DECEMBER 2014

Gambling Law & Regulation
Overview

Welcome to the December 2014 Addisons’ Gambling Law & Regulation Newsletter.

In this Newsletter, we cover a variety of issues that will be of interest to our readers as 2014 comes to an end:

- In Australia, the Melbourne Cup is celebrated almost more widely than Christmas. Businesses including bookmakers and other betting providers see value in marketing that refers to famous racehorses and racing events. We consider the ownership of intellectual property in this area and potential legal pitfalls that advertisers might face. Please see: The trade mark that stops an ad campaign? IP and related issues in marketing by bookmakers.

- Despite the Australian wagering market commonly being described as “saturated”, it remains a popular market for multi-national gambling brands and small operators alike (we suspect this popularity is only encouraged by the locals’ enthusiasm for racing). To assist any party wishing to consider entering the Australian market (as well as operators currently in the market), we have set out an overview of the regulatory framework that applies to Australian wagering operators. Please see: So you want an Australian Online Wagering Licence? This is what you need to know.

- One of the major differences between the Australian wagering market and other regulated wagering markets around the world is the existence of a prohibition under Australian law on online in-play betting on sports events. On 30 October 2014, the Federal and the (then) Victorian governments announced that a new national working group would be set up to address the “increasing impact of illegal offshore wagering on Australian racing and sports”. It is too early to predict whether the working group will consider the repeal of the in-play prohibition. Please see: Australia: Will action be taken against illegal online betting operators? And is regulated in-play betting next on the list?

- The Interactive Gambling Act 2001 (Cth) prohibits the provision and promotion of online gambling services to Australian residents. Online wagering services (except online in-play betting on sports) and online lotteries are exempt from this prohibition. For a full overview of online gaming regulation in Australia, please see: Australia: Online Gaming Regulation. Bitcoin and other digital currencies are of increasing interest to e-commerce businesses and, particularly, online gambling operators. To coincide with the Australian Senate’s (the upper house of Australia’s federal Parliament) current Digital Currency Inquiry, we overview the current regulatory framework surrounding Bitcoin. Please see: Bitcoin Regulation in Australia: A Bit of a Task to Coin.

- Brand owners should be aware of the risks faced in an online environment where unauthorised use of their brands may take place online in a foreign language. These dangers were highlighted in a case involving Las Vegas Sands Corp (LVS) brought in the Nevada Courts. LVS initiated proceedings for trade mark infringement against the registrants of 35 domain names that related to websites operating out of China. Please see: Protecting your Gambling Brand from Misuse in Foreign Jurisdictions.

- There have also been significant recent developments in Australia in relation to casino development. Currently, there are proposals for four new casinos in Australia. If the facility proposed by Crown Resorts Limited (Crown) in Sydney proceeds, Sydney will host two casinos within a kilometre or two of each other. In October 2013, the Queensland government announced that it had issued conditional licences for three new casinos. If these casinos open, there will be seven casinos in Queensland. Please see: Australia: 23 million people and FOUR new casinos?!

The difficulty in preparing this Newsletter is that there is not enough space to address other recent developments. For example, at the time of writing:
Gambling Law & Regulation

• Tabcorp had lodged an application to appeal to the High Court of Australia a decision by the Victorian Court of Appeal that the Victorian Government did not have to pay Tabcorp $868 million in compensation. The proceedings relate to the Victorian government’s determination to change the regulatory scheme in Victoria relating to the supply of gaming machines in that state.¹

• Negotiations between Tabcorp-owned Sky Racing and TVN (which is owned by a number of racing bodies, including Racing NSW and Racing Victoria) relating to the broadcast of races in NSW and Victoria remain unresolved. As result, Sky Racing ceased its broadcast of Victorian and NSW thoroughbred races during the weekend preceding Christmas.² It is unclear whether there are opportunities for third parties to obtain rights to the vision. For example:
  - Is there an opportunity for a mainstream television network to broadcast the races on commercial television?
  - Is there an opportunity for a corporate bookmaker or an affiliate to obtain the digital rights and to stream the races on its website?

• BetEasy and Crown announced that they had entered into a joint venture to combine BetEasy’s sportsbook business with the sportsbook business conducted by Crown’s subsidiary, Betfair Pty Ltd. We will watch with interest the effect of this JV on the local wagering market as well as the regulatory environment.

We look forwarding to covering these issues in future editions of the Newsletter.

Finally, we recommend to recipients of this Newsletter the Gambling Law course at the University of Melbourne which is being co-presented by Jamie Nettleton and Professor I Nelson Rose. The dates have changed – it will now take place in the week commencing 1 June 2015. Details are available at:

For further information relating to any of the matters in this Newsletter, please feel free to contact one of the Addisons’ Media and Gaming Team.

We wish all of our readers a prosperous 2015.

¹ For more information about this dispute, please see:

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The trade mark that stops an ad campaign? IP and related issues in marketing by bookmakers

Author(s): Justine Munsie, Alexander Latu

Introduction

A website is devoted to retired racehorse Black Caviar where roses, horse-care products and a range of merchandise may be purchased – all bearing the famous mare’s trade marked name or racing silk design. Makybe Diva, another registered mark, adorned a marquee at this year’s Melbourne Cup, and its $920 tickets were sold out well in advance. Not only is “Melbourne Cup” a registered trade mark of the Victoria Racing Club Ltd, so too is “The Race that Stops a Nation”.

Clearly, businesses including bookmakers and other betting providers see value in marketing that refers to famous racehorses and racing events. “The Bet that Stops a Nation” was promoted extensively in the lead-up to the Melbourne Cup and Emirates Airlines acquired naming rights to the “Emirates Melbourne Cup”. This raises questions as to how far other businesses may go in linking themselves and their products to sporting events and participants without becoming exposed to legal risk as rights-holders act to protect their intellectual property.

This note considers who might be expected to assert intellectual property rights in this area, before overviewing potential pitfalls that advertisers might face in respect of trade mark infringement and false sponsorship representations.

Who are the rights-holders?

i) Racehorse names, jockey silks and more

The Australian Rules of Racing prohibit thoroughbreds running in races without first being registered with the Registrar of Racehorses. Naming rules apply, including restrictions on naming horses after past winners. Some names, including those of horses that have won the Melbourne Cup, are permanently unavailable.

Since 1 October 2012, as a condition of registration, horse owners agree to the Registrar (in effect Racing Information Services Australia – RISA) owning “all right, title or interest (including but not limited to copyright, goodwill and reputation) in the name, image, jockey silks and any other indicia associated with the horse, whether existing before or after the horse is registered”, and assign these to the Registrar to the extent they own or have an interest in them.

Further, owners undertake not to apply to register these features as a trade mark as well as to refrain from asserting any claim of ownership of any such intellectual property rights.

Owners are, however, granted a non-exclusive and non-transferable licence to use this intellectual property for “any purpose related to racing, training, promoting and otherwise dealing with the horse, including merchandising”. This may be sub-licensed. RISA has disclaimed any intention to derive any income from merchandise associated with horses.

For horses registered after October 2012, the Registrar of Racehorses may apply for trade marks in these indicia and to protect or defend this intellectual property. Other persons may

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4 The rights held by RISA are to be held by Racing Australia, which will be formed through the merger of RISA and the Australian Racing Board, with effect from 31 March 2015.

5 Australian Rules of Racing, AR.18A(1)(b)-(c).

6 Australian Rules of Racing, AR.18A(1)(d)-(e).

only own trade marks and intellectual property concerning horses registered before this
date – for example, in respect of Black Caviar and Makybe Diva, trade marks are owned by
Black Caviar Racing Pty Ltd and Makybe Racing and Breeding Pty Ltd, respectively.

