ADDISONS

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Gambling Law & Regulation Newsletter

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Overview

Welcome to the December 2017 edition of Addisons Gambling Law & Regulation Newsletter.

2017 will be remembered for a number of significant industry changes relating to gambling in Australia. This Newsletter addresses a number of the legal developments relating to the gambling industry that occurred in the course of this year.

Matters covered in this Newsletter are:

- A summary of the powers of the Australian Communications and Media Authority (the **ACMA**) under the *Interactive Gambling Act 2001* (**IGA**) following its amendment by the *Interactive Gambling Amendment Act* which came into force on 13 September 2017: The ACMA's new teeth: The Long Arm of Australia's Gambling Law;
- Comments on various cases involving the wagering sector, particularly in NSW, namely:
    - The Jelly Bean prosecution of Tabcorp: A sweet victory for the NSW regulator: Tabcorp fined for jelly bean promotion;
    - The application by Crownbet seeking clarification of the right to display advertising relating to interstate betting operators in association with New South Wales venues: Digitalising the monopoly: The CrownBet and ClubsNSW digital affiliate case.

  We have no doubt that further clarification of New South Wales law, and the laws of other States and Territories relating to advertising restrictions on wagering, will occur in the course of 2018.
- There has been widespread commentary globally relating to the interaction between certain aspects of video games and gambling law. This is highlighted by the recent discussion relating to loot boxes: The gloves are off on the gaming Battlefront: International and Australian gambling regulators weigh in on loot boxes.
- 2018 will bring in significant changes to privacy law both in Australia and in Europe. These changes will have material ramifications for the gambling sector. Privacy developments in 2018 and their impact on the gambling sector;
- A summary of one of the areas in which our team is actively involved, being the conduct of probity investigations. We often find that our clients do not have much knowledge about the probity process and we summarise both the objective of the process and some of the difficulties involved: Probing "probity": What you should know about suitability investigations in the gambling sector.
- Secondary lotteries have been a hot topic in relation to the conduct of online gambling in Australia with a number of recent regulatory developments: The Lottoland Effect Part 2: Weathering the Regulatory Storm in Australia.

Unfortunately, this Newsletter does not enable us to comment on all of the legal and industry developments which have occurred in 2017. Some of the more material issues are outlined below:

- In the last couple of weeks, Tabcorp has completed successfully its merger with Tatts Group. This will result in material changes in the gambling sector in Australia, due to the scale of the merged entity, which includes the combination of their exclusive retail wagering licensed businesses in New South Wales, Victoria, Queensland, South Australia, Tasmania and Northern Territory.

- AUSTRAC has been particularly active. This is evidenced by its recent prosecution of Australia's largest bank, the Commonwealth Bank of Australia. However, earlier in the year, the long running proceedings brought by AUSTRAC against Tabcorp were settled under which Tabcorp paid a record $45 million penalty with attendant costs involving, reportedly, an additional $45 million.

  These proceedings make it very clear that Australian gambling businesses need to be aware of their obligations under Australia's anti-money laundering laws.

- Suggestions have been made that features of poker machines are misleading and deceptive. This is the subject of both an action before the Federal Court brought against Crown Casino and Aristocrat. This issue was also addressed in a 2015 report by the University of Sydney Gambling Treatment Clinic released recently by the New South Wales Government. Expect to see more about this issue in 2018.

We trust that you enjoy this edition of our Gambling Law & Regulation Newsletter.

If you have any queries or wish to discuss any of the matters set out in this Newsletter or otherwise relating to gambling regulation in Australia or elsewhere, please do not hesitate to contact any of Addisons' Media and Gambling Team.

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The ACMA's new teeth: The Long Arm of Australia's Gambling Law

Authors: Jamie Nettleton and Nicola Austin

Overview

If you are looking to conduct an online gambling business in Australia, you will soon become acquainted with the Australian Communications and Media Authority (**ACMA**), the independent federal agency tasked with regulating the media and communications industries in Australia.

The ACMA is responsible for the administration of the federal online gambling legislation, the *Interactive Gambling Act 2001* (Cth) (**IGA**), and has further regulatory powers over other areas relevant to the conduct of an online B2C business, including the *Spam Act* and standards and codes of practice relevant to television and radio advertising.

In September 2017, the ACMA's role in regulating, investigating and enforcing offences against the IGA was expanded considerably with the introduction of the *Interactive Gambling Amendment Act 2017* (**IGA Amendment Act**).

In this paper, we highlight the far-reaching powers bestowed upon the ACMA by the IGA, and consider the mechanisms available to the ACMA when it seeks to enforce the IGA against online gambling operators both within Australia and overseas.

Background to the ACMA

The ACMA is established under the *Australian Communications and Media Authority Act 2005* (Cth) (**ACMA Act**). The scope of the ACMA's functions has been crafted specifically to reflect the "convergence" of the communications industry, bringing together the regulation of telecommunications, broadcasting, radiocommunications and the internet.

The ACMA's powers are stated broadly in the ACMA Act, and extend to "all things necessary or convenient to be done for or in connection with the performance of its functions" (s 12 ACMA Act). The specific regulatory powers relevant to each of the ACMA's regulatory areas are set out in the relevant legislation, which often include wide-reaching powers of investigation and enforcement.

In some instances, the ACMA's powers are granted by reference to the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**RPA**), which prescribes uniform provisions for the monitoring, investigation and enforcement of legislative instruments by regulatory bodies, such as the ACMA.

The ACMA's enforcement tools

The ACMA's enforcement powers vary across a number of different statutes within its purview. Until recently, the ACMA had very limited enforcement mechanisms under the IGA, which resulted in there being very limited or no enforcement action under the IGA in its 16 years of operation. This is demonstrated in the ACMA's *"Communications Report 2016–17"*[1] – of 283 online gambling complaints and general enquiries, only 3 lead to investigations by the ACMA and a referral to the Australian Federal Police (**AFP**) for enforcement due to a finding by the ACMA that the content constituted prohibited internet gambling content in breach of the IGA. In fact, we are only aware of one prosecution by the AFP under the IGA since its introduction in 2001.

The IGA Amendment Act, which came into force in September of this year, introduced a suite of civil penalty provisions relating to the provision of prohibited interactive (or online) gambling services into the IGA and, in doing so, strengthened substantially ACMA's powers.

[1] The ACMA Communications Report 2016–17 can be accessed here.

The ACMA is now empowered to conduct the entire civil enforcement process, including complaints handling, investigation and enforcement. This is in addition to the requirement to refer the matter to the AFP for criminal enforcement.

Further, the RPA empowers the ACMA, in response to alleged breaches of IGA civil penalty provisions, to, among other things, issue formal warnings and infringement notices and seek injunctions.

Powers extending beyond Australia

The main impetus behind the introduction of the IGA Amendment Act was to implement the Federal Government's response to the *2015 Review of the impact of illegal offshore wagering*, which investigated and made recommendations relating to illegal offshore wagering in Australia.

