ADDISONS

COMMERCIAL LAWYERS

GAMBLING LAW & REGULATION

Recent developments in Australian gambling law

August 2012

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OVERVIEW

This issue of Addisons' Gambling Law & Regulation newsletter is issued in connection with the Australasian Gaming Expo and Gaming, Racing and Wagering Australia 2012 Conference.

It contains a number of articles of importance to the gambling sector, including articles relating to problem gambling and fantasy sports, as well as commentaries on recent cases relating to the advertisement of betting inducements and a disciplinary action brought against a Northern Territory corporate bookmaker.

We also include further commentary in connection with the article in our April 2012 issue relating to the treatment of game shows by the UK Gambling Commission.

Sicnce the last edition of our newsletter, the Interim Report of the DBCDE on its review of the IGA has been released. Further details are set out in our focus papers at http://www.addisonslawyers.com.au/knowledge/DBCDE_Inquiry_into_Interactive_Gambling_Act_–_Interim_Report_–_What_Does_it_Mean_for_Wagering_Operators_in_Australia_–_Potential_for_Change_in_Australian_Online_Gambling_Regulatory_Landsca354.aspx and http://www.addisonslawyers.com.au/knowledge/DBCDE_Inquiry_into_Interactive_Gambling_Act_–_Interim_Report_Released_–_What_Does_it_Mean_for_Online_Gaming_in_Australia355.aspx.

Addisons has been involved in making various submissions in connection with the Interim Report and we look forward to the final report with interest.

Finally, we should mention that Jamie Nettleton, in his role as a Senior Fellow, Melbourne Law School, University of Melbourne will be co-presenting a masters course at the University of Melbourne in September entitled Gambling, Policy and the Law. For further information, please contact Jamie Nettleton direct or contact Melbourne University direct at http://www.law.unimelb.edu.au/masters/courses-and-subjects/gambling-policy-and-the-law .

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Online Gambling - To What Extent Do White Label, Affiliate and Other Revenue Share Agreements Require Approval from Gambling Regulators? - Decision of Northern Territory Racing Commission relating to Betezy

Author(s): Jamie Nettleton

In a recent decision handed down by the Northern Territory Racing Commission, sanctions were imposed on Betezy, one of the corporate bookmakers licensed in the Northern Territory to conduct sports bookmaking. This decision clarifies a number of operational issues of relevance when conducting gambling business under a licence granted in an Australian jurisdiction and the extent to which regulatory approval is required.

Among the issues considered by the Commission were:

- To what extent is approval from the Commission required concerning white label agreements?
- To what extent must affiliate agreements also be approved?

The Commission's decision related to a number of complaints that had been made to the Commission concerning arrangements entered into by Betezy with a number of sporting clubs and other bodies under which net profits arising from those arrangements would be distributed between Betezy, the club and other parties.

These allegations required the Commission to consider the following provisions of the Northern Territory Racing and Betting Act:

- (Section 81) *A bookmaker who, except with the approval of the Commission:*

  (a) enters into a partnership in relation to the business of bookmaking carried on under his licence or permit with a person whose name is not endorsed on his licence or permit; or

  (b) makes an arrangement or enters into an agreement with a person whereby that person becomes entitled to a share in the profits of that business.

  (c) ….

- (Section 102(6)) *A person whose name is not endorsed on a licence who, except with the approval of the Commission, acquires or holds an interest in or derives a benefit from, the business of bookmaking carried on by the registered bookmaker is guilty of an offence.*

In coming to its decision, the Commission stated that, as a matter of principle, both affiliate agreements and management agreements fall within section 102(6). The Commission set out its understanding of affiliate agreements and management agreements as follows:

- *Affiliate agreements comprise contracts between a licensee and an affiliate that entitle the affiliate to receive commission where that commission is calculated as a percentage of the losses attributable to clients introduced to the licensee by the affiliate.*
- *Management agreements, on the other hand, comprise a tripartite contract between the licensee, an affiliate and a third party who administers the relationship. Under this agreement, the manager receives a commission calculated by reference to a percentage of losses or turnover, or a combination of both.*

As indicated above, a number of white label agreements had been entered into by Betezy with various parties, principally sporting clubs. Some of these involved a net profit being shared between the parties, while other agreements provided for a fee to be paid that was calculated by reference to a percentage of turnover and for bonuses to be paid by reference to a profit share calculation.