It remains to be seen whether the Registrar will seek to exploit its rights as fully as
racehorse owners might (or have). One reason given for the changes to the Rules was to
ensure that racing bodies could perform functions necessary for the efficient administration
and promotion of the industry, including publishing racing information.\(^8\) RISA considered
this could be jeopardised by allowing owners to register horse names as trade marks. In
any event, at least for trade marks, there is scope for bookmakers to continue to make
some use of names within the limits of the trade marks regime and other laws (discussed
below).

\(^{ii)}\) Names of races, events etc.

Race names may be registered as trade marks and some are owned by various racing
clubs. For instance, Moonee Valley Racing Club Inc has registered “Cox Plate”, and
Victoria Racing Club Ltd owns several trade marks relating to its major events.

Sponsors of races or events, especially those with naming rights, may be granted exclusive
rights to use the names under a sponsorship agreement. They may also have obligations to
prevent others from misrepresenting themselves as a sponsor or other official associate of
the event. And even if they do not, the Australian Consumer Law (ACL) prohibits
misleading and deceptive conduct, including by making false representations of
sponsorship or approval.

**What conduct is risky? And how can this risk be minimised?**

Wagering operators with approval to use race fields information or sports fixture information
are usually able to publish information that identifies the name or number of a horse taking
part in an intended race, or participants in a sporting event, but do not obtain any
intellectual property or other rights in that information.

Wagering operators should therefore be wary of using that information in any way that may
amount to trade mark infringement or be considered false, misleading and/or deceptive.

\(^{i)}\) Trade mark infringement.

The registered owner of a trade mark is granted the exclusive right to use (and to authorise
others to use) the mark in relation to the goods or services for which it is registered. Others
may not use marks that are substantially identical or deceptively similar to the registered
mark in that manner, or in relation to goods or services that are closely related to the
registered class(es). Third parties are prohibited from using a registered word mark as an
AdWord or TextAd on Google, for example.

Bookmakers wishing to refer to indicia associated with events or horses in their advertising
or marketing should accordingly take steps to identify whether such indicia are trade
marked in order to consider whether there is an infringement risk. Similarly, if a bookmaker
receives a letter of complaint from a trade mark owner, it should be taken seriously. On the
other hand, trade mark owners need to take care in asserting infringement wrongly as it is
an offence to do so.

There is no infringement of a trade mark if it is used, in good faith, descriptively – to indicate
a characteristic of goods or services. So promotions offering great odds on ‘Horse Y’, or a
special offer for ‘Event X’, will not necessarily infringe trade mark rights.

There is nothing to stop any bookmaker taking bets on a specific race or sporting event and
using the names of horses and participants in doing so (provided the relevant product fee
agreement is in place). However, care should be taken not to assert a sponsorship or
association where none exists.

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**ii) Misleading and/or deceptive conduct**

The prohibition on misleading and deceptive conduct in trade or commerce covers a wide variety of circumstances and cannot be discussed in any detail in this brief note. However, it is worth noting a specific example of such conduct, which is a false representation of sponsorship, approval, or affiliation.

Using a well-known person’s image in conjunction with a marketing campaign without permission may be considered misleading and deceptive. This is especially the case when that person is widely known to be an endorser of products. For example, Telstra’s advertisement featuring Olympic swimmer Kieran Perkins wearing a swimming cap with its logo was found to misrepresent that Perkins was sponsored by Telstra. In a similar decision, The Senior’s Choice was recently forced to pay damages and the legal expenses of Ita Buttrose when its website used her image to promote aged care franchises. Using Ita Buttrose’s image without permission was considered likely to mislead and deceive the public into believing that the franchises were endorsed by the celebrity.

Applying these principles in light of the status of some races, racehorses, jockeys, or persons associated with particular racing silks, bookmakers ought to be aware of using images or other advertising material in a manner that might be considered to falsely imply endorsement or authorisation. In order to manage the risk of such promotions, businesses should avoid unauthorised use of images of specific participants without permission of the owner of those images. A safer strategy would be for businesses to use images of events where specific individuals are not identified or highlighted and in this way minimise suggestions of a specific endorsement.

The position would seem to be similar in respect of racing events. Given that Emirates Airlines is the naming rights holder of the Melbourne Cup, some advertising may be more risky than others in implying a formal affiliation – for example, “The [Bookmaker name] Melbourne Cup Special Offer”, might carry greater risk than “The Melbourne Cup Special Offer at [Bookmaker name]”.

It is also important for businesses to secure the appropriate rights to the images and phrases it wishes to publish on its websites and promotional material. Many standard and subscription image licences grant only limited rights (and are subject to various conditions), and specifically prohibit commercial or advertising purposes.

**Overall**

This note is not comprehensive, it covers only the major points of interest in this area, and necessarily briefly. More generally, it will be interesting to see how racing and sporting bodies take steps to protect their intellectual property.

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So you want an Australian Online Wagering Licence?
This is what you need to know

Overview
- Online wagering is permitted, except for online in-play betting on sports.
- Online wagering is regulated at each of the Federal and the State/Territory levels of government.
- Wagering operators must comply with the gambling laws of each State/Territory. These laws contain restrictions on various aspects of the gambling business conducted by the wagering operator. These include restrictions which apply to advertising, the provision of services to minors and other harm minimisation practices.
- All leading Australian licensed wagering operators have entered into product fee and integrity agreements with the major Australian racing and sporting bodies. Under these agreements, they are required to pay a product fee to the relevant body and comply with integrity related and other obligations.
- Advertising restrictions are also imposed by the Australian Consumer Law.

The Legal Framework
The Interactive Gambling Act 2001 (Cth) (the IGA) regulates online gambling at the Federal level and prohibits the supply of interactive gambling services to persons present in Australia. Although wagering services, such as sports betting, are exempt from the definition of an interactive gambling service, online in-play betting on sports events is excluded expressly from this exemption. In other words, the IGA permits the conduct of online wagering to the extent that it does not include online in-play betting on sports events.

Operators providing sports betting products to Australian customers must comply with both the IGA and applicable State/Territory laws.

Each State/Territory has its own gambling legislation which, in general terms, applies to any gambling operator that seeks to provide and/or promote services to residents of that jurisdiction. Under the gambling laws of each State/Territory, it is an offence to provide a wagering service (such as the offering or acceptance of a bet) to a person without a wagering licence.

Under Australian constitutional law, to the extent that a gambling service is provided legally under a licence granted by another Australian State/Territory, it will be recognised as a legal service under the laws of each other State/Territory. This does not mean that certain prohibitions in the laws of another State and Territory do not apply: they must be applied in a non-discriminatory manner.1

Where can I get a Wagering Licence?
Each State/Territory has its own licensing framework under which wagering operators can obtain a licence. However, the framework of most States/Territories contemplate only the

1 The relevant principles are set out in the decisions in the proceedings involving Betfair and Western Australia and in the proceedings involving Sportsbet and Victoria. Betfair initiated proceedings against Western Australia and argued successfully that prohibitions relating to the use of a betting exchange contained in Western Australian law were unconstitutional (Betfair Pty Limited v Western Australia (2008) 234 CLR 418).

Sportsbet initiated proceedings against Victoria and argued unsuccessfully that provisions contained in Victorian law prohibiting a person from keeping a “place of betting” or an “instrument of betting” are unconstitutional (The State of Victoria v Sportsbet Pty Ltd [2012] FCAFC 143). Please see: http://www.addisonslawyers.com.au/knowledge/Sportsbet_Boxed_Out_of_the_Retail_Market_The_Betbox_Case__Tabcorp's_Appeal_Successful_in_the_Full_Federal_Court438.aspx
grant of licences to that jurisdiction’s totalisator (in most cases a monopoly licence) and on-course bookmakers.

However, the Northern Territory contemplates the licensing of online “sports bookmakers”. Operators such as bet365, Sportsbet, Sportingbet, Tom Waterhouse and Unibet are all licensed by the Northern Territory Racing Commission (NTRC).