As such, there is an inherent "international" or "offshore" focus to the ACMA's increased powers brought into effect by the IGA Amendment Act, which, in turn, aligns with the ACMA's responsibility of "representing Australia's communications interests internationally".[2]

In addition to the ACMA's powers of enforcement, the IGA Amendment Act introduced amendments to the ACMA Act which have a more distinct focus on deterring illegal offshore gambling, including:

- the power to notify international regulators of their licensees who may be providing interactive gambling services to persons present in Australia in contravention of the IGA, raise awareness of the IGA and receive enforcement assistance; and
- the power to notify the Department of Immigration and Border Protection for the purposes of placing the names of executive officers of entities who are in breach of the IGA on a "Movement Alert List" with the aim of restricting their travel to, or from, Australia.

These measures will contribute to both raising awareness of Australian gambling laws among both international regulators and offshore operators, and assisting the ACMA's enforcement actions against offshore entities.

The ACMA's expanded role

The ACMA takes its expanded role under the amended IGA seriously. Within days of the IGA Amendment Act coming into force, the ACMA sent letters to various international gambling regulators informing them of the changes to Australia's online gambling laws, the "expanded role" of the ACMA and seeking each regulator's assistance in informing its licensees of these changes.

In order to effectively discharge its new responsibilities, the ACMA has established an "Interactive Gambling Taskforce", which has resulted in increased resources being dedicated to investigating alleged breaches under, and enforcing, the IGA.

Despite the expanded resources, it remains to be seen if the ACMA's enforcement efforts against *offshore* entities, in particular, will prove effective. Indeed, the Explanatory Memorandum to the IGA Amendment Act[3] suggests that it may be more realistic to expect a reduction in illegal or unlicensed online gambling (both onshore and offshore) being provided to Australians, rather than necessarily an increase in successful enforcement action against offshore entities. Indeed, the introduction of the IGA Amendment Act has resulted in many of the leading operators ceasing to provide services to Australia. Time will tell whether this effect is permanent, or whether the gap in the market will be filled by less reputable operators who perceive a market opportunity and are prepared to take the risk.

Nonetheless, it is clear that the ACMA is very much aware of its increased powers and seems more than willing to use them.

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[2] "The ACMA's Strategic Intent": https://www.acma.gov.au/theACMA/About/Corporate/Authority/role-of-the-acma
[3] The Explanatory Memorandum to the IGA Amendment Act can be accessed here.

We are monitoring the regulatory and enforcement action of the ACMA with great interest and will provide further updates as they arise. If you have any questions about the ACMA or any other Australian regulators overseeing gambling businesses, please feel free to contact any member of Addisons' Media and Gaming Team.

A sweet victory for the NSW regulator: Tabcorp fined for jelly bean promotion

Authors: Jamie Nettleton and Mia Corbett

Introduction

In October this year, TAB Limited (**TAB**) was fined $1,500 and ordered to pay $10,000 in legal costs for handing out packets of jelly beans which did not display a responsible gambling message to morning commuters at Sydney's Town Hall and Martin Place train stations.

Background

TAB pleaded guilty to two charges of advertising in contravention of the *Betting and Racing Regulation 2012* (NSW). This legislation prohibits a licensed wagering operator, or an employee or agent of a licensed wagering operator, from publishing advertising in a printed form to the world "at-large" which does not display the following message:

> *Think! About your choices*
>
> *Call Gambling Help*
>
> *1800 858 858*
>
> *www.gamblinghelp.nsw.gov.au*

The maximum penalty for this offence is 50 penalty units, or $5,500.

Shades of grey

The packets of jellybeans were brought to the attention of the NSW regulator, LGNSW by Greens MP Justin Field, whose letter to the NSW racing minister prompted the charges.

Commenting on the conviction, Global LGNSW Director of Compliance Operations, Sean Goodchild, stated:

> *"This warning must be on all gambling advertising published in NSW to encourage people considering gambling to think carefully about the potential risks"*[1]

No guidance has been provided by the NSW regulator regarding what will be considered "gambling advertising" for the purpose of this provision. However, in the context of this prosecution, it is relevant to note that the promotional jelly beans featured the slogans "NOTHING'S AS SWEET AS A WIN" and "WE LOVE A BET" and coincided with large billboard advertising featuring the TAB logo only.

This outcome is the most recent of a suite of prosecutions brought against Australian licensed wagering operators for advertising in contravention of NSW gambling laws which, in essence, prohibit licensed wagering operators from offering customers an "inducement" to participate in gambling activities.[2]

What does this mean?

Gambling regulators should expect that L&GNSW will monitor closely all offline and online advertising directed at NSW residents to ensure that the appropriate gambling warning notices are displayed.

The Federal Government has acknowledged the difficulties faced by operators who wish to conduct national advertising campaigns which are compliant with the various responsible gambling requirements in each jurisdiction.

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[1] http://www.liquorandgaming.nsw.gov.au/Documents/about-us/media/media-release-tab-jelly-bean-prosecution.pdf.

[2] We note that the Court in this case did not consider whether the distribution of jellybeans constituted an "inducement".

It is proposed that this issue will be addressed in the National Consumer Protection Framework (**NCPF**), an initiative between State and Territory Ministers recommended following the 2015 Review of Illegal Offshore Wagering.

In a media release, Federal Minister for Human Services, The Hon Alan Tudge MP stated that the NCPF would mandate a national standard based for responsible gambling messaging.[3]

The messaging used, including its format, style, consistency and imagery, will be developed in accordance with the recommendations of expert researchers. Addisons' Media and Gaming team will be monitoring the development of the NCPF, which is expected to be announced in early 2018.

[3] For more information, see our Focus Paper: *A National Consumer Protection Framework for Australian Online Licensed Wagering Operators*.

Digitalising the monopoly: The CrownBet and ClubsNSW digital affiliate case

Authors: Jamie Nettleton and Shanna Protic Dib

Overview

On 27 October 2017, Stevenson J of the Supreme Court of New South Wales declined to make a declaration sought by digital wagering operator CrownBet that conduct under a commercial agreement for the provision of advertising of digital wagering services would not contravene the *Unlawful Gambling Act 1998* (NSW) (**UGA**).[7]

This decision adds to the growing jurisprudence on the restrictions imposed, at a State level, on digital wagering operators in the context of a monopoly retail market dominated by Tabcorp.[8]

Background

In February 2017, CrownBet and ClubsNSW entered into a Master Services Agreement, under which CrownBet agreed to offer advertising for its digital wagering services in licensed clubs in New South Wales (the **Master Agreement**).

In April 2017, CrownBet entered into an Individual Licensed Venue Agreement with Warners Bay Bowling Club Co-Op Ltd (**Warners Bay**) to provide equipment and services to Warners Bay to implement CrownBet advertising as per the Master Agreement (the **Agreement**).