In the Commission's view, arrangements of this type need approval from the Commission. On the basis that no formal approval had been given, the Commission imposed fines on Betezy.

In addition, a number of breaches by Betezy of its licence conditions were considered. These related to:

- a failure to obtain approval of changes to its board and senior management;
- a failure to notify the Commission of litigation having been commenced against Betezy;
- the existence of errors in the terms and conditions which appeared on the Betezy website (which if proved, would give rise to a breach of an oblation to publish a set of clearly comprehensive betting rules);

- a failure to notify the Commission of changes in its share capital and ownership structure; and
- allowing a third party access to the electronic records or systems associated with the conduct of Betezy's business.

Save for the last element which was not established, Betezy was found to have breached various licence conditions. Fines totalling $45,000 were imposed by the Commission.

This decision indicates clearly the necessity to keep the Commission, and other Australian regulators, aware of changes to the ownership structure and other key management changes. Also, it highlights the necessity to keep regulators informed of affiliate agreements, white label arrangements and other profit sharing and commission bearing arrangements, (many of which are standard practice in the online gambling environment). In certain cases, the regulator may wish to make further enquiries concerning relevant arrangements and to investigate the suitability of the affiliate or agent (as the case may be). This is consistent with the approach taken by gambling regulators in reviewing junket arrangements entered into by terrestrial casinos.

However, a number of other revenue share agreements that are standard practice in e-commerce, including online gambling, were not considered. For example, to which extent do software licences, web marketing agreements and other standard revenue share arrangements require approval?

It is probable that further clarification will be given by the Commission in due course concerning the manner in which affiliate white label and other revenue share arrangements can be concluded and the extent to which regulatory approval is required. We will keep you informed of any announcements made by the Commission relating to these issues.

Wagering Operators Fined for Offering Inducements to Victorian Residents

Author(s): Jamie Nettleton, Mary Huang

Two corporate bookmakers, Sportsbet and IASbet were found to have committed a number of offences following the offering of inducements to open betting accounts.

This case highlights the attention being given by Australian authorities to forms of advertising by betting operators involving inducements.

Facts

In Victoria, sports bookmakers are prohibited from offering to Victorian residents inducements to open a betting account. This is governed under section 4.7.10 of the *Gambling Regulation Act* 2003 (VIC) (the "Act"), which states:

"A wagering service provider must not offer any credit, voucher or reward as an

inducement to open a betting account."

In October 2010, the Victorian Commission for Gambling Regulation (**VCGR**) initially laid charges against three wagering operators relating to betting inducements. These charges were issued after VCGR's investigator, David Leadbetter, accessed the wagering operators' websites in September and October 2010.

Luxbet and Betstar admitted the breaches and were placed on good behaviour bonds. On the other hand, Sportsbet and IASbet pleaded not guilty and contested the charges on the basis that there was an ambiguity in the word "offer".

The charges issued by the VCGR related to:

- Sportsbet's offer of "Join now get $100 in free bets on the races" and "Up to $200 free bet for first time deposits"; and
- IASbet.com's offer of"$1000 free – 15% sign up bonus".

Decision

Magistrate Fitz-Gerald held that Sportsbet and IASbet.com had advertised on their websites an "offer" rather than an "invitation to treat". Accordingly, Sportsbet and IASbet.com were found guilty of four charges and six charges respectively. The parties were fined a total of $7,500.00.

Judgment

Amongst other issues raised, the key points of the case are:

- An "invitation to treat" refers to an expression of willingness to negotiate under contract law. However, Magistrate Fitz-Gerald found that section 4.7.10 of the Act creates a criminal offence and that the word "offer" is not used in the contractual sense.
- Magistrate Fitz-Gerald stated that the process of accessing or downloading the websites, from information on servers in the Northern Territory, where Sportsbet was licensed, was at the heart of the charges;
- Even though the communication of material in the form of a webpage was instigated at the request of the consumer, the process involves the sending of communication from the server in Darwin to the computer located in Melbourne. Magistrate Fitz-Gerald held that this process of downloading amounted to the defendants making an "offer" in Melbourne;
- Magistrate Fitz-Gerald considered that stipulations accompanying the offers (which included being over the age of 18, providing an address and first making a deposit into a betting account) did not alter the situation that a reward of a free bet or bonus was being made as an inducement to open a betting account.