Norfolk Island, a self-governing territory of the Commonwealth of Australia, also has a licensing regime under which licences have been granted to online wagering operators. Ladbrokes is the best known online wagering operator licensed by the Norfolk Island Gaming Authority (NIGA).

The Tasmanian licensing framework also contemplates specifically the licensing of betting exchanges. Betfair Australia was granted a Tasmanian licence in 2005.

Product Fees
State/Territory gambling laws also contain provisions relating to product fees. That is, in all States/Territories (except Northern Territory and Norfolk Island), it is an offence to use “race fields information” (generally information relating to racing events held in that jurisdiction) without having an approval granted by the relevant racing controlling body in that State/Territory.

For example, if a wagering operator wishes to take bets on the Melbourne Cup, they must have an approval from Racing Victoria. Under the conditions of this approval, the wagering operator must pay a product fee to Racing Victoria (being a percentage of the wagering operator’s turnover on races supervised by Racing Victoria) and meet certain integrity obligations (see below).

Under Victorian law, an operator must not take bets on a sporting event in Victoria unless they have a product fee and integrity agreement in place with the relevant sports controlling body. In 2014, similar legislation was introduced into NSW; however, at the time of writing, this legislation had not yet commenced.

In general terms, all Australian licensed betting operators have agreements with the major Australian sporting bodies. Under these agreements, each wagering operator is required to pay a product fee to the relevant sporting body, which, unlike the product fee levied by most racing bodies, is based on “gross revenue” (turnover minus winnings paid to customers).

Integrity
Under each agreement relating to the use of race fields or sporting information, wagering operators are required to comply with numerous obligations relating to integrity. For example, they must report suspicious transactions to the relevant racing/sports controlling body and provide that body with information relating to customers and transactions upon request.

Advertising
Wagering operators must comply with restrictions that originate from a number of different sources in respect of the advertising of their services. These sources include:

- gambling legislation of each State/Territory (including the conditions of a race fields approval);
- advertising codes that apply to a particular medium, for example, the Free TV Code;
- Association of Australian National Advertisers (AANA) Code which applies to all advertising; and

2 Match-fixing laws have also been introduced in numerous Australian States/Territories and information provided by wagering operators may be used to investigate alleged breaches of these laws. Prior to the introduction of these laws, allegations of match-fixing referred to the police were dealt with generally under laws relating to fraud or obtaining a financial advantage by deception.
What’s Next for Online Wagering in Australia?

Regulatory Creep
Wagering operators conducting business in Australia are subject to considerable regulatory overlap. Numerous statutory bodies have jurisdiction over wagering operators, including:

- the operator’s licensing body;
- racing and sports controlling bodies;
- the gambling regulator of each State/Territory; and
- non-gambling specific bodies, for example, the Australian Competition and Consumer Commission (ACCC).

In many cases, two or more regulators/authorities impose requirements relating to the same issue, for example, responsible gambling measures or advertising restrictions.

In 2014, we have seen the following:

(a) Racing NSW introduced a new condition to its approval conditions, requiring approval holders to accept certain minimum bets; and

(b) the South Australian gambling regulator introduced further restrictions concerning the advertising of gambling products and brands as well as responsible gambling practices.

These requirements are in addition to requirements that exist under the licence granted by the licensing body (for example, the NTRC) or under the general law (for example, the Australian Consumer Law).

In-play
On 30 October 2014, the then Australian Federal Minister for Social Services, Kevin Andrews, and the then Premier of Victoria, Denis Napthine, who at the time was also the Minister for Racing in Victoria, announced that a new national working group would be set up to address the “increasing impact of illegal offshore wagering on Australian racing and sports”.3

It remains to be seen whether this working group4 will consider any possible amendment to the IGA to allow the provision of online in-play betting on sport events.

Given that, in 2015, Australia will host both the Cricket World Cup and the Asian Cup, these events are likely to intensify calls from the industry that the liberalisation of in-play laws will encourage Australian punters to bet with Australian wagering operators who, unlike offshore operators, are subject to the integrity related requirements referred to above. These calls will only be strengthened by any recommendation by the working group for measures to be taken to limit the access of Australian residents to offshore operators.

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4 For more information, please see our Focus Paper of 21 November 2014, “Australia: Will action be taken against illegal online betting operators? And is regulated in-play betting next on the list?” http://www.addisonslawyers.com.au/knowledge/Australia__Will_action_be_taken_against_illegal_online_betting_operators__And_is_regulated_in-play_betting_next_on_the_list698.aspx
Australia: Will action be taken against illegal online betting operators? And is regulated in-play betting next on the list?

Author(s): Jamie Nettleton, Jessica Azzi

On 30 October 2014, the then Australian Federal Minister for Social Services, Kevin Andrews, and the then Premier of Victoria, Denis Napthine, who was also the Minister for Racing in that state, announced that a new national working group would be set up to address the “increasing impact of illegal offshore wagering on Australian racing and sports”.

This group, to be called the Illegal Offshore Wagering Working Group (Working Group), will include representatives from the racing industry, professional sports and wagering organisations.

This announcement followed comments made by the Chairman of Tabcorp, Paula Dwyer, that Tabcorp had been in talks with the Australian Government relating to the blocking of offshore, unregulated bookmakers.

Current regulatory framework

Online wagering is regulated in Australia under both federal and state/territory law.

At the federal level, the Interactive Gambling Act 2001 (Cth) (IGA) prohibits the provision of an online gambling service to Australian residents; however, online wagering (save for in-play betting on sports events) and lotteries are exempt from this prohibition. In other words, the provision of an online wagering service to Australian residents is permitted under the IGA; provided that the operator does not offer in-play betting on sports events (In-play Prohibition). This position does not affect Australian state and territory laws that apply to online gambling and which contain additional prohibitions.

Under the laws of each Australian state/territory, the provision of wagering services is permitted only when conducted by an operator licensed by the gambling regulator of an Australian state/territory. For example, corporate bookmakers such as bet365, Sportsbet (a subsidiary of Paddy Power) and the William Hill Australia brands (Sportingbet, Centrebet and Tom Waterhouse) are all licensed by the Northern Territory Racing Commission. Similarly, the totalisator in each Australian state/territory is licensed by the gambling regulator of that Australian state/territory.

Unfair playing field

Understandably, Australian licensed operators raise frequently concerns that betting operators licensed outside Australia do not comply with Australian law and, therefore, do not incur the costs involved in compliance. For example:

- Offshore operators typically do not comply with the In-play Prohibition.
- Offshore operators do not pay a product fee to any Australian racing or sporting body in return for offering markets on that body’s events.
- Offshore operators do not comply with various integrity obligations (that apply to Australian licensed betting operators), for example, the obligation to monitor and report suspicious betting activity to the relevant racing or sporting body or to AUSTRAC.

On the other hand, as a result of the In-play Prohibition, Australian licensed operators cannot compete with offshore operators to the extent that they allow customers to place online in-play bets on sports events. While the IGA purports to apply extra-territorially, there has been no effective enforcement of the In-play Prohibition against offshore operators.

Additionally, Australian licensed operators have onerous obligations in respect of both product fees and sports/racing integrity.

**ISP blocking**

While it is too early to predict the recommendations of the Working Group, it is clear that they will consider, as one possible enforcement option, the introduction of legislative provisions directed at blocking offshore operators from providing services to Australian residents. This will require legal obligations to be imposed on Australian ISPs requiring ISPs to block access to the websites of offshore operators by Australians.

This is an issue that has been considered by a number of jurisdictions as a measure to limit offshore illegal online gambling – to our knowledge, few countries (France being one exception) have retained statutory provisions to this effect.

**What about in-play?**

It is also too early to predict whether the Working Group will consider any possible amendment to the IGA to allow the provision of online in-play betting on sport events.