In July 2017, CrownBet sought a declaration from the Supreme Court of New South Wales that the commercial arrangement between CrownBet and Warners Bay was lawful. Specifically, CrownBet sought confirmation that the performance of certain obligations, and the provision of certain equipment and services, by CrownBet and Warners Bay under the Agreement did not contravene the UGA.

CrownBet and Warners Bay Digital Affiliate Agreement

Under the Agreement, CrownBet and Warners Bay agreed to implement an exclusive digital wagering partnership in two phases; that is, Phases 1 and 2.

CrownBet sought a declaration in respect of Phase 1.

Under Phase 1 of the Agreement, Crownbet agreed to install at Warners Bay, within what is described as a *CrownBet Advertising Zone*:

- A panel of nine television screens to display:
    - live sports and racing events from free to air and subscription providers;
    - promotional content from CrownBet; and
    - a countdown ticker (which is a countdown timer that provides club customers with notice of forthcoming sporting events on which CrownBet would take wagers);
- Electronic form guides or touch screens to display CrownBet odds, race field information and promotional content; and
- A mobile phone charging station.

CrownBet also agreed to provide to Warners Bay the following services:

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[7] Specifically, the declaration was sought in respect of sections 9, 11, 11A, 15 and 31 – 33 of the *Unlawful Gambling Act 1998* (NSW).

[8] This monopoly now exists in all states and territories (except Western Australia) following completion of the Tabcorp/Tatts merger.

- SMS notifications (and other notifications) to be pushed to CrownBet customers who have the CrownBet mobile app on their personal devices;
- CrownBet Data (being CrownBet promotional content and odds to be displayed on the television and touch screens installed at Warners Bay);
- Financial contributions to the cost incurred by Warners Bay in providing its existing Wi-Fi service, to be renamed "CrownBet" and to be made available to all patrons at the Club for any purpose; and
- Training of staff as to the operation and functionality of the equipment in the *CrownBet Advertising Zone*.

CrownBet emphasised that none of the equipment it proposed to install at Warners Bay, or the services that it proposed to provide, would accept wagers, allow wagers to be placed, allow a wagering account to be opened or allow a deposit or withdrawal of funds into or from a wagering account. Rather, Warner Bay customers seeking to wager with CrownBet would be required to use their personal devices.

CrownBet's basis for seeking the declaration

CrownBet sought declaratory relief from the Supreme Court on the basis that it considered there to be a *'present state of uncertainty'* in respect of the legality of the obligations proposed by the Agreement.

CrownBet argued that this uncertainty arose on the following bases:

1. Tabcorp expressed direct concern to CrownBet that the overall commercial arrangement (and particular elements of that arrangement as described in Phase 1 of the Agreement) between CrownBet and Warners Bay would be unlawful; and
2. Liquor and Gaming New South Wales (**LGNSW**) was not prepared to confirm whether the arrangement between CrownBet and ClubsNSW was lawful. While LGNSW initially stated that it had commenced its review of the arrangement in February 2017, LGNSW did not (and had not) provided any further guidance on the matter. CrownBet noted that, in accordance with LGNSW's published Compliance and Enforcement Policy, LGNSW's primary role in the industry is to provide stakeholders with regulatory guidance in a timely manner.

CrownBet submitted that this legal uncertainty prejudiced CrownBet's ability to attract other clubs to engage as a digital affiliate, as giving effect to a contractual arrangement of this type gave rise to a risk that the club (or CrownBet) would be liable to prosecution.

Further, CrownBet claimed that it was in the interest of all clubs in New South Wales to have certainty as to whether its commercial arrangement with Warners Bay was lawful, and that these proceedings should be treated as a test case.

Judgement

Stevenson J found that the Supreme Court had jurisdiction to grant declaratory relief (as sought by Crownbet) in exceptional circumstances.

Stevenson J came to the view that this case did not constitute a matter of 'exceptional circumstance' to warrant the grant of a declaration, even though giving effect to the Agreement by CrownBet and Warners Bay would run the risk that both CrownBet and Warners Bay would be liable to prosecution.

Stevenson J considered the following when handing down his judgement:

- CrownBet submitted that it had disclosed the specifics of its arrangement with ClubsNSW in minute detail. However, Stevenson J was of the view that the declaration did not specify how the *CrownBet Advertising Zone* would be operated, nor what obligations were imposed upon Warners Bay under the Agreement. Stevenson J stated that this information was vital to the determination of the declaration, as CrownBet was seeking declaratory relief in respect of the performance of those obligations, which could only be determined by the Court by reference to the Agreement as a whole;

- CrownBet and Warners Bay are well-resourced parties who had entered into the Agreement after careful consideration of the Agreement's potential unlawfulness and on the basis of high quality legal advice. Stevenson J was of the view that the Court should be cautious about making a declaration as to the lawfulness of a commercial arrangement in these circumstances;
- The Agreement considered the possibility that regulatory approval would not be forthcoming. Stevenson J stated that the Agreement made specific provision for a mutually satisfactory way to deal with the eventuality that the proposal was unlawful;
- CrownBet sought declaratory relief in the context of a regulated industry. Stevenson J found that LGNSW had refrained from expressing any view in respect of the Agreement, and that, as a result, the Court did not have the ability to consider submissions from the regulator. Stevenson J commented that the Court has assumed LGNSW's position in terms of providing the industry with guidance. However, in accordance with CrownBet's position, he reiterated that the commencement of this proceeding does not abrogate LGNSW's responsibility to complete their regulatory investigation;
- The question of whether there would be a contravention of the UGA is dependent upon the particular circumstances at Warners Bay, and consideration should be given to the club's premises as a whole, including the aesthetic of Warners Bay, the equipment installed at Warners Bay, and the services provided at Warners Bay. Stevenson J was of the view that this was difficult to ascertain in the current proceeding as no statement of agreed facts had been presented to the Court. Stevenson J noted that those facts and circumstances would differ between clubs; and
- CrownBet sought declaratory relief only in respect of Phase 1 of the Agreement. Stevenson J noted that the Agreement contemplated additional obligations being performed by CrownBet and Warners Bay, which are beyond the circumstances for which the declaration was sought;
    - In this regard, Stevenson J agreed with Tabcorp's submission that the Agreement did not mirror the subject of the declaration; and
    - Stevenson J also noted that the contractual arrangements to be entered into with other clubs at a later stage (after the declaratory decision) would involve different obligations, and therefore the extent to which it could be said that these proceedings are a test case, was diminished.

CrownBet did not proceed to appeal the Supreme Court's decision.[9]

What does this mean for digital wagering operators?

The main objective of this proceeding was to clarify the scope of the restrictions in the UGA that applied to the promotion of wagering operators in clubs (and the underlying commercial arrangements). Of particular relevance to this case was whether a club could be considered to be providing a remote access betting facility, or operating a gambling premises, in contravention of the UGA.

While Stevenson J did not determine that performance of the obligations under the Agreement (or the commercial arrangement itself) was in fact unlawful, he did not provide clarity concerning the extent to which a club's engagement of a digital wagering affiliate could be lawful.

