufacturer) will be responsible for obtaining relevant regulator approval. Where the supplier is required to hold a licence, the relevant regulator generally has the power to conduct any enquiries of the supplier or their employees for the purpose of determining their suitability to hold the necessary licences, permits or other approvals.

Registration

27 | If licensing is not required, is there a registration or other process suppliers are subject to, and what triggers that process?

Where suppliers are not required to be licensed, there may still be the requirement for certain agreements with third party service providers to be approved by the regulator. Legislation regulating casinos may require that the relevant regulator approve any agreement entered into between a supplier and the casino operator. These contracts are known as controlled contracts. Similar requirements extend to licensed bookmakers in relation to white-label arrangements.

LABOUR AND EMPLOYMENT

Wage and hour rules

28 | Are there particular rules governing hours and wage treatment for casino employees?

There are no specific rules governing hours and wage treatment for casino employees. In Australia, casino employees are subject to the same labour laws that regulate other industries.

Collective labour

29 | Must casino employees be members of labour unions or similar organisations?

It is not a requirement for casino employees to be members of labour unions or other similar organisations; however, they are not precluded from being members.

ACQUISITIONS AND CHANGES OF CONTROL

Change of control

30 | How are licensee changes of control, and substantial changes in shareholdings of licensees, addressed?

Most licensing authorities retain the discretion, either under the relevant legislation or licence conditions, to require that a licensee discloses, and seeks approval of, any change in their direct or indirect ownership structure. These requirements apply regardless of whether the operator is a public or private company. However, in practice, regulatory authorities will ordinarily only conduct a full probity investigation into a shareholder that acquires an interest of more than either 5 per cent or 10 per cent of the issued shares directly or indirectly in the company.

Bankruptcy

31 | How are gambling licences treated in bankruptcy?

Generally, laws provide that a ground for suspension or cancellation of a gambling licence will arise in favour of the regulatory authority where a licensee:

- fails to meet its financial commitments;
- becomes bankrupt or compounds with creditors;
- takes advantage of the laws in force for the time being relating to bankruptcy;
- is the subject of a winding up, either voluntarily or pursuant to court order; or
- appoints a liquidator or receiver.

Accordingly, a creditor will generally be unable to effectively secure a debt against a gambling operator's licence. Regulatory authorities usually require that, as a condition of their licence, a licensee must implement measures to protect client funds in the event of insolvency or bankruptcy.

QUASI-GAMBLING

Regulation

32 | How are forms of 'quasi-gambling' regulated? Are any treated as 'gambling', and what triggers such treatment?

Certain forms of 'quasi-gambling' are regulated in Australia such as pay-to-play daily fantasy sports. Fantasy sports operators have existed in the Australian market for some time and were originally regulated as a form of trade promotion. More recently, they are treated by regulators as a form of sports bookmaking for which a licence is required.

Generally, social gaming and skill gaming are not considered to be 'gambling' on the basis that neither meets the general test of 'gambling' under Australian law. This is on the basis that social gaming does not involve a prize element and/or a consideration element, and skill gaming does not involve a chance element. Recently, however, politicians have called for these types of products to be deemed as gambling to ensure that they are appropriately regulated and comply with harm minimisation standards applicable to gambling operators.

In 2018, there was an inquiry by the Australian Federal Senate into loot boxes and whether those features are to be considered as gambling and regulated accordingly. The inquiry did not reach a conclusion; however, it did acknowledge that, where real-world currency is exchanged to purchase loot boxes or to buy or sell virtual items (or both), this activity is close to a gambling activity. No further action was taken by the Australian government following the conclusion of this inquiry. In 2020, a study commissioned by the New South Wales Responsible Gambling Fund suggested that the risk and reward properties of loot boxes may closely align them with traditional gambling and may potentially encourage greater gambling involvement.

Licensing

33 | Does your jurisdiction license quasi-gambling operators?

Fantasy sports operators are regulated in Australia as a form of sports bookmaking and therefore must obtain a licence to provide their services in the country. For this reason, the licensing process is the same as the process to obtain an online sports bookmaking or wagering licence.

Generally, social gaming does not require a licence. Certain states and territories have legislation in place which contemplates the licensing of skill gaming. However, in practice, we are not aware of any operator that has been granted a skill gaming licence. In other states and territories, the legal position of skill gaming is less clear and no licensing regime is contemplated under existing legislation. Accordingly, it is recommended that a review of the applicable state and territory legislation is conducted prior to commencing operations.

Other restrictions

34 | Does your jurisdiction impose other restrictions on the conduct of quasi-gambling activity, including restrictions on advertising, age of participation, limitations on prizes, etc?

As licensed sports wagering operators, fantasy sports operators that provide pay-to-play services must comply with all relevant Australian gambling laws. Operators that provide non-gambling products, such as social games and skill games, must still comply with Australian laws and regulations relating to advertising, consumer protection, privacy, and taxation, but are not subject to gambling laws, which provide, for example, that all customers must be over the age of 18. However, operators that provide social casino games should consider age classification and parental warning requirements to ensure that consumers are aware that gambling-style elements are present in the social games and, therefore, that the games may only be suitable for consumers over a certain age.

LITIGATION

Recent cases

35 | What, if any, significant litigation involving the gambling or quasi-gambling sectors has your jurisdiction seen in recent years?

In recent years, Australian courts have considered many cases with implications for the Australian gambling sector.

In 2015, Australian Transaction Reports and Analysis Centre (AUSTRAC) filed an action in the Federal Court against three Tabcorp Group companies for 'extensive, significant and systemic non-compliance' with anti-money laundering (AML) and counter-terrorism financing (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 AML/CTF law. Consequences for the industry are significant, with many operators investing heavily in reviewing their compliance systems and procedures.