We anticipate that the Working Party will receive submissions that one effective way to counter the activities of offshore operators who provide in-play betting services will be to allow Australian licensed operators to provide those services.

This would be on the basis that the In-play Prohibition has not eliminated the demand of Australian customers for online in-play betting on sports events. Rather, Australian customers choose to place their bets with offshore operators.

It remains to be seen whether Australian licensed online betting operators, who are required to operate in full compliance with Australian law, will be given the opportunity to provide in-play services legally in a manner which meets the demand of Australian customers for online in-play betting on sports events.

**What’s next?**

It is likely that the composition of the Working Group will be finalised by the end of 2014.

While details have not yet been made public, the Working Group will be calling for public submissions.

The Working Group will provide its final report including recommendations to the Federal Government in 2015.
Australia: Online Gaming Regulation

Author(s): Jamie Nettleton, Karina Chong

1. Introduction

Australia was the first country to pass legislation at the national level to address specifically interactive gambling. The Interactive Gambling Act 2001 (the “Act”), which came into effect in July 2001, was a response by the Federal Government to concerns that the Internet would exacerbate problem gambling among Australians. In essence, the Act seeks to safeguard Australians from Internet gambling by restricting access to interactive gambling services.  

The Act is not concerned directly with the behaviour of persons accessing interactive gambling services. Rather, it targets both interactive gambling service providers and Australian Internet service providers (“ISPs”) to implement measures to prevent end users in Australia, and in certain foreign countries, from accessing, and being able to access, interactive gambling services.

The three main elements of the regulatory regime established by the Act are:

(a) a general prohibition on both Australian and foreign persons from providing interactive gambling services to customers in Australia (the Operational Prohibition);  
(b) a prohibition on the advertising in Australia of interactive gambling services (including for example, the publishing, broadcasting or datacasting of advertisements for interactive gambling services) (the Advertising Prohibition); and  
(c) the creation of a complaints scheme, with the Australian Communications and Media Authority (ACMA) prescribed as the body responsible for investigating complaints by members of the public.

The Act also contains a prohibition on Australian-based interactive gambling services from providing interactive gambling services to customers in certain designated countries.  

Where a prohibited Internet gambling service is hosted outside Australia, the Act seeks to impose both regulatory and mandatory obligations upon Australian ISPs to take steps to restrict access by Australians to those services.

The Act is monitored by the ACMA and enforced both by ACMA and the Australian Federal Police (the AFP).

2. Interactive gambling service

It is clear that the Act applies only to certain specified interactive gambling services including online casinos. Other forms of interactive gambling services, such as sports betting, are not caught by the Act, except to a limited extent.

1 Italicised terms are used to indicate defined terms in the Act.  
2 Interactive Gambling Act 2001, s 15.  
3 Interactive Gambling Act 2001, s61EA.  
4 Interactive Gambling Act 2001, s 15A. At the date of this paper, no country has been declared to be a “designated country” under Part 2A of the Act.
The meaning of an interactive gambling service is central to the offence provisions created under the Act. The first element of an interactive gambling service is that of a gambling service.

2.1 What is a gambling service?
A gambling service is:

(a) a service for the placing, making, receiving or acceptance of bets; or

(b) a service which introduces individuals who wish to make bets to individuals who are willing to receive or accept those bets; or

(c) a service for the conduct of a lottery or for the supply of lottery tickets; or

(d) a service for the conduct of a game, where:
   (i) the game is played for money or anything else of value; and
   (ii) the game is a game of chance or of mixed chance and skill; and
   (iii) a customer of the service gives consideration to play or enter the game; or

(e) a gambling service (within the ordinary meaning of that expression) that is not covered by any of the above.5

2.2 What is an interactive gambling service?
An interactive gambling service is a gambling service that is provided to customers in the ordinary course of business using various means such as the Internet, broadcast and datacast services.6 This covers smartphones, tablets and other web-enabled devices.

2.3 What is not an interactive gambling service?
Among the exclusions from an interactive gambling service (and therefore which do not come within the scope of the offence provisions in the Act) are:

(a) telephone betting;

(b) excluded wagering services7, which include services relating to betting on:
   (i) a horse race;
   (ii) a harness race;
   (iii) a greyhound race;
   (iv) a sporting event, except where the bets are placed or accepted after the beginning of the event; or

6 Interactive Gambling Act 2001, s 5.
7 Since the date of this publication was written, the Federal Government and the Victorian Government have announced the formation of a working group (to be known as the Illegal Offshore Wagering Working Group) to examine the ramifications of unauthorised offshore wagering operations and the steps that can be taken to block those services.

For further information, see Australia: Will action be taken against illegal online betting operators? And is regulated in-play betting next on the list?
(c) excluded gaming services to the extent to which the service is provided to customers in a public place (for example, a shop, casino or club);

(d) services exclusively associated with a particular TV or radio program; or

(e) the broadcast of gambling services associated solely with a trade promotion as part of an advertising campaign;

(f) various lottery services, but not including an instant lottery;

(g) a service that relates to contracts that are exempt from gaming and wagering laws under Australian corporations law; and

(h) a service exempted by the Minister.

The Act contemplates that regulations may specify additional conditions that persons may have to satisfy before they gain the benefit of an exclusion. For example, for a lottery to be an excluded lottery service, the lottery must comply with the requirements set out in the regulations. At the date of this paper, no regulations in respect of these additional conditions have been enacted.

3. Prohibition on providing interactive gambling services to customers in Australia

3.1 Offence

Under Part 2 of the Act, a person will be guilty of an offence if the person intentionally supplies an interactive gambling service to persons physically present in Australia.8 Currently, the generally accepted position is that the offence applies to both local and foreign interactive gambling service providers.

3.2 Defence – reasonable diligence

A person is not liable under Part 2 of the Act if the person did not know, and could not, with reasonable diligence, have ascertained that any customers of the service were physically present in Australia.9 Matters that would be taken into account in determining whether reasonable diligence was exercised are:

(a) whether prospective customers have been informed that Australian law prohibits such services from being provided to persons in Australia;

(b) whether customers have been required to enter into contracts that prohibit expressly customers from using the service if they were physically present in Australia;

(c) whether the customer provided details that suggested that the customer was not physically present in Australia; and

(d) whether network data indicates that customers were physically present outside Australia during the period in which the service was provided to the customer.

3.3 Treatment of Online Casinos

In essence, the provision of services to enable Australians to play online a game of:

(a) chance, such as roulette; or

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8 Interactive Gambling Act 2001, s 8.
9 Interactive Gambling Act 2001, s15(3).
(b) mixed chance and skill, such as online poker;
in which money or anything else of value is staked (or a service which introduces players to
such a game) is a gambling service in contravention of the Operational Prohibition.
Accordingly, online casinos are prohibited.

4. Prohibition on advertising an interactive gambling service in Australia
There are a number of statutory restrictions in federal, state and territory laws (including the
Act) on advertising online gambling in Australia. Generally, a foreign operator is prohibited
from advertising online gambling services actively in any Australian jurisdiction. The
prohibitions apply to the “publisher” which, in general terms, covers both the operator and
any intermediary who may publish the advertisement.

4.1 Offence
At the Federal level, Part 7A of the Act prohibits persons from broadcasting, datacasting or
publishing an interactive gambling service advertisement in Australia. Persons are also
prohibited from authorising or causing an interactive gambling service advertisement to be
broadcast, datacast or published.

4.2 What is an interactive gambling service advertisement?
An interactive gambling service advertisement includes any visual image or audio message
that gives publicity to, promotes, or is intended to promote:

(a) an interactive gambling service;
(b) interactive gambling services in general;
(c) a trade mark in respect of an interactive gambling service;
(d) a domain name or URL that relates to the interactive gambling service; or
(e) any words that are closely associated with an interactive gambling service.