At the date of this paper, it is also unclear whether LGNSW will provide any guidance to the industry in relation to agreements of this nature.

Without this guidance, it will be difficult to consider generally the legality of any commercial arrangement between a digital wagering operator and a club or other venue. Any club or

[9] For more information please see the press release issued on 30 November 2017 by Tabcorp: http://www.smh.com.au/business/crownbet-pulls-out-of-battle-against-11b-tabcorp-tatts-merger-20171130-gzvrf4.html

digital wagering operator seeking to engage in a digital affiliate arrangement must give specific attention to the overall commercial arrangement, and assess the legality of the specific terms of the arrangement under legislation (whether it be New South Wales or any other State or Federal law).

On the other hand, the Court confirmed the underlying principles relating to digital wagering services – that is, that they are capable of being provided and being promoted legally throughout Australia if a relevant Australian wagering licence is held by the operator which enables those services to be provided.

The gloves are off on the gaming Battlefront: International and Australian gambling regulators weigh in on loot boxes

Authors: Jamie Nettleton and Karina Chong

Introduction

The end of the year often marks an exciting time for the video gaming industry as Christmas means new games, new console sales and Christmas themed DLC. However, in recent months, the video gaming industry has been overshadowed by the contentious issue of loot boxes and whether or not these in-game virtual items constitute gambling and, therefore, whether their inclusion in video games marketed at children crosses the line between traditional video gaming and gambling.

With gambling regulators all over the world, including Australian gambling regulators, chiming in with their views on the issue, it is clear that loot boxes are another example of where the strict legal definitions and laws have struggled to keep up with the rapid growth of innovative technology.

What is a loot box?

A "loot box" (also known as loot crates, prize boxes or other similar names depending on the game) is a voluntary feature available in some video games which allows players to "purchase" virtual in-game "boxes". When opened, these loot boxes contain randomised virtual items that can be used to enhance a player's in-game play and experience.[1] Ultimately, loot boxes are a new form of micro-transaction monetisation applied by game developers and publishers.

The process for obtaining loot boxes varies depending on the mechanics of the base game. In the majority of games, loot boxes can be earned simply by playing the game and earning points or other virtual items such as coins or crystals and using these items to obtain a loot box. The player never has to spend any real world currency to obtain the loot box.

However, some video games have an additional voluntary feature where players, who do not wish to spend the time playing the game to earn enough points to obtain a loot box, can purchase additional points (or virtual coins, crystals etc.) using real world currency, to then use in exchange for a loot box.

These loot boxes are nothing new to gaming. Loot boxes, or a similar function, have been featured in a number of social games (primarily, free to play mobile games) as well as some AAA video game titles released over the past few years. For example, in 2011, Valve introduced the concept of crates and item trading into its popular multi-player game *Team Fortress 2* and *CS:GO* added weapon crates in 2013.[2] The recent surge of games introducing a loot box function came from gaming publisher Activision introducing the feature in the beta version of its popular game, *Overwatch* in 2016.

For most games, items which can be obtained by opening a loot box are "cosmetic". For example, this may include a new costume for the player's in-game character or a rare skin or attachment for a weapon. However, it was the introduction of a new "kind" of loot box in the recently released *Star Wars Battlefront II* which has sparked concerns for the gaming community and gambling regulators alike.

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[1] This is the description of “loot boxes” provided by the Entertainment Software Association. Alex Walker, ‘Queensland’s Gambling Regulator Doesn’t Think Loot Boxes are Gambling’, *Kotaku* (online), 23 November 2017 https://www.kotaku.com.au/2017/11/queenslands-gambling-regulator-doesnt-think-loot-boxes-are-gambling/

[2] Mike Williams, ‘The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes’, *US Gamer* (online), 11 October 2017 http://www.usgamer.net/articles/the-history-of-gaming-microtransactions-from-horse-armor-to-loot-boxes

Why the recent concern?

The gaming community has expressed concerns about this new type of loot box mechanism which is integrated into the core of gameplay and offers items which provide key power-ups required for a player to progress in, or complete, the game. In order for a player to complete the game and, to have a reasonable chance at being competitive in a multi-player game, obtaining loot boxes and the features they contain is no longer a voluntary option, but a necessity.

For example, the loot boxes in *Star Wars Battlefront II* contained items which provide a player with power-ups, including stronger characters or items which increase substantially the damage, health and fire rate of the player's characters. The gaming community has expressed concerns that this gives players who purchase loot boxes an unfair advantage in multi-player competitive matches.

From a gambling law perspective, the gaming community and gambling regulators have questioned whether the combination of requiring players to pay for loot boxes, and the randomised chance of what a player will receive in a loot box, constitute a form of gambling on the basis that it has similar characteristics to the features of a poker machine.

If the "playing" of a loot box constitutes gambling, then, naturally, concerns have arisen as to whether this function (or the video games of which they form part) should be regulated under gambling law, particularly as they are often marketed at, and accessible by, minors under the age of 18.

What have the Australian gambling regulators said?

The issues arose first in Australia when an Australian university student contacted the Victorian regulator for gambling, the Victorian Commission for Gambling and Liquor Regulation (**VCGLR**) questioning whether loot boxes should be regulated as gambling.[3]

The student received a response from Jarrod Wolfe, a Strategic Analyst for the VCGLR and the response was posted online sparking great debate.[4] Mr. Wolfe stated that *"what occurs with "loot boxes" does constitute gambling by the definition of the Victorian Legislation…the idea that (genuine) progression in a game could be reliant on the outcome of a random number generator is at odds with responsible gambling and the objectives of our acts."*[5]

The reference to Victorian legislation made by Mr Wolfe was to the *Gambling Regulation Act* 2003 (Vic). The definition of "gambling" under this Act means, among other things, an activity in which a prize of money or something else of value is offered or can be won, where the outcome involves an element of chance, and the person pays or stakes money or some other valuable consideration to participate.[6]

Mr. Wolfe went on to state that, whilst an activity may constitute "gambling", it does not necessarily constitute "unauthorised gambling" under Victorian law. For example, placing a bet with a licensed Australian wagering operator or playing a poker machine at a casino constitutes gambling, but is authorised gambling under the Victorian legislation and, therefore, is not in breach of the Act. Mr. Wolfe further stated that, where the complexity arises, is in relation to the jurisdiction of the VCGLR and its powers to investigate a feature in a video game that is available globally through the internet.[7]

Despite these earlier reports, the VCGLR later clarified that it *"has not made a determination that "loot boxes" are an unauthorised form of gambling under Victorian*

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[3] Alex Walker, 'Victoria's Gambling Regulator: Loot Boxes 'Constitute Gambling'', *Kotaku* (online), 22 November 2017 https://www.kotaku.com.au/2017/11/victorias-gambling-regulator-loot-boxes-constitute-gambling/

[4] The response is set out in full in the article: Mark Campbell, 'Australia's VCGLR has weighed in on Loot Boxes – They Constitute Gambling' *Overclock 3D* (online), 22 November 2017, https://overclock3d.net/news/misc_hardware/australia_s_vcglr_has_weighed_in_on_loot_boxes_-_they_constitute_gambling/1

[5] Ibid.