Implications

The case shows an increased willingness on VCGR's behalf to enforce restrictions on betting inducements. When advertising free bets or prizes (either with respect to opening accounts or existing customers), wagering operators should be aware that any advertisement is likely to be considered an offer as opposed to an invitation to make an offer for a contract.

Further, the case illustrates how the concept of jurisdiction is determined in the context of online advertising. The case suggests that the location of the server hosting the advertisement (or from which it is uploaded) is not relevant when assessing the relevant jurisdiction. The significant factor is the location at which the advertisement is accessed or downloaded. If the advertisement is

accessed or downloaded in Victoria, then Victorian gambling law would apply. This is consistent with the principles set out by the High Court of Australia in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 in relation to defamation, but is the first time that an Australian Court has applied a similar principle in the context of Australian gambling law offences.

As each State and Territory has different requirements with respect to betting inducements, a wagering operator should familiarise itself with all relevant legislation to ensure that it is compliant in each State and Territory. The inconsistencies and difficulties involved in complying with these different requirements highlight the need to harmonise the regulation of betting inducements. It is particularly impracticable in a global and digital economy for wagering operators to be subject to inconsistent advertising and betting inducement restrictions in Australia (and globally).

Play on! The UK Gambling Commission Tells Game Show Producers that a Gambling Licence is not Required (For Now)

Author(s): Jamie Nettleton, Jessica Azzi

As reported in the April 2012 issue of this newsletter, the UK Gambling Commission (the **UK Commission**) earlier this year considered whether popular UK game shows including Deal or No Deal and Red or Black gave rise to gambling law ramifications.

The UK Commission's concern was that, through their participation in game shows, contestants are gambling.

If this view were correct, the producers of game shows would need to change the format of their respective shows (to ensure that they did not constitute gambling) and/or acquire a gambling licence in order to comply with the UK Gambling Act (the **Act**).

Substantial commercial implications would result. Deal or No Deal, for example, has a daily audience of 4 million viewers in its current afternoon time slot.

In addition to the cost involved in obtaining a gambling licence, the licence conditions are likely to require the show to screen after 9pm. This would impact the audience (including its composition) and size and, ultimately, advertising revenue.

Possible changes to the format to ensure that the show does not constitute gambling may include, for example, in the case of Deal or No Deal, ceasing to allow the main contestant to win "money" as they progress throughout the game.

This would eliminate the possibility that the contestant is providing consideration by staking the money they win to continue to participate in the game.

Any change of this nature is likely to affect the appeal of the game show to audiences, broadcasters and advertisers.

However, soon after announcing that it was planning to issue a guidance note to assist game show producers in meeting their obligations under the Act, the Commission indicated that it would no longer be taking this approach. It is likely that this occurred after discussions with concerned producers.

Despite this change, comments made by the Commission's chairman, Philip Graf, in June indicate that the UK Commission remains concerned. Rather, based on Mr Graf's comments, the UK Commission will engage in discussions with producers to ensure that the shows comply with gambling legislation - either through a carve out in the existing legislation or by modifying the shows themselves, for example, suggested above.

The Commission's willingness to consider a carve out, for example, so that game shows would be exempt from the Act, is significant for two reasons.

First, it would effectively introduce an exemption for trade promotions into UK gambling legislation. This approach is similar to that taken in Australia, where the producers of TV shows which involve a game of chance either can apply for a trade promotion permit, or meet other criteria (for example, they must not charge contestants a fee for entry), to ensure that the show falls outside the ambit of gambling legislation. UK game show producers would benefit from the availability of an exemption of this nature, whether it be in the form of a trade promotion exemption or as a carve out for game shows specifically, as it would enable them to design game shows in a manner that would avoid the risk of the Commission raising similar concerns in the future.

Secondly, by considering a carve out, as opposed to, for example, requiring producers to apply for a gambling licence, it would appear that the Commission is adopting a more practical approach in dealing with its concerns, and will work with producers to address these concerns.

It is clear that the application of gambling laws to game shows is an issue that will remain unclear and will need to be considered on a country by country basis. Certainly, the UK consideration of the issue will remain a topic of global interest, particularly considering the popularity of game shows generally. This includes Australia, where, for example, the view taken by regulators is that the local version of Deal or No Deal is a game of skill and therefore falls outside the ambit of gambling legislation.