Clarification of this definition is given on page 81 of the Act’s Revised Explanatory
Memorandum which states:

“Interactive gambling service advertisement" is intended to cover more than just the
promotion of an individual interactive gambling service. For example, an advertisement
that refers to a website where details of interactive gambling services can be found should
be regarded as advertising for the purposes of Part 7A of the Bill.”

4.3 How does publication take place?
The key provision of concern to online gambling service providers is section 61EA of the
Act which states that a person commits an offence if they publish, or authorises or causes
to be published, an interactive gambling service advertisement in Australia.

The scope of when an interactive gambling service advertisement is published is set out at
section 61CA of the Act.

However, in general, a person publishes an interactive gambling service advertisement if
the person:

(a) includes the advertisement on an Internet site, in a document such as a
newspaper or in a magazine, film, video, television program or radio program;
(b) displays the advertisement so that it can be seen or heard in a public place; or
(c) otherwise supplies or disseminates the advertisement to the public.
An interactive gambling service advertisement published online will be considered to have been published in Australia if:

(a) the site is accessible to users in Australia; and

(b) the content and the marketing of an operator’s site indicate that a majority of users accessing the site are physically present in Australia.

4.4 Exceptions
The Advertising Prohibition does not extend to advertisements published in overseas media, such as magazines published overseas or websites that are aimed at non-Australian audiences. If an operator’s site does not allow Australian users to register with the site, this will go towards demonstrating that the site is not accessible to users in Australia for the purposes of the Act.

There are also various other exceptions to the Advertising Prohibition, for example political advertising, incidental or accidental advertising, advertisements that discourage the use of gambling services or advertising at a trade fair for interactive gambling services.

4.5 Treatment of online casinos
The definition of interactive gambling service advertisement was considered in ACMA’s 2009 inquiry into advertisements broadcast by the Nine Network and Network Ten. ACMA took the view that the relationship and similarities between a non-gambling service (in this case a free-play poker site) and an interactive gambling service were close enough to cause an advertisement for the non-gambling service to be caught by the prohibition.

In this inquiry, the broadcasters were found to have breached a condition of their licences. However, ACMA’s findings are not determinative or binding. They are significant as they are the only determinations made involving alleged contraventions of the Act and reflect the approach likely to be taken by the Australian authorities.

Further, the authorisation of the publication of an interactive gambling service advertisement in Australia may also constitute a breach of the Act. Accordingly, even though an operator may not advertise its own website, where it has authorised a promotion to be conducted by an affiliate, it may still be in breach of the Act.

5. Sanctions and Enforcement

5.1 Sanctions
The maximum penalty for a contravention of the Operational Prohibition (that is, an offence under Part 2) is $340,000 (for individuals) and $1,700,000 (for corporations) for each day an offence is committed.

A person who contravenes any of the advertising offences under Part 7A of the Act will be liable for a penalty of $20,400 (for an individual) and $102,000 (for a company) for each day an offence is committed.

5.2 Enforcement action undertaken by the authorities
To date, no formal steps have been taken to enforce a contravention of the Act against any operator (either local or overseas) in relation to online gaming. However, this does not mean that steps will not be undertaken in the future.

Part 3 of the Act sets out the statutory complaints system which provides that, if a person has reason to believe that end-users in Australia can access prohibited internet gambling
content using an internet carriage service, the person may make a complaint about the matter to ACMA (s 16 of the Act).

Section 20 of the Act provides that, if a complaint relates to internet content hosted in Australia, ACMA must refer the complaint to the Australian Federal Police (AFP). ACMA must investigate all other complaints made under s 16 (unless it is frivolous, vexatious, not made in good faith or if ACMA has reason to believe that the complaint was made for the purpose of frustrating or undermining the effective administration of the legislation).

A number of investigations have been undertaken by ACMA. For example, ACMA’s 2013/2014 Annual Report reported that there were 121 complaints and general inquiries made regarding the Act and prohibited interactive gambling services.

During last year, there were 23 investigations into overseas-hosted internet content, of which 11 resulted in the finding of a breach of the Act and were notified to the makers of accredited family-filter software providers and the AFP for further investigation. Further, there were 25 preliminary assessments of Australian-hosted URLs, of which 10 were referred to the AFP. Finally, there were also 45 complaints about interactive gambling advertising which were referred to the Department of Communications.

In relation to the advertising prohibition, the ACMA has in the past found that the advertising of free-to-play online poker sites was in breach of the Act (see paragraph 4.5 above).

However, despite the investigations undertaken by the ACMA and the referrals to the AFP, no prosecutions have been brought by the Australian Federal government and authorities in respect of breaches of the Act. This view is supported by the fact that there has been limited police comment on online gambling or gaming. Nevertheless, this does not mean that enforcement action will not be taken in the future.

6. Review of the Act
Since the commencement of the Act in 2001, there have been a number of reviews conducted by various bodies.

For example, a Productivity Committee report on gambling issued in June 2010 concluded that the most appropriate form of regulation for online gaming was a gradual managed liberalisation with strict licensing criteria and harm minimisation requirements and that online poker was the least harmful form of online gaming. Accordingly, the Productivity Commission recommended that online poker be licensed as the first step to liberalisation.

A further lengthy review of the Act was conducted by the Department of Broadband, Communications and the Digital Economy (the DBCDE, the predecessor to the current Federal Department of Communications). Commencing in 2011, with the DBCDE’s Final Report being published in March 2013, the DBCDE made various recommendations in respect of interactive gambling.

In relation to online gaming in particular, the DBCDE agreed with the Productivity Commission’s recommendations that online gaming should be liberalised under a strict licensing scheme, based on the fact that the Act has had little impact in limiting the provision of illegal online gaming services by overseas-based operators.

The DBCDE further recommended that a five year pilot of online tournament poker (which the DBCDE concluded was the form of online gaming that was least risky based on the research that had been conducted) should be trialled in Australia. In the submissions received by the DBCDE in response to the Interim Report (released in May 2012), the Northern Territory government expressed its interest and willingness to be the host...
jurisdiction of any pilot trial of online poker to be provided by an Australian-licensed online gambling operator.

However, as yet, no trial licensing system for online tournament poker has been developed or introduced in Australia, nor has there been any indication that a trial will be introduced any time soon. Indeed, following the release of the DBCDE’s Final Report, the Australian government at the time confirmed that it would not be pursuing changes to the trial of online poker, despite the DBCDE’s recommendations.

7. **Path Ahead – what is next for online gaming in Australia?**

The current Australian federal government has indicated that it does not support any proposals to liberalise the regulation of online casinos or online gaming (even though various states and territories have legislation which provides for the grant of licences to operate online casinos). This is contrary to the position taken generally in other jurisdictions such as the United States.

However, there is a growing recognition at the Federal level of the increasing demand for online gaming services and the need to move away from a prohibitionist approach to the regulation of the online environment, in a consumer friendly manner.

Accordingly, it will be interesting to see whether consideration is given to further proposals to liberalise online gaming in Australia or for trials to be conducted in the future in relation to these proposals.
Bitcoin Regulation in Australia: A Bit of a Task to Coin

Author(s): Jamie Nettleton, Daniel Goldberg, Elizabeth Cameron and Sophia Urlich

1. The Senate Inquiry

Digital currencies, and what they mean for Australia and Australian business, are high on the agenda after the Economics References Committee of the Australian Senate (the upper house of Australia’s federal Parliament) conducted the first hearing of its Digital Currency Inquiry on 26 November 2014.

The Senate Inquiry’s terms of reference include:

- how to develop an effective regulatory system for digital currency;
- the potential impact of digital currency technology on Australia’s economy including the payments sector, retail sector and banking sector; and
- how Australia can take advantage of digital currency technology in order to establish itself as a market leader in this field.¹

2. What is Bitcoin and why is the Senate looking at it?

Bitcoin is the most well-known digital currency or crypto-currency: a virtual currency which can operate as an anonymous and decentralised peer-to-peer medium of exchange. Crypto-currencies work by using encryption techniques to regulate the production of units of currency and verify the transfer of funds, independently of a central bank or authority.