[6] *Gambling Regulation Act* 2003 (Victoria), section 1.3AA

[7] Walker, above n 3.

legislation"[8] but that it is aware of the issue of loot boxes and is working with other agencies and jurisdictions to address this complex issue and the risks involved.[9]

Following the initial statement from the VCGLR, the Queensland gambling regulator, the Queensland Office of Liquor and Gaming Regulation (the **QOLGR**) provided its own views, considering the issue by reference to whether loot box mechanism would constitute a gaming machine under the *Gaming Machine Act* 1991 (Qld).

The QOLGR stated that it was *"not in a position to definitely advise whether loot boxes or similar video game features would constitute "gambling"…however…video gaming which provides for loot boxes would not fall within the meaning of a gaming machine as defined under the Gaming Machine Act"*.[10] The representative for the QOLGR confirmed that he did not consider loot boxes to constitute gambling and, therefore, they fall outside the legislative authority of the QOLGR to regulate.

Finally, the ACMA confirmed that, from a Federal gambling law perspective, it does not consider loot boxes to constitute a "gambling service" under the IGA because they are not "played for money or anything else of value".[11]

Under the IGA, "gambling service" is defined to include the conduct of a game where:

- the game is played for money or anything else of value;
- the game is one of chance (or mixed skill or chance); and
- the player/customer gives or agrees to give consideration to play or enter the game.[12]

The ACMA has applied a strict interpretation by stating that, because those games which involve loot boxes are not played with the object of winning money or other valuable items, they do not meet one of the key elements required to constitute a "gambling service" under the IGA.[13] This conclusion raises an interesting question in the context of competitive esports tournaments which involve the playing of games (some of which may contain loot boxes) on the basis that the object of winning money or a prize is the ultimate goal of these competitions.

Despite its views, the ACMA has indicated that, like all regulators, they are monitoring the use of loot boxes and other similar in-game mechanics which may involve gambling-like characteristics.

What's the view of international gambling regulators?

The views of the Australian regulators are largely consistent with the commentary of the international gambling regulators in their consideration of loot boxes.

Perhaps the most stringent criticism are the comments of Hawaiian state representative, Chris Lee. In his speech on the issue, Mr Lee referred to *Star Wars Battlefront II* as a *"Star Wars-themed casino"* and condemns loot boxes as *"predatory practices…designed to lure kids into spending money"*.[14] From Mr. Lee's perspective, the protection of children and minors from accessing games which exhibit significant gambling-style mechanics and features is paramount and he indicated that Hawaii state legislators are intending to introduce laws in the next year to ban loot boxes and similar items.[15]

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[8] Ange McCormack, 'Loot boxes, video game 'gambling': How game developers are after your money', *TripleJ Hack* (online), 23 November 2017 http://www.abc.net.au/triplej/programs/hack/loot-boxes/9185942
[9] Ibid.
[10] Walker, above n 1.
[11] Alex Walker, 'Australia's Telco Regulator Is Keeping an Eye on Loot Boxes', *Kotaku* (online) 24 November 2017 https://www.kotaku.com.au/2017/11/australias-telco-regulator-is-keeping-an-eye-on-loot-boxes-too/
[12] *Interactive Gambling Act* 2001 (Cth), section 4
[13] Walker, above n 11.
[14] Hannah Dwan, 'Hawaii to crack down on 'predatory' loot boxes in video games following Star Wars Battlefront 2 controversy', *The Telegraph* (online) 27 November 2017 http://www.telegraph.co.uk/gaming/news/hawaii-crack-predatory-loot-boxes-video-games/
[15] Ibid.

In Europe, it was initially reported that Belgium's Gaming Commission had determined that loot boxes constituted a form of gambling under Belgian law and that the Minister of Justice was seeking to ban loot box type in-game mechanics outright. It was later clarified that the Belgium Gaming Commission had not finalised its decision on whether loot boxes constitute gambling; however, it confirmed that it is important for the right rules and enforcement mechanisms to be put in place to protect players from the harmful effects of gambling without compromising the games.[16]

However, the most significant response comes from the UK Gambling Commission (the **UKGC**), a gambling regulator and jurisdiction which is notoriously strict on its gambling policy and regulation. The UKGC's Executive Director, Tim Miller, stated that a key factor in determining whether a game crosses the line into gambling is whether the *"in-game items acquired 'via a game of chance' can be considered money or money's worth. In practical terms this means that where in-game items obtained via loot boxes are confined for use within the game and cannot be cashed out, it is unlikely to be caught as a licensable gambling activity."*[17]

Therefore, from the perspective of the UKGC, because the in-game virtual items that are obtained from opening loot boxes cannot be cashed out, sold or exchanged for real world money, they do not fall within the strict legal definition of "gambling" under UK law, and therefore, the UKGC cannot regulate the offering of loot boxes.

However, the UKGC also highlighted its concern with the growth of video games which blur the line between traditional gaming and gambling and indicated its intention to share its experiences and expertise with other regulators in order to keep young people safe from the potential effects of video games which contain gambling-style elements or features from being heavily marketed at children.[18]

What does this all mean?

Despite the extensive commentary, it is evident that there is no consistent determination as to whether or not loot boxes constitute gambling. This is partly due to the differing definitions of "gambling" in the laws in Australian and other jurisdictions. However, this lack of clarity (and consistency) is also an example of the way in which gambling laws and regulation are struggling to keep up with the rapid growth and innovative commercial models being applied by video game developers, publishers and other online businesses.

This is also true from an Australian perspective as the gambling laws in each Australian State and Territory are different and attempts by regulators to apply, and content producers to comply, in a manner which is consistent with all Australian gambling legislation, is difficult.

Interestingly, this is one of the few occasions where the ACMA has given a view as to what it considers to constitute "anything else of value" and, certainly, it raises uncertainty about what is "value" (usually determined in a subjective manner) and what this term may mean from an objective, legal, policy and regulatory perspective.

It may be that further formal guidance will be given by the regulators on the issue. Whether legislation is introduced in the future to clarify the issue of in-game purchases, virtual currency, loot boxes and other virtual items is also uncertain; however, to date, the issue has not been considered in detail by Australian gambling law.

Following the controversy, the gaming industry has reacted with Electronic Arts, the game publisher for *Star Wars Battlefront II*, removing micro-transactions and the ability to purchase the crystals (the in-game virtual currency used to exchange for loot boxes) using real money, from the game. Nevertheless, it has indicated plans to bring back these micro-

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[16] Andy Chalk, 'Belgium's Justice Minister calls for loot box ban in Europe', *PC Gamer* (online) 23 November 2017 http://www.pcgamer.com/belgium-says-loot-boxes-are-gambling-wants-them-banned-in-europe/

[17] Tim Miller, UK Gambling Commission, 'Loot Boxes within Video Games' (online) 24 November 2017 http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx

[18] Ibid.

transactions at a later date after fine-tuning the game's systems to provide a more balanced feature.