Problem Gambling - Proceedings to Recover Gambling Losses - The Australian Experience – Is Litigation Worth the Gamble?

Author(s): Jamie Nettleton, Nicholas Rozenberg, Michael Hislop

Executive Summary

Whilst the topic of problem gambling has received a great deal of attention from policy-makers in recent times, some problem gamblers have continued to take matters into their own hands - through the courts. Problem gamblers have sought to recover all or part of their gambling losses by bringing claims against the gambling operators with whom they have gambled. This has led to the development of a body of case law that clarifies the extent to which, and the circumstances where, gambling operators may be liable for losses sustained by problem gamblers.

In general terms, the courts have set a high threshold of the evidence that must be established by a problem gambler seeking to recover damages from a gambling operator in respect of their losses. It is only in the most extreme cases of gross negligence of the operator (or deliberate conduct on the part of the operator with knowledge of the vulnerability of the problem gambler), that there will be any prospect of a successful action.

Relevant Cases

In Australia, the key cases comprising this body of law are:

- *Preston v Star City Pty Ltd*[1];
- *American Express International v Simon Famularo; Simon Famularo v Burst Pty Ltd* (a decision in 2001) (**Famularo**)[2];
- *Reynolds v Katoomba RSL All Services Club Ltd* (a decision in 2001) (**Reynolds**)[3];
- *Foroughi v Star City Pty Ltd* (a decision in 2007) (**Foroughi**)[4];
- *Kakavas v Crown Melbourne Ltd & Ors* (**Kakavas**)[5]; and
- *Kakavas v Crown Melbourne Ltd & Ors* (a decision in 2012) (**Kakavas Appeal**)[6].

The above cases are largely grounded on three distinct causes of actions against gambling operators:

- negligence;
- breach of statutory duty; and
- unconscionable conduct under the provisions of the *Australian Consumer Law*[7] (formerly the *Trade Practices Act* 1974 (Cth)).

This article explores the current position with respect to this area of law, particularly in light of the Victorian Court of Appeal's decision in the *Kakavas Appeal*[8].

Negligence

Australian cases

Prior to the cases outlined above, the general proposition was that, where an activity carries with it inherent risks, voluntary participation in the activity will rarely ground a claim for damages.

This proposition was considered in the context of gambling by NSW Chief Justice Spigelman in *Reynolds*, where his Honour observed:

> *"This Court should be very slow indeed to recognise a duty to prevent self-inflicted economic loss. Loss of money by way of gambling is an inherent risk in the activity and cannot be avoided."*[9]

In *Reynolds*, the plaintiff sued its local RSL club for substantial gambling losses. He alleged that the club acted negligently by breaching its duty of care to protect him from gambling losses in circumstances where the club had been made aware of his problem gambling and had been asked to prevent him from gambling at the venue.

Spigelman CJ observed that the Australian community places great importance on holding

[1] There are multiple judgments in *Preston v Star City Pty Ltd*. Reference in this article is made to the following judgments: [1999] NSWSC 459 (**Preston No.1**); [1999] NSWSC 1273 (**Preston No.2**); and [2005] NSWSC 1223 (**Preston No.3**).
[2] District Court of New South Wales, McNaughton DCJ, unreported, 19 February 2001.
[3] [2001] NSWCA 234.
[4] [2007] FCA 1503.
[5] There is more than one judgment in the *Kakavas* case. Reference in this article is made to the following judgments: *Kakavas v Crown Ltd* [2007] VSC 526 (**Kakavas No.1**); *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559 (**Kakavas No.2**).
[6] [2012] VSCA 95.
[7] Schedule 2, *Competition and Consumer Act 2010* (Cth).
[8] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95.
[9] *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, at [27] per Spigelman CJ.

individuals responsible for their own actions and that the identification of the duty of care for the purposes of negligence must reflect this.[10] On this basis, his Honour held that Australian law will not permit recovery for economic loss occasioned by gambling under the tort of negligence except in extraordinary circumstances.[11]

Spigelman CJ did not elaborate greatly on what would constitute an extraordinary circumstance or set of circumstances. He did, however, state that whether a duty of care to protect against reasonably foreseeable harm arises is a question to be determined not by some general principle of law, but by the specific and peculiar circumstances of each case.[12] His Honour suggested that a significant factor would be whether one party has knowledge of another party's vulnerability.[13]

Decisions by Wood CJ at CL (on appeal from an interlocutory decision of Master Harrison) in *Preston No. 2* and by Hoeben J (in a later interlocutory decision) in *Preston No.3* provide some clarification concerning the boundary between ordinary and extraordinary circumstances. In *Preston*, Mr Preston sued the Sydney casino (then called Star City) for gambling losses of approximately $3 million. He alleged that they had breached their duty of care to only allow him to gamble responsibly in plying him with alcohol and other inducements.