Global uptake of crypto-currencies is increasing, with more than 60,000 online retailers now accepting crypto-currencies worldwide.² The global regulatory picture for Bitcoin is, however, mixed.

- In June 2014, the European Banking Authority identified approximately seventy risks associated with digital currencies, acknowledged that regulation to address all elements would be substantial and recommended that regulators discourage credit institutions, payment institutions and e-money institutions from buying, holding and selling digital currencies.³

- The US’s Internal Revenue Service guidelines provide that crypto-currency is treated as property for US federal tax purposes.⁴ In 2013, the US Department of Treasury’s Financial Crimes Enforcement Network released a guidance paper providing that digital currency exchangers and administrators are money services businesses requiring registration, reporting and recordkeeping, including establishing an anti-money laundering program and filing suspicious activity reports.⁵

- Russia has deemed digital currencies as an unlawful substitute for money and plans to pass a law to ban digital currencies in 2015.⁶

³ MasterCard (Eddie Grobler), submission No 18 to Senate Economics References Committee, Digital Currency Inquiry, 3.
⁵ MasterCard (Eddie Grobler), above n 3, 3.
⁶ Ibid.
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- Bitcoin has effectively been banned by The National Assembly of Ecuador in light of the establishment of guidelines for the creation of a new state-run cryptocurrency.7
- The People’s Bank of China has also banned all third-party payment service providers from dealing with Bitcoin, leaving private individuals to do so at their own risk.8

While Bitcoin offers scope for significant innovation and growth opportunities for Australian businesses,9 it challenges the existing legal framework in respect of taxation, financial services, payment systems, banking, personal property and securities, insolvency, anti-money laundering, counter-terrorist financing and consumer protection. Australian regulatory authorities have now begun reviewing how Bitcoin may be used by businesses and, in some cases, providing comments and/or developing guidelines and procedures for businesses to consider.

3. How Bitcoin transactions work

Bitcoin transactions are transfers of value between ‘Bitcoin wallets’ which are software programs that emulate bank accounts. Each wallet contains a ‘public key’ and a ‘private key’. The public key is the wallet address (similar to a payment account or card number) which can be shared with others and the private key is the signature (or security code) that authorises a transaction.

If, for example, one wishes to make an online payment to a company using Bitcoin:

1. The company creates a new Bitcoin address, and directs the payer to send their payment to it;
2. The payer directs the payment to the company's new Bitcoin address by instructing their Bitcoin client (the end-user software that facilitates private key generation and security) to transfer the requisite number of Bitcoins from their wallet to the company’s new Bitcoin address;
3. The payer’s Bitcoin client electronically ‘signs’ the transaction request with the private key of the address from which they are transferring the Bitcoins;
4. The transaction is broadcast to the Bitcoin network and can take up to 10 minutes to be confirmed.10

All confirmed transactions are recorded permanently on a shared public ledger called a ‘block chain’ which updates globally approximately every ten minutes.

Although Bitcoins are virtual, Bitcoin ATMs, derivatives and prepaid cards are beginning to emerge. Australia’s first crypto-enabled Automated Teller Machine (ATM) which permits cash deposits and withdrawals in exchange for Bitcoin was launched in Sydney in April 2014.11

4. Australia’s first official regulatory response to Bitcoin – did the ATO get it wrong?

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9 Bit Trade Australia (Jonathon Miller), submission No 35 to Senate Economics References Committee, Digital Currency Inquiry.
On 20 August 2014, the Australian Taxation Office (ATO) released a guidance paper providing an overview of the proposed tax treatment for transactions associated with crypto-currencies, specifically Bitcoin, in Australia.

The ATO’s guidance proposed that Bitcoin and other crypto-currencies should not be treated as currency for Australian tax purposes. Rather, transacting with Bitcoin should be considered as akin to a barter transaction where non-cash consideration is received and Bitcoin should be treated as a commodity for tax purposes in business transactions.12

The ATO also suggested that Bitcoin should be treated as an asset for Capital Gains Tax (CGT) purposes. The disposal of Bitcoin in the course of carrying on a business or when acquiring an investment could therefore also have CGT implications.13

Critics of the ATO’s approach argue that the implications of this are that GST could be payable twice in respect of a business transaction involving Bitcoin – GST could be levied on both the acquisition of a Bitcoin and also when the Bitcoin is used to pay for goods and services.

The ATO’s approach was criticised in some submissions made to the Senate Inquiry, and is at odds with the approach taken by some foreign revenue authorities, although it is consistent with others.14

For example, HM Revenue and Customs (the UK customs and tax authority) has discarded its plans to charge Value Added Tax (VAT) on income received from Bitcoin mining and related activities.15 VAT will simply be due in the normal way from suppliers of goods and services sold in exchange for Bitcoin.16

Advocates of Bitcoin claim that the ATO’s approach has caused confusion in the industry, gives rise to difficulties in structuring transactions, makes Bitcoin impractical to purchase locally and fails to reflect the true functional characteristics of Bitcoin and the way that it operates.17

MasterCard, in a written submission, argued that any regulations should be technology neutral and that all participants in the payments system that provide similar services to consumers should be regulated in the same way to achieve a level playing field for all.18

5. Commercial risks and opportunities associated with Bitcoin

Low fees. Bitcoin is subject to minimal transaction fees, particularly because transactions are peer-to-peer. In this way, Bitcoin has the potential to reduce transaction costs for payments and fund transfers and users can theoretically avoid fees and other constraints that are imposed typically on transactions by traditional financial institutions.

Convenience. Another major benefit of Bitcoin is that it is very convenient and versatile and may potentially improve payment efficiency. Cross-border transactions, in particular, are facilitated by the fact that Bitcoin is digital and is able to operate independently of geographical borders. One sector which has seized on the convenience offered through the


13 Ibid.


16 Ibid.


18 MasterCard (Eddie Grobler), above n 3, 1.
use of Bitcoin is online gambling. This benefit is also particularly relevant for global e-commerce transactions, for example in connection with online shopping.

**Resistance to regulation.** There is a clear tension between Bitcoin’s intrinsic resistance to regulation and the need to develop an effective regulatory system for crypto-currencies. Bitcoin is especially difficult, if not impossible, to regulate at a transactional level, because it is intangible and involves largely anonymous, peer-to-peer transfers. This makes it difficult for authorities to trace accountability and monitor the use of Bitcoin where there may be a suspicion of criminal activity. This has bolstered concerns that the characteristics of Bitcoin facilitate transactions involving money laundering, tax evasion, fraud and the purchase of illegal goods such as drugs. ASIC has also commented that, if the Bitcoin network fails or is hacked, individuals will not be protected and will have no statutory recourse or consumer protection. For example, in October 2013 an Australian Bitcoin bank was hacked, resulting in losses equivalent to US$1 million.

**Volatility.** The value of Bitcoin is extremely volatile and vulnerable to the effect of extraneous factors, including its popularity at any given time. This can be influenced by factors such as the number of merchants accepting Bitcoin and the ease with which it can be used and traded internationally, particularly in light of the effects of external regulation measures operating in different jurisdictions.

**Technical limitations.** Bitcoin has various technical limitations that may also inhibit its utility. The most significant of these include:

- Fragmentation: fractions of Bitcoin may accumulate where small purchases involve only a fraction of a Bitcoin. In the future, especially as individual Bitcoins increase in value, the system may potentially become clogged with fragments of Bitcoin because it is impossible to arbitrarily join the fragments; and
- Response time: the completion of Bitcoin transactions is not necessarily automatic. This may make Bitcoin impractical for point of sale and limit immediate sales to small value items.