Any legislation would certainly throw a hydrospanner in the proverbial Millennium Falcon works for not only gambling regulators and video game developers and publishers, but also for player consumers, as it would involve finding new ways to commercialise and market (for game developers), and obtain (for players), that really rare Star Card.

Addisons' Media and Gaming team will be watching the battle with interest over the coming months.

Privacy developments in 2018 and their impact on the gambling sector

Authors: Donna Short and Hazel McDwyer

2018 is shaping up to be an important year for privacy in Australia, which will have far reaching effects, mainly due to two pieces of legislation.

The Privacy Amendment (Notifiable Data Breaches) Act 2017 (Cth) was passed in February 2017 and amends the *Privacy Act 1988* (Cth) (**Privacy Act**). This amendment act introduced the mandatory data breach notification scheme (**NDB Scheme**).

The other legislation which will have the potential to impact businesses in Australia in 2018 is the EU General Data Protection Regulation (**GDPR**).[1]

Each of these pieces of legislation will have the potential to have a significant impact on the gambling sector in Australia, as a sector that collects and uses personal information on a large scale. As a highly regulated industry, no doubt gambling operators will be able to implement updated policies and procedures to address the requirements of this new privacy legislation.

The new mandatory obligation to notify affected individuals at risk of serious harm as a result of a data breach has the potential to seriously affect an organisation's brand. In an industry that uses so much personal information, data breaches could be catastrophic to a company in the gambling industry. The introduction of the NDB Scheme also increases the possibility of class actions in this area in Australia.

Notifiable data breaches - A new regime

The Privacy Act governs the collection, use and disclosure of personal information by "APP entities", which are organisations or commonwealth public sector bodies. To be fully bound by the Privacy Act, organisations generally have to have an annual turnover of over AUD3 million, which would apply to most organisations in the gambling sector.

The NDB Scheme applies to eligible data breaches that occur on or after 22 February 2018. Any breaches that occur prior to that date are not subject to the NDB Scheme. There are voluntary guidelines in place to deal with data breaches prior to that date. Some data breaches occur over time, particularly with IT systems, therefore it may be the case that a breach occurs prior to and after 22 February 2018, which could be a notifiable breach under the Privacy Act.

Where Australian Privacy Principle (**APP**) 8[2] applies to the disclosure of personal information overseas, the APP entity in Australia is deemed to hold the personal information. If the overseas recipient is subject to unauthorised access or disclosure, the APP entity is responsible for assessing whether it is an eligible data breach under the Privacy Act.

Notifiable data breaches

Data breaches can occur in any number of ways, such as an employee accidentally emailing personal information to incorrect recipients, or incorrectly publishing personal information on the internet. They can also occur where personal information is lost, such as a USB or hard copy documents going missing or where an employee, without authority, accesses personal information of an individual on the company's network.

Not all data breaches are notifiable data breaches under the NDB Scheme. A notifiable data breach (or eligible data breach as it is described in the Privacy Act) occurs when

[1] Regulation (EU) 2016/679 of the European Parliament And The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[2] There are 13 APPs, which are contained in Schedule 1 to the Privacy Act and govern how personal information is collected, used, and disclosed.

personal information, which an organisation holds, is subjected to unauthorised access or disclosure or is lost, where such a breach is likely to result in serious harm to any individual to whom the information relates.

If an entity acts quickly and takes remedial action after a breach has occurred to avoid the likelihood of serious harm to individuals, then there is no requirement to notify under the NDB Scheme.

Serious harm is not defined in the Privacy Act, but may include serious psychological, emotional, financial or reputational harm. Serious harm needs to be assessed holistically, taking into account, not only the likelihood of the harm, but the consequences of the harm.[3] With gambling customers, there could be a risk of serious harm due to a breach, such as reputational harm as well as financial harm.

The Office of the Information Commissioner (**OAIC**) has issued a number of draft guidelines and materials to assist with identifying notifiable breaches and on data breach responses. A chapter on data breach incidents has been added in its Guide to Privacy Regulatory Action.[4] These have gone through consultation with stakeholders and finalised guidelines should be published prior to the commencement of the NDB Scheme.

If an APP entity has reasonable grounds to believe that an eligible data breach has occurred, the NDB Scheme requires it to notify the OAIC by way of a statement as soon as practicable after it becomes aware of the breach. It also requires the APP entities to notify the affected individuals as soon as practicable after completion of the statement to the OAIC.

The Privacy Act specifies the minimum content of the statement to be provided to the OAIC.[5] Even if an entity merely suspects that an eligible data breach may have occurred, it is required to undertake a reasonable and expeditious assessment (to be completed within 30 days) of whether there are reasonable grounds to believe that the circumstances amount to an eligible data breach which requires notification.[6]

If entities do not carry out any of the requirements of the NDB Scheme (such as carrying out an assessment of a suspected eligible data breach), this will be taken to be an interference with the privacy of an individual and result in possible enforcement action against the entity. The OAIC's enforcement powers include accepting enforceable undertakings, making determinations, seeking injunctions and applying to court for civil penalty orders. Orders up to AU$1,800,000 can be made under the Privacy Act where there are serious or repeated interferences with the privacy of an individual.

In addition to the enforcement powers of the OAIC, an entity that does not comply with the NDB Scheme is likely to suffer reputational damage, for example, through negative PR, and may also face a class action by affected individuals who have suffered serious harm.

Breaches involving more than one organisation – contractors

In a technology driven sector such as the gambling sector, many companies outsource services or enter into shared services arrangements.

If there is a breach which involves more than one entity, only one entity needs to notify individuals. However, if none of the entities notify, each of the entities may be found to have breached the Privacy Act.

The introduction of the NDB Scheme is an opportune time for entities to review their contracting arrangements with third parties and consider privacy issues in their contracts. In some contracting situations, it will be important to address issues, such as ensuring prompt investigation of breaches by the contractor and notification to the entity. Sufficient

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[3] Section 26WG of the Privacy Act contains a non-exhaustive list of relevant matters that may assist entities to assess the likelihood of serious harm, such as the kinds of information and the sensitivity of the information.
[4] See https://www.oaic.gov.au/engage-with-us/consultations/notifiable-data-breaches/ for more information.
[5] See section 26WK of the Privacy Act and the OAIC guidance notes "What to include in an eligible data breach statement" and "Notifiable Data Breach statement".
[6] See section 26WH of the Privacy Act.

indemnities should be in place and the costs of investigating and addressing breaches could be addressed.