Wood CJ at CL made the following remarks:

> *"The precise limits of the duty of care owed in the present case, and of any breach, are likely to depend on the facts proved – most particularly upon the extent to which the defendant had knowledge of any propensity on the part of the plaintiff to be a problem gambler, and upon the extent to which it sought to take advantage of him…I am of the view that it is strongly arguable that a duty of care would extend to a prohibition on the provision of further liquor to a problem gambler, who is seen to be intoxicated, or to be behaving in a manner that is obviously totally rash…Equally arguable in my view, is its extension to the provision of significant credit facilities or excessive encouragement through incentives, of a person who has specifically asked to be barred or to go beyond a limit that he has asked the casino to set…"*[14]

In *Foroughi*, the limits of a hypothetical duty of care in respect of "problem gamblers" were further explored. Mr Foroughi sued Star City for over $600,000 in gambling losses after he was able to continue visiting and gambling at the casino despite have instituted a voluntary exclusion order. Mr Foroughi argued that Star City owed him a duty of care to detect and remove him from the casino as soon as possible. Jacobson J held that the casino did not owe Mr Foroughi any such duty. Moreover, his Honour held that, even if Star City had owed such a duty, it had not breached it. Jacobson J was satisfied that Star City had in place reasonable mechanisms to detect and prevent Mr Foroughi from entering and gambling on the premises.[15]

The decisions in *Kakavas No.1* and *Kakavas No.2* provide clear guidance that the threshold is high for establishing a claim in negligence, whilst the distinction between a claim of negligence and one of unconscionable conduct is somewhat blurred.

In *Kakavas*, Mr Kakavas brought a claim against Crown Casino in Melbourne to recover approximately $30 million in losses. He alleged that the casino provided him, a known problem gambler, with a number of inducements to gamble, including:

- the use of a jet on about 30 occasions to fly to Melbourne;
- gifts of thousands of dollars on many occasions, including when Mr Kakavas boarded the plane or arrived at the casino hotel; and
- the provision of lines of credit of up to $1.5 million.

Mr Kakavas pleaded a number of causes of action, including negligence and unconscionable conduct under the relevant provisions of the then *Trade Practices Act* 1974 (Cth). In relation to the claim of negligence, Mr Kakavas alleged that Crown Casino had breached its duty of care to prevent him from gambling, due, in part, to its alleged knowledge of his problem gambling.

Crown Casino made an application to strike out the claim in its entirety. In an interlocutory decision, Harper J ruled that claims of active and deliberate intervention by a casino operator in the knowledge and exploitation of a patron's vulnerability are not claims in negligence[16].

[10] *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, at [26] per Spigelman CJ.
[11] *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, at [9] per Spigelman CJ.
[12] *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, at [27] per Spigelman CJ.
[13] *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, at [29] - [30] per Spigelman CJ.
[14] *Preston v Star City Pty Ltd* [1999] NSWSC 1273, at [131] - [132] per Wood CJ at CL.
[15] *Foroughi v Star City Pty Ltd* [2007] FCA 1503, at [120] – [138] per Jacobson J.
[16] *Kakavas v Crown Ltd* [2007] VSC 526, at [47].

Nonetheless, his Honour allowed the claim to proceed on the basis of unconscionable conduct.

Some overseas cases

It is useful to consider recent overseas decisions which address similar principles.

In *Calvert v William Hill Credit Ltd*[17], an English case, the Court held that a duty of care to exclude identified problem gamblers could arise. A breach would occur where the gambling operator (the holder of the duty) negligently fails to prevent foreseeable breaches of that duty.[18]

Mr Calvert had identified himself to William Hill as a problem gambler, and had attempted to exclude himself voluntarily from gambling for a period of time by temporarily closing his account with William Hill. Two employees of William Hill failed to process his temporary suspension order and Mr Calvert continued to gamble with William Hill. Although it was established that Mr Calvert was owed a duty of care by William Hill, and that William Hill had breached the duty, the claim ultimately failed on causation grounds. Notably, the Court was satisfied that Mr Calvert would have continued to bet elsewhere even if he had been properly excluded by William Hill.