6. The future

The Senate Inquiry’s objectives are admirable, and seek to identify a regulatory regime that:

- Determines the most appropriate definition of digital currencies under Australian law;
- Promotes competition and the growth of the digital currency industry;
- Ensures ongoing stability in the financial services industry;
- Secures the protection of consumers and businesses against illegal activities;
- Incorporates digital currencies into Australia’s national security framework; and
- Ensures the financial stability of the digital currency industry.

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22 Australian Securities & Investments Commission, above n 20.
23 Dr. PJ Radcliffe, submission No 5 to Senate Economics References Committee, Digital Currency Inquiry, 5.
Given the distinguishing characteristics of Bitcoin and other crypto-currencies, and the pace at which the industry is moving on a global level, designing practical solutions to address these concerns is an important and complex task.

The future of Bitcoin and its regulation in Australia is difficult to predict. Submissions to the Senate Inquiry, however, highlight the fact that the maintenance of the ATO’s current approach is a major cause for concern for Australian businesses, especially startups: it seems clear that a regulatory approach that imposes double taxation will make transactions uneconomic and discourage the uptake of the new technology by Australian businesses.

It is clear that regulators need to develop thoughtful, innovative and sensible policies that protect the public without stifling crypto-currency innovation and the resulting potential for economic growth. An overly cautious and ill-considered legislative response is likely to have significant implications for Bitcoin’s utility in Australia in the short term, and ultimately the question as to whether Australia can take a leading role in promoting FinTech and e-commerce or whether we will be playing catch-up with other jurisdictions who more nimbly seize these opportunities.

The Senate Inquiry’s Report is due to be published by the first sitting day of Australia’s federal Parliament in March 2015.

We will keep you informed of further developments.

25 Centre for Internet Safety, submission No 29 to Senate Economics References Committee, Digital Currency Inquiry, 1.
Protecting your Gambling Brand from Misuse in Foreign Jurisdictions

Author(s): Jamie Nettleton, Ashleigh Fehrenbach

Overview
A recent case in the United States has highlighted the dangers that brand owners face in the online world where infringing content can be disguised in a foreign language. The case was brought by the well-known casino operator based in Nevada Las Vegas Sands Corp (LVS) and involved the registrants of 35 domain names (Defendants). The decision has implications for Australian trade mark owners as it highlights the ease with which individuals can register anonymously websites that display infringing content and associate themselves falsely with a particular brand.

Background
In June 2014, LVS commenced proceedings in the Nevada District Court against the registrants of 35 domain names for trade mark infringement. The registrants of the infringing domain names used a combination of:

1. the SANDS trade mark (owned by LVS);
2. the Chinese equivalent to the words "GOLD SANDS" using Chinese Jinsha characters; and
3. images of LVS’ VENETIAN RESORT logo throughout numerous websites operating out of China (Websites), in order to affiliate falsely those websites with LVS.

LVS had been unable to identify the registrant/s of the various domain names, as this information was hidden through the use of privacy protection services. Privacy protection services are offered by popular registrars including Go Daddy, Name.com and eNom, and provide registrants with the opportunity to ensure that their name and contact details remain out of public view in a whois search. These services are employed commonly in cases where registrants of domain names operate monetised websites or if they wish to redirect traffic to websites containing infringing material.

LVS brought proceedings claiming that the use of the domain names constitutes:

1. trade mark infringement;
2. false designation; and
3. trade mark dilution under the United States Lanham Act;
4. common law trade mark infringement; and
5. unfair competition.

LVS argued that the Websites, which were accessible to citizens in the United States, lured prospective gamblers to overseas online casinos. It also claimed that the unauthorised use of its trade marks by the domain name registrants threatened to dilute its reputation in the gambling world. LVS requested that the Court order the domain name registrars to remove or disable the domain name server information for the infringing domains.

Court Orders
On 30 June 2014, the Nevada District Court issued a temporary restraining order requiring the domain name registrars to remove or disable the Websites pending a trial. The Court stated that the issue of a restraining order would “protect consumers against deception and
confusion arising from the use of Las Vegas Sands Corp federally registered trademarks by persons other than Las Vegas Sands Corp".2

Importantly, the Court also ordered LVS to subpoena the relevant privacy protection service/s for the purpose of identifying the unknown registrants. The Court reasoned that its order was justified on the basis that LVS would be likely to succeed on its claims of false designation of origin claims and trade mark infringement if the proceedings progressed to a trial.

Following this order, LVS were able to remove at least some infringing use of its brand from the marketplace. This would have the effect of lessening consumer confusion and thereby protecting the LVS brand.

On 10 July 2014, the Court issued a preliminary injunction order, requiring that the Defendants be restrained temporarily from transferring the Domain Names to anyone. The Court found that a failure to issue a preliminary injunction would cause LVS to suffer additional irreparable injury and potentially incur further costs. It was also found that a preliminary injunction was in the interest of the public as it would protect consumers against the deception and confusion arising from the use of LVS' trade marks by persons other than LVS.

A date for a full trial of this matter has not yet been set.

Application in Australia

An important finding by the Nevada District Court was that the Websites were accessible to people in the United States. If an analogous situation arose under which an individual uses an Australian registered trade mark on its website, but uses a French translation of that trade mark (and therefore sought to conceal or disguise the trade mark in another language), the trade mark owner may consider taking proceedings against the individual. The trade mark owner would, however, need to demonstrate that the content of the website in question was accessible to people in Australia.

This might be done if the website displayed indicia of specific interest to Australians, for example through the display of the Australian flag or the use of Australian dollars for payment.

In order for a successful claim to be established, the trade mark owner needs to ensure that one of the following claims can be proved against the infringer:

1. infringement of a registered Australian trade mark pursuant to section 120 of the Trade Marks Act 1995;
2. misleading and deceptive conduct in contravention of sections 18 and 29 of Schedule 2 (Australian Consumer Law) of the Competition and Consumer Act 2010 (Cth); and
3. common law passing off.

One difficulty remains, at least in the contexts of a claim brought for trade mark infringement, that the use of the mark with a different language may result in an argument being made that the mark (or a mark which substantially identifies or depicts similar to the registered mark) has not been used.

Similar difficulties would exist in respect of claims that may be brought under the Australian Consumer Law or passing off.

Take Home Points

The online world presents considerable difficulty to trade marks owners who seek to enforce their trade mark rights. Registrants of domain names globally are able to manipulate the content on their websites in such a way that it has the effect of diluting or tarnishing an overseas brand. Due to tools, such as privacy protection services, the identity of a domain

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2 His Honour James C. Mahan at paragraph 4.
name registrant can remain unknown even when internet traffic is being diverted for the registrant's commercial gain. This factor, coupled with the variances in how stringently intellectual property policies are adhered to in different jurisdictions means that trade mark owners can find it very difficult to seek court remedies to prevent this kind of activity.

It is important to note that, in this case, while LVS could not identify initially the registrants behind the Websites containing the infringing material, it was able to obtain an order from the Court to subpoena the privacy protection services to uncover this information. This would enable it to pursue applicable legal remedies against the Registry – this may be of interest to Australian trade mark owners.

It is important that brand owners understand that the burden of enforcing their rights in the online world falls predominantly on their own shoulders. As such, it is important for brand owners to monitor online content for potential infringing content, including websites that contain content in another language. Monitoring and policing potentially infringing material will assist in protecting brand owners, including online gambling brand owners, in ensuring that their trade marks remain enforceable.
Australia: 23 million people and FOUR new casinos?!

Author (s): Jamie Nettleton, Jessica Azzi and Elizabeth Cameron

Introduction
In the year ending June 2014, international visitors spent $30.1 billion in Australia, with $5.3 billion of this revenue generated by Chinese visitors alone.\(^1\) Australia is also seeing record numbers of visitors from Singapore, Malaysia, Hong Kong, India and the US.\(^2\)

It is no surprise that casino developers are seeking to develop new casinos in Australia to capitalise on existing Chinese tourism and to further promote Australia to Chinese tourists.