The contracts may also address who will be responsible for assessment and, if relevant, the statement to the OAIC and notification. The initial assessment is vital with respect to the NDB Scheme. Even if a decision is taken not to notify, the assessment will provide documentary evidence of this. Therefore, it is important that this should be clarified at the outset as decisions need to be made quickly in the event of a breach.

As the principal organisation, the gambling operator would be likely to want to control the notification to the OAIC and individuals, rather than its contractor. However, in some situations, it may be preferable for the contractor to make the notification, depending on the breach. The OAIC has suggested that generally the appropriate party to make the notification should be the entity with the most direct relationship with the individuals at risk of serious harm.

It will depend on the relevant facts of the scenario, but it is advisable that parties give further consideration to privacy in their contracting arrangements going forward.

GDPR

The GDPR will enter into force on 25 May 2018. The GDPR completely overhauls data protection throughout the EU.[7]

As the GDPR is a Regulation, it will automatically apply throughout the EU, in each Member State, without Member States needing to implement separate legislation. However, there are some areas of the GDPR that allow some latitude for Member States regarding implementation, so Member States will also implement their own legislation relating to GDPR.

The GDPR protects personal data, which is defined as any information relating to an identified or identifiable (either directly or indirectly) natural person. The definition specifically includes information such as location data and an online identifier as well as the more traditional types of personal data.

Similar to the Privacy Act, the GDPR adopts a principles based approach and takes a 'privacy by design' approach to compliance.

Applicability of GDPR outside of the EU

Australian businesses, of any size, may need to comply with the GDPR if they:

- have an establishment in the EU;
- offer goods or services in the EU; or
- monitor the behaviour of individuals in the EU.

Therefore, the GDPR could have far reaching consequences for Australian businesses, even if they do not have offices in the EU. It may even bind Australian businesses which would not be bound as APP entities under the Privacy Act due to low turnover. There is also no minimum amount of turnover or sales needed in the EU to be caught by the GDPR.

Penalties for breaching the GDPR can be up to 4% of an entity's annual global turnover for the precedent year or up to €20 million, whichever is greater, so the penalties are potentially higher than under the Privacy Act.

Data controllers or processors that are covered by the GDPR, but not established in the EU, will usually have to appoint a representative in the EU.

Power to the people

Individuals will have far more power over their personal data under the GDPR than previously. Any business with EU customers will generally need to secure explicit consent

[7] The GDPR replaces Data Protection Directive 95/46/EC which was designed to harmonise data protection laws across the EU.

to be able to collect, retain and use their personal data in accordance with the GDPR. This has to be easy for customers to understand, and identify as being a request for consent. Any part of a consent declaration which constitutes an infringement of the GDPR will not be binding.[8]

Any procedure to withdraw consent must be as straightforward as initially giving consent.

The Privacy Act already has consent provisions in place in the APPs, so many companies may already be compliant in this regard, but systems should be reviewed in light of the changes introduced by GDPR, particularly as regards withdrawal of consent.

Individuals will have the right of erasure of their personal data (the right to be forgotten) and rights to restrict processing, profiling and automated decision making.[9]

Individuals will also have rights to access and rectification as well as portability of their personal data.[10] Data portability relates to the right to receive the personal data in a structured, commonly used and machine-readable format and have the right to transmit such data to another controller. Data portability could impact the gambling sector as customers often have numerous accounts with different operators and could seek to port their data to another gambling operator. The GDPR will oblige entities to have technically compatible systems. Where 'technically feasible, the data subject should have the right to have personal data transmitted directly from one controller to another'.[11] It is unclear how this will work in practice.

Data breach notification under the GDPR

The GDPR will also introduce a mandatory notification scheme where there is a breach relating to personal data.

Controllers will be obliged to report personal data breaches to their lead supervisory authority within 72 hours after becoming aware of such a breach unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons.[12] The GDPR also sets out the content of the notification where there is such a breach. This is a very short window within which to notify the relevant supervisory authority.

Where the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay[13], unless certain exceptions apply, such as where the controller has taken subsequent measures which ensure that such high risks are no longer likely to materialise.

Consequences of the GDPR and NDB Scheme for gambling operators

Entities in the gambling sector hold extensive personal information about their customers, including financial information, such as credit card details. Therefore, potential breaches to their systems are often likely to result in serious harm to individuals.

Australian businesses that have customers in the EU or operate in the EU should check whether the GDPR is relevant to them prior to May 2018 and make any changes that may be required to their systems and processes.

As a result of the changes being brought about as a result of the NDB Scheme and the GDPR, it is more important than ever before that companies have appropriate plans in place to deal with potential data breaches as investigations and, if relevant, notifications need to take place very quickly.

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[8] Articles 6 and 7 of the GDPR.
[9] Articles 17, 18, 19, 21 and 22 of the GDPR.
[10] Articles 15, 16 and 20 of the GDPR.
[11] Recital 68 of the GDPR.
[12] Article 33 of the GDPR.
[13] Article 34 of the GDPR.

As the gambling industry is a highly regulated industry, it is likely that many companies already have good privacy compliance procedures in place. However, further review and planning should be undertaken in light of the upcoming changes.

The role of the Privacy Officer will become more and more important and appropriate internal procedures and training should take place to ensure that businesses are fully prepared.

Probing "probity": What you should know about suitability investigations in the gambling sector

Authors: Jamie Nettleton and Mia Corbett

If you have ever been directly or indirectly involved in the ownership or operation of a gambling enterprise, you may have been asked to submit to a probity investigation conducted by a gambling regulator or licensing authority.

What is probity?

Probity is broadly defined as a standard of ethical and moral behaviour which concludes that a person or company complies with appropriate principles of "integrity, uprightness and honesty".[1]

Probity investigations relating to gambling operations are usually conducted by a regulatory body to determine if a person or organisation is "fit and proper" to be involved in the provision of gambling services to a sector of the public. These investigations go beyond an assessment of legal compliance: instead, probity is concerned with determining that your actions are suitably governed by what you ought to do, not only what is lawful, commercially acceptable or expedient.

In the Australian regulatory environment, there is a high level of public awareness, media attention and concern about probity and integrity issues in the gambling industry.

When and why?

Authorities that conduct probity investigations in relation to gambling activities include government agencies, liquor and gaming regulators, licensing authorities and, in some cases, racing and sporting bodies.

A regulatory body may conduct a probity investigation, for example:

- before issuing a licence to conduct a gambling operation;
- prior to the acquisition by an individual or a company of a direct or indirect interest (or the increase in an existing interest) in a gambling operation;
- prior to the appointment of a director or key manager by a company which conducts a gambling operation, or a related company of an entity which conducts a gambling operation;
- on an ongoing basis (e.g. once every 5 years), or otherwise at any time at their complete discretion.

For government regulators, conducting probity on gambling operators is key to ensuring that the public is protected, when participating in gambling activities, from financial crime, for example, fraud, money laundering and counter terrorism financing activities. Probity is also important to ensure objectivity and consistency in accordance with legislative or other criteria, particularly in relation to a public tender process. In the Australian context, the disclosure requirements that apply in the gambling industry are more onerous than those imposed by any other authority, including ASIC and the ASX.