A recent decision of the Seoul Central District Court in South Korea is also relevant. In this case, two South Korean problem gamblers sued a "foreigners only" casino operator for losses of over $2 million incurred whilst gambling at the venue. One of the allegations apparently made by the two gamblers was that the casino had provided them with the opportunity to gamble by issuing free Bolivian residency cards. The Court held that the casino bore 50 per cent of the responsibility as it solicited the two men to gamble with the knowledge that the men were problem gamblers. The Court ordered an award of over $1 million in favour of the problem gamblers[19]. However, it is unclear to us whether the claim was grounded in negligence.

Breach of Statutory Duty

The High Court of Australia held in *Byrne & Frew v Australian Airlines*[20] that a breach of statutory duty will arise:

> *"…where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind which the statute was designed to afford protection."*[21]

The authorities suggest that it is difficult for problem gamblers, when seeking recovery of their gambling losses and other damages from gambling operators, to succeed in a claim for breach of statutory duty. Mr Reynolds alleged a breach of statutory duty under the *Registered Clubs Act* 1976 (NSW) and both Mr Preston and Mr Foroughi alleged breaches of statutory duty under the *Casino Control Act* 1992 (NSW). Each of those claims failed (or were not pressed), with the respective Courts holding on each occasion that, in the circumstances, the particular provisions did not confer a private right of action for damages against the gambling venue.

Unconscionable Conduct

Section 21 of the *Australian Consumer Law* provides that, in the context of the supply or acquisition of goods or services, a person must not engage in conduct that is, in all the circumstances, unconscionable.

Moreover, section 22 of the *Australian Consumer Law* lists a number of factors that a court may have regard to when determining whether unconscionable conduct has occurred. These factors include:

- the relative bargaining strengths of the business and the consumer;
- whether the business required the consumer to comply with conditions that were not reasonably necessary to protect the legitimate interests of the business;
- whether the consumer understood any documentation that may have been provided;
- whether the business used undue influence, pressure, or unfair tactics; and
- the price and terms on which the consumer could have acquired the same or equivalent goods elsewhere.

As previously mentioned, Harper J in *Kakavas No.1* permitted Mr Kakavas' claim to proceed on the basis of unconscionable conduct. This claim ultimately failed and the appeal was recently dismissed in a unanimous decision of the Victorian Court of Appeal in the *Kakavas Appeal.*

[17] [2008] EWCA 458.
[18] *Calvert v William Hill Credit Ltd* [2008] EWCA 458.
[19] '*Payout for Punters*', Daily Telegraph, 13 June 2012; '*S. Korea casino must partially repay gamblers' losses*', AsiaOne News, 12 June 2012.
[20] (1995) 185 CLR 410
[21] *Byrne & Frew v Australian Airlines* (1995) 185 CLR 410, at 424 per Brennan CJ, Dawson and Toohey JJ, citing *Sovar v Henry Lane Pty Ltd* [1967] HCA 31; (1967) 116 CLR 397 at 404, 405.

The Victorian Court of Appeal largely based its decision to dismiss the appeal on its findings concerning the factors referred to above. The majority judgment held that Mr Kakavas was not in an unequal bargaining position with Crown Casino. This was supported by his ability to, on numerous occasions, make demands and dictate terms to Crown Casino regarding his attendance to gamble. The majority did not find that any extraordinary conditions or inducements had been granted to Mr Kakavas over and above those which were a customary part of Crown Casino's regular business, nor did the Court find that Crown Casino employed unfair pressure and unconscionable tactics to gain and retain Mr Kakavas' attendance. The majority also held that similar products and services were available elsewhere to Mr Kakavas, a fact that he used to his own advantage on several occasions during negotiations over terms with Crown Casino.

Conclusion

In Australia, no decision has been handed down recently in which a problem gambler has recovered losses from a gambling operator.

To the extent that claims are based on negligence, the Australian courts are yet to recognise an "exceptional case" in which the courts are prepared to depart from the proposition that the law should not permit recovery of economic loss resulting from gambling. That said, the findings in the above cases do not completely rule out potential future claims.