The development of casino destinations is becoming an increasingly popular focus of infrastructure investment for Asian countries such as Singapore, the Philippines and Vietnam. This seeks to follow the success of Macau, which now, as a result of visitors from the Chinese mainland, generates gambling revenues in excess of the revenues generated by all the casino destinations in the United States combined (this includes Las Vegas and Atlantic City).

There appears to be potential for similar success in Australia. Based on 2009 research, each international visitor to Australia who visits a casino during their holiday spends an average of $4940, nearly double the amount spend on average by a visitor who does not (who spends on average $2630).\(^3\)

The success of casino destinations in Macau and Singapore has encouraged the governments of Australian states New South Wales and Queensland to adopt strategies designed to capitalise on and/or encourage casino-tourism, with a view to obtaining benefits such as increased employment opportunities, tourism and revenues for the state.

However, the adoption of these strategies and the development of new casinos (or ‘integrated resorts’):

(a) requires consideration of a complex legal and regulatory framework; and

(b) faces significant opposition from the anti-gambling lobby, which argues that casino gambling leads to adverse social impacts, for example, problem gambling, corruption and crime.

NSW: The ‘VIP Gaming Facility’
In November 2013, the NSW government entered into a binding agreement with Crown Resorts Limited (Crown) to develop a new integrated VIP ‘gaming facility’ hotel and casino (VIP Gaming Facility) in Sydney CBD’s Barangaroo South, which is scheduled to open in 2019. Crown’s existing casino portfolio includes the casinos in Melbourne and Perth.

By approving Crown’s unsolicited proposal for an integrated resort-casino, the NSW state government has changed fundamentally the previous policy in NSW which had contemplated only a single casino in NSW.

Also in November 2013, the NSW Parliament passed the Casino Control Amendment (Barangaroo Restricted Gaming Facility) Act 2013 (NSW) to enable the grant of a ‘restricted gaming licence’ to the Barangaroo development.

The arrangement between the NSW government and Crown\(^4\) relating to the approval of this proposal includes a number of strict conditions on Crown, for example:

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1 Tourism Australia, Quarterly Market Update November 2014, pg 1.
2 Ibid, pg 5.
4 A NSW Parliamentary Inquiry was held to determine the extent to which privilege (or confidentially) could be claimed over the Crown Casino VIP Gaming Management Agreement. On 11 November 2014, the Independent
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(a) a delay on the commencement of gaming until 15 November 2019;
(b) a prohibition on poker machines;
(c) the application of minimum bet limits (commensurate with the expected limits in VIP facility); and
(d) the barring of the general public from entry into the casino.

Further, Crown is restricted from having a “material” association with prominent Macau based casino developer, Dr Stanley Ho and his associates and from allowing Dr Ho to obtain an interest, or hold a relevant position, in Crown.

Local residents who wish to apply for VIP membership status at the new facility must either demonstrate similar ‘VIP’ membership status at another casino, or wait for a 24-hour ‘cooling-off’ period before their membership is approved and they are permitted to gamble. The imposition of these conditions support arguments made publicly by James Packer and Crown that the target market of the new facility comprises high-value tourists.

The requirement for responsible gambling measures to be implemented is one of the means by which the new facilities are being marketed to the electorate, with Crown accepting the formation of a memorandum of understanding with Mission Australia as a condition of the grant of its NSW licence. Crown has also undertaken to pay a special tax rate, which includes a 2% responsible gambling levy that will be re-directed to the NSW Responsible Gambling Fund.

Crown needs to secure planning approval for the development from the Barangaroo Delivery Authority and the NSW Department of Planning and Infrastructure.

Queensland: SEVEN casinos!

In October 2013, the Queensland government announced that it had issued conditional licences for three new casinos.

Unlike the more restrictive legislative arrangements and agreements in NSW, the Casino Control Act 1982 (Qld) permits the Governor to grant an unlimited number of casino licences.

Plans have been announced for three new casinos in Queensland (which will be in addition to the four casinos already in operation in Queensland):

(a) Hong Kong billionaire Tony Fung has proposed a $8.15 billion Aquis resort in Cairns. The proposed location is Yorkeys Knob, 15 kilometres north of the existing Reef Hotel Casino (RHC) in Cairns. However, at the time of writing, Mr Fung had withdrawn his offer to purchase the RHC. Whilst Mr Fung remains committed to the Aquis proposal, his purchase of the RHC was initially part of his strategy to raise funds for the development of Aquis;
(b) a conditional licence has been granted to ASF Consortium for its proposed $7.5 billion Broadwater Marine Casino on the Gold Coast; and
(c) the tender period for a second Brisbane casino has closed. Echo Entertainment (owner of the Star casino in Sydney) and Crown (among others) have lodged tenders. A decision is due in February 2015.

Legal Arbiter, the Honourable Keith Mason AC QC, released his final report, recommending the redaction of only a few, commercially sensitive clauses. On 13 November 2014, the VIP Management Agreement dated 8 July 2014 between the NSW Independent Liquor and Gaming Authority (ILGA) and Crown Resorts Limited and a number of other Crown entities was disclosed to NSW Parliament.
It’s not just gambling law that matters
In addition to the gambling laws requirements in each state, other laws also apply, for example, planning and environmental law. As mentioned above, Crown’s proposed VIP Gaming Facility is yet to obtain the approval of the Barangaroo Delivery Authority and the NSW Department of Planning and Infrastructure.

Additionally, the Commonwealth competition and consumer regulator, the ACCC, has been paying close attention to the developments.

The ACCC investigated both Echo Entertainment and Crown for potential cartel conduct in 2013 following Crown’s acquisition of shares in Echo. The ACCC found that no contraventions had taken place. The ACCC also examined, and elected not to oppose, Mr Fung’s proposed acquisition of the RHC in 2014. (As stated above, Mr Fung decided subsequently not to proceed with this acquisition.)

Commercial risks
A significant question relating to the proposed casino development which has arisen is whether sufficient demand exists and/or can be generated to enable both the existing and proposed casinos to remain independently economically viable. This is particularly relevant to Queensland, where seven casinos will be in operation if each of the proposed licences is granted and these casinos proceed to open.

As the new Australian casinos are, to a large extent, targeted directly at Chinese visitors, the following trends and developments may prove significant:

(a) In October 2013, the Chinese government introduced a series of strict anti-corruption laws in response to serious incidents of Chinese tourists being coerced and harassed into shopping and gambling while travelling in tour groups overseas. These laws were designed to break down the close relationships and arrangements between tour operators and gambling service providers in destination countries. While Australian tours were not identified as a source of concern, these laws may affect the viability of the Chinese casino tourism market in Australia.

(b) There have been reports in the media in late 2014 that the Chinese tourism market is contracting, as the growth in Australian tourist arrivals from China halved in 2014 compared to 2013.5 Additionally, Macau saw a 23% fall in gaming revenue in October 2014, a decline attributed to slowing in-bound tourism from China. (However, this decline has also been attributed to specific legislative reforms in Macau targeting tourism and the imposition of smoking bans.)

In addition to the proposals for new Australian casinos, significant investment is also being undertaken by existing Australian casinos operators, with extensive refurbishment and development expenditure taking place.

Commentators have also expressed concerns about the dominance of casinos in smaller cities and whether this dominance will prejudice the appeal of other hospitality venues and restaurants. This is due to the potential preference of tourists to visit casino developments, rather than other venues, thereby creating job losses which may well offset the employment opportunities and revenues generated by the new integrated resorts (and by improvements to existing casinos).

What next?
Addisons will be monitoring these developments as they progress.

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5 http://www.theguardian.com/business/2014/may/23/chinese-tourism-market-declining-china-arrivals-uk