What is involved?

Ordinarily, a regulatory body conducting a probity investigation will ask for information relating to a company or an individual associated with the operation or management of the gambling operation. This information may include:

- contact details;
- identification documents;

[1] Macquarie Dictionary Publisher, *Macquarie Dictionary Online* (2017) http://www.macquariedictionary.com.au .

- qualifications;
- related and associated companies;
- shareholdings;
- statement of assets and liabilities;
- licences, certificates and memberships;
- arrests, detentions or litigation;
- a history of involvement in the gambling industry;
- any past probity investigations conducted by regulatory bodies;
- bankruptcy information;
- tax information;
- written references;
- criminal history; and/or
- the source of their wealth/funds.

It may be necessary for the information to be provided to go back a number of years.

Key considerations

It is important to note that probity is a weighted process. Disclosing information that is likely to discredit you or your company does not necessarily mean that the relevant regulatory body will come to the conclusion that you are not fit and proper to be associated or connected with a gambling operation. As indicated below, omission is often worse.

Instead, investigators are generally concerned with the mechanisms in place to recognise, identify and mitigate the risk that a company or its personnel might be involved in inappropriate behaviour. For this reason, organisations should show that they are setting and implementing measures at an organisational level to manage these risks.

However, regulatory agencies have broad discretion and their decisions are often not capable of appeal. For this reason, it is important to fully cooperate with any regulatory body that requests information for the purpose of conducting a suitability investigation.

What can go wrong?

Impediments to a successful probity investigation can arise where fulsome disclosure of relevant information is affected by:

- incomplete or incorrect facts;
- contradictory information;
- fear that full and frank disclosure will jeopardise a finding of suitability; and/or
- time and resource pressures.

For these reasons, certain applicants have, in some cases, failed or refused to meet the requirements of a regulatory body, which has resulted in a negative finding of suitability to be associated or connected with a gambling operation.

Omission of material matters may have serious consequences; indeed, a failure to satisfactorily disclose information to a regulatory body may give rise to:

- implications for your existing gambling licence;
- a direction by a regulatory body to dismiss an employee or remove a person from a position of authority;
- “blacklisting” a person from being associated or connected with a gambling operation; and
- in serious cases, criminal liability.

Probity investigations may also be difficult for venture capital and private equity investors that have a relevant interest in an Australian gambling enterprise, particularly if they have little to do with the day to day operation of the business.

How we can help

Addisons has relationships with many State and Federal Government regulators developed over the course of many years of providing advice and assistance to companies and individuals undergoing probity.

If you would like more information about probity, or any of the services we provide, please contact a member of Addisons' Media and Gaming Team.

The Lottoland Effect Part 2: Weathering the Regulatory Storm in Australia

Authors: Jamie Nettleton and Nicola Austin

As the year draws to a close, secondary lottery operators in Australia continue to face the regulatory storm which has been building for much of the year.[42] After months of publicity and mounting pressure from Tatts Group and newsagent camp, there has been a response on the regulatory front.

For now, the focus is on restricting, rather than prohibiting, secondary lotteries; however the stated objective is to protect the lottery businesses of newsagents, and also consumers.

"Lottoland's Gotta Go"

In September 2017, Tatts Group and the Australian Lottery and Newsagents Association (**ALNA**) united to launch the *"Lottoland's Gotta Go!"* campaign. The aggressive campaign was featured in point-of-sale material posters in newsagents and on television across the country, broadcasting the message that Lottoland should be prohibited from operating in Australia.

The "Lottoland's Gotta Go!" campaign was designed to increase pressure on Australian State regulators to prohibit the supply to Australian consumers of secondary lottery products.

The campaign does not stop there. In addition to the promotional campaign, it has also been reported that Tatts Group has donated considerable amounts of money to political parties, including to One Nation Senator Pauline Hanson, who earlier this year called for secondary lotteries to be banned at the Federal level.[43]

Where do the State Governments stand?

All State/Territory governments have now announced an intention to introduce legislation that would prohibit, or otherwise impose restrictions on, the provision of secondary lottery products to customers located in their particular jurisdiction. This is in addition to the restriction that exists currently under South Australian law, where betting on contingencies involving the outcome of lotteries has been prohibited for decades.

At this stage, we are only aware of a bill being introduced in Victoria, where the *Gambling Legislation Amendment Bill 2017* was tabled in October 2017. If passed, these amendments would provide the relevant Minister with a mechanism to either prohibit or impose conditions upon betting on a particular contingency (for example, lotteries), where the Minister considers that betting on the contingency would be contrary to the public interest.

It is not clear whether statutory amendments that may be introduced by other States/Territories will take this form, or the form of a prohibition relating expressly to the supply of secondary lotteries (like in South Australia). Pressure has also been applied to the Federal government to amend the IGA – if this occurred, secondary lotteries would become an[44] additional enforcement priority for the ACMA.

The Northern Territory breaks its silence

On 14 November, following months of silence, the Northern Territory Attorney General formally directed the Northern Territory Racing Commission (**NTRC**) to remove "Australian

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[42] For more information, please refer to our article entitled "The Lottoland Effect – the rise and risk of secondary lotteries in Australia" in the Gambling Law & Regulation Newsletter from July 2017.

[43] *Tatts has thrown cash donations at political parties during Lottoland campaign*, The Herald Sun (19 November 2017): http://www.heraldsun.com.au/news/tatts-has-thrown-cash-donations-at-political-parties-during-lottoland-campaign/news-story/59056f6cfb47b8015b890b4fa8068381

[44] Section 95 of the Gambling Act 2005.

lotteries" as an approved betting contingency. This change took effect on 30 November 2017.

As a result, secondary lottery operators licensed by the NTRC will only be permitted to accept bets on foreign lotteries. Lottoland responded promptly to the announcement, with CEO Luke Brill announcing to its customers on 29 November 2017 that it would no longer accept bets on Australian lotteries.

This change seeks to protect the interests of Tatts Group and newsagents, while allowing Lottoland and other secondary lottery providers to continue operating but only in respect of a narrower category of products. It is also consistent with the approach taken by the UK Gambling Commission (**UKGC**), where UK licensees are prohibited from accepting bets on any lottery forming part of the National Lottery and in the future, on the outcome of EuroMillions.

Is there light ahead?

It remains to be seen which operators will weather the regulatory storm. While Lottoland has achieved a substantial customer base and continues to promote its products, Crownbet has already ceased to provide its CrownLotto offering despite being only launched in August.

While the restriction imposed by the Northern Territory Racing Commission will not deter most operators, the continued viability of the secondary lottery model in the Australian market will now depend on any further restrictions which may be imposed at the State and Territory level.

If you require further information relating to the changing regulatory framework relating to secondary lotteries in Australia, please feel free to contact any of Addisons' Media and Gaming Team.