In light of the decisions in *Preston*, *Kakavas* and the *Kakavas Appeal*, it would appear that, for a claim in negligence to succeed, the claim would have to rely on circumstances characterised by the following:

- specific knowledge of a plaintiff's vulnerability to gambling; and
- conduct by the gambling operator which takes advantage of that vulnerability in ways that cause harm to the plaintiff. Such conduct may include:
    - excessive and/or extraordinary inducements; and
    - failing to prevent an identified and afflicted problem gambler from gambling.

In an article entitled, 'Rolling the dice', Mr Julian Snow suggests that the following set of circumstances may give rise to an "extraordinary case":

- "An established relationship between a gambler and a provider of gambling services (e.g. a bookmaker or a casino);
- Awareness on the part of the provider that the gambler is a problem gambler (as per a recognised psychiatric assessment), such that the gambler has diminished control over their gambling habit;
- An undertaking by the provider to exclude the gambler from continued gambling, in order to afford them protection from their gambling problem;
- A breach of that undertaking, whether passively or actively, on the part of the provider such that the gambler is able to continue gambling;
- Losses flowing from this continued gambling; and
- Evidence that the gambler had no access to or potential use of other gambling outlets."[22]

These circumstances have yet to coincide to form the factual matrix required for a case to be brought successfully by a problem gambler to recover gambling losses. If those circumstances do arise, Harper J's decision in *Kakavas No.1* suggests that such a claim by a gambling operator could be made alleging unconscionable and/or misleading and deceptive conduct under relevant provisions of the *Australian Consumer Law*.

Even though Mr Kakavas' unconscionable conduct claim against Crown Casino was unsuccessful, the decision nonetheless provides useful guidance concerning the approach the courts will take when assessing the merits of unconscionable conduct claims brought by problem gamblers against gambling operators. It would also appear that the extent to which the gambling operator's conduct was deliberate may have a bearing on the success of the claim.

Way Forward

We anticipate that further claims will be brought from time to time seeking to assert that either "extraordinary circumstances" exist, or that the factors under section 22, when applied to the facts of the case, support a finding that the wagering operator engaged in unconscionable conduct.

However, it should be noted that the legal obstacles involved are considerable and it will only be in the clearest situations of negligence or

[22] Julian Snow, 'Rolling the Dice' (2009) 86(08) *Law Institute Journal* 40.

unconscionable conduct that a claim by a problem gambler will be successful in the Australian Courts.

Any Given Sunday: Can Australian law reach your fantasy sports team? - The treatment of fantasy sports under Australian law – gaming, wagering or skill?

Author(s): Jamie Nettleton, Jessica Azzi

Fantasy sports are predicted to be a $1.7 billion dollar business by 2017 in the US.[1] The NFL's fantasy gridiron competition alone is estimated to have in excess of 20 million participants. Locally, it is estimated that almost 1 million Australians participate in fantasy sports.[2]

However, unlike in the US where legislation[3] provides a clear carve out from the ambit of gambling for fantasy sports, the position of fantasy sports under Australian law is unclear. This lack of clarity presents an obstacle to the growth of fantasy sports in Australia.

The most notable limitation on fantasy sports in Australia is that the operator of a fantasy sports league cannot charge participants money in exchange for the right to participate. As soon as, for example, an entry fee is charged, consideration – one of the three definitional requirements of gambling – exists. Accordingly, one of the most effective risk-management strategies for any fantasy game operator who fears their business model is at risk of requiring a gambling licence is to make participation free.

What are Fantasy Sports?

A fantasy sports competition traditionally involves a participant taking over the role of coach, being allocated a salary cap, and using this budget to "draft" a team from a roster of real life players.

Each week, the coach will select the fantasy squad that will "play" that week against the teams of other coaches in that fantasy competition. The performance of the players in the "real" competition each week translates into points in the fantasy competition.

Participants typically have opportunities to "trade" their drafted players throughout the competition. The coach with the most points at the end of the season wins.

There are two principal types of fantasy competitions:

- private fantasy leagues, which require one participant to both set up the competition and invite others participants to join. Participants can only compete in a private fantasy competition if they have received an invitation (or if they have set the competition up themselves); and
- public fantasy leagues, in which participants compete against all the other participants in that public league.

The biggest fantasy sports operators in Australia, the NRL Dream Team and News Limited's SuperCoach, provide both private and public leagues.