In February 2018, the Federal Court of Australia dismissed the application that Aristocrat's Dolphin Treasure electronic gaming machine (EGM) gave rise to misleading and deceptive representations in contravention of the Australian Consumer Law. 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 the media.

The judgment of the Supreme Court of New South Wales (NSW) in *Lottoland v ACMA* was a key decision for the online gambling sector. The Australian Communications and Media Authority (ACMA) considered that Lottoland could not provide a number of its products because they were deemed to be prohibited interactive gambling services under the Interactive Gambling Act 2001 (IGA). Lottoland disagreed with the ACMA's interpretation of the IGA and submitted an application to the Supreme Court to seek a declaration that the products were not a prohibited interactive gambling service under the IGA. The Supreme Court's decision, given on 26 July 2019, disagreed with the ACMA's interpretation, and concluded that Lottoland could continue to provide legally these betting products in Australia under its licence. This decision provides clarity on the interpretation of prohibitions under the IGA relating to online gambling services.

In September 2020, Lottoland also commenced proceedings against the Northern Territory Racing Commission and the Northern Territory Minister for Racing, Gaming and Licensing following a decision by the Minister to impose two additional conditions onto Lottoland's sports bookmakers licence. If effected, these conditions would prohibit Lottoland from offering its current products. Lottoland is challenging both the validity of the decision and the conditions themselves. On 1 October 2020, Lottoland was granted an injunction to restrain the imposition of the conditions into its licence pending resolution of the substantive dispute. The conditions that are the subject of the litigation have been imposed onto the licences of all other sports bookmakers licensed in the Northern Territory. The matter is currently set down for further hearing in 2021.

There has been continued enforcement of wagering advertising restrictions under which prosecutions have been brought successfully against Australian wagering licensees. Fines, usually varying from A\$2,500 to A\$20,000, have been imposed by the courts and, in early 2020, a fine of A\$207,500 was imposed in NSW for offering gambling inducements (reduced on appeal to A\$159,000).

UPDATE AND TRENDS

Key developments of the past year

- 36 | Highlight any noteworthy developments or trends in the gambling or quasi-gambling sectors (legal or business) and their potential implications.

The decision of the Supreme Court of New South Wales (NSW) in *Lottoland v ACMA* is a key judgment in relation to the legality of online gambling services. The result of Lottoland's Northern Territory Supreme Court litigation is also expected to be noteworthy and will likely be relevant to determining the constraints on the power of a regulator to vary the conditions of online gambling licences.

In 2020, the NSW Independent Liquor and Gaming Authority established an inquiry into Crown Resorts under the Casino Control Act 1992. The inquiry was convened to consider the suitability of Crown Resorts and its NSW subsidiary and whether actual and proposed transactions involving Melco Resorts (a Hong Kong-based company that operates casinos) breached its casino licence or any other regulatory agreement and to make recommendations relating to the current NSW casino regulatory framework. This inquiry followed allegations made against Crown Casino of money laundering and possible links to organised crime through arrangements with junket operators. The inquiry was conducted by a former Supreme Court Judge.

On 9 February 2021, the Report of the NSW Casino Inquiry was tabled in the NSW Parliament. The Report found that Crown Resorts was not suitable to hold its Barangaroo Casino licence and recommended a number of measures that should, at minimum, be implemented for Crown Resorts to demonstrate its suitability. These recommendations included a full and wide-ranging audit of Crown Resorts' accounts, enforceable undertakings, a remediation action plan and board renewals. Following the Report, several members of Crown Resorts' board of directors have resigned. Victoria and Western Australia have both convened a Royal Commission to conduct an inquiry to determine, among other things, the suitability of Crown (and its subsidiary) to operate a casino in their respective jurisdictions.

Coronavirus

- 37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Covid-19 restrictions were implemented by each state and territory in March 2020, soon after the recognition of the severity of the pandemic. Initially, covid-19 restrictions were coordinated nationally and were relatively consistent. As time has passed, however, each Australian state and territory has implemented rules and restrictions more specific to their jurisdiction. All covid-19 restrictions have come into effect through, and derive enforceability from, the making of public health orders and directions by the relevant health ministers in each state and territory.

The initial approach in Australia was to implement lockdowns and business closures that remained in place as the number of cases and affected areas increased. This meant that land-based venues (including hotels, clubs and casinos) were prevented from opening to the public. Currently, land-based gambling venues in each Australian state and territory are generally permitted to open to the public provided additional requirements are adhered to, such as record-keeping, capacity limits and social distancing. Fines and infringement notices have been issued by state and territory gambling regulators and law enforcement authorities owing to non-compliance with public health restrictions.



Jamie Nettleton

jamie.nettleton@addisons.com

Joseph Abi-Hanna

joseph.abi-hanna@addisons.com

Brodie Campbell

brodie.campbell@addisons.com

Level 12, 60 Carrington Street
Sydney, NSW 2000
Australia
Tel: +61 2 8915 1000
www.addisons.com

Online gambling operators in Australia were also affected by the pandemic given the suspension of sporting and racing events. As a result, there was concern that Australians would turn to offshore gambling websites, which are prohibited from providing online gambling services to customers located in Australia under the Interactive Gambling Act 2001, or prohibited services such as pay-to-play online casino games.

Some non-legislative measures were also introduced by state and territory gambling regulators in response to the pandemic. For example, we are aware of regulators allowing licensed operators to receive customer service calls in premises other than those designated in their licence (due to business closures) and discounts being issued in relation to licence fees for land-based venues.

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