However, there are many variants to these traditional models. Many fantasy sports operators are increasingly offering short term models, which do not require season long commitment. For example, you may wish to play in a fantasy baseball competition for just one weekend.

Further, the fantasy model has evolved beyond sport and, whilst the following US products are lesser known, particularly in Australia, they raise similar legal issues:

- MTV's Power of 12 – a "fantasy election" product which MTV will offer in the lead up to the 2012 US presidential election, in which participants can draft a 12 person league made up of Congressional and presidential candidates. Measures such as fact checks and funding disclosure will be used to allocate points.
- Fantasy finance – a fantasy stock trading game, which involves participants being allocated a hypothetical amount to trade shares and other financial products. The participant who has "made" the most money at the end of the specified period wins a prize. For example, the winner of the Yahoo! Fantasy Finance competition, which lasts for a 12 week period, will be entitled to receive US$50,000. An additional $1000 will be

[1] Tom Van Riper, "The Rich Reality of Fantasy Sports: A $1.7bn Industry By 2017", *Forbes*, 12 July 2012. Accessed via http://www.forbes.com/sites/tomvanriper/2012/07/12/money-still-rolling-into-fantasy-sports/ on 13 July 2012.

[2] Adam Cooper, "Fantasy sports enjoy very real growth", *The Sydney Morning Hearld*, 27 March 2012. Accessed via http://www.smh.com.au/small-business/growing/fantasy-sports-enjoy-very-real-growth-20120327-1vvvd.html on 31 July 2012.

[3] Unlawful Internet Gambling Enforcement Act of 2006, 31 USC 5361-5366.

awarded each week to the participant who makes the most money that week.

- Fantasy celebrity leagues – participants "draft" a number of celebrities and points are awarded according to a number of factors. For example, one variant, Celebrity Fantasy League, deducts 10 points each time a drafted celebrity goes to rehab, awards 5 points for every birth or adoption announcement and deducts 3 points if a drafted celebrity is featured in People Magazine's "Who Wore it Best?" feature as the Loser.

- CBSSports' Baseball Boyfriend – CBS describes it as a "single draftee, fantasy baseball, mini-game", which sits alongside the main fantasy baseball product. Every time the single draftee (ie the "boyfriend") plays in the "real" major league competition, the fantasy participant scores points. This product is perceived as an attempt to attract more female participants to fantasy sports offerings.

The internet

There is no doubt that the internet has accelerated interest in fantasy sports. Prior to the availability of the internet, sports tragics participating in fantasy sports competitions would spend hours pouring over statistics published in newspapers and translating these numbers each week into player picks and, perhaps more importantly, rankings to determine who in their group of friends was coming on top.

To illustrate, in the US, it is estimated that 2 million people competed in fantasy sports before the internet become generally accessible. Fantasy sports participation in the US has grown more than 60% since 2007, and it is estimated that currently more than 32 million people aged 12 and older play fantasy sports in the US and Canada.[4]

There is no doubt that, in the US, the biggest beneficiaries of this growth have been the professional sports leagues. In Australia, there are strong indications that at least the AFL and the NRL are seeking to maximise the marketing opportunities fantasy sports present.

The NRL recognises that fantasy sports have become an integral part of its marketing strategy. The average NRL DreamTeam player will spend 10 minutes a day on the NRL site. More dedicated participants will spend up to 2 hours a day looking at statistics, articles and researching teams. In return for its participants' efforts, the NRL's DreamTeam will award more than $90,000 worth of prizes in 2012. The overall DreamTeam winner, that is, the coach with the most points, will be presented with a car during grand final week.[5]

The AFL is taking a similar approach. In developing the AFL Media brand, the AFL will rely on its own fantasy product, the AFL DreamTeam, and more specifically, the 250,000 AFL DreamTeam participants, to drive additional traffic to AFL created content, including AFL Media.

Australian gambling law

Unlike their US counterparts, Australian fantasy sports operators typically do not charge a participation fee. Given that online media content is increasingly hidden behind paywalls and interactive games are increasingly accessed through purchased apps, the fee-free nature of Australian fantasy sports reflects the perception that fantasy sports offered to Australian residents, would, if a fee were charged:

- breach the *Interactive Gambling Act 2001* (Cth) (**IGA**)[6] ; or, alternatively

- constitute a wagering product which, if provided without a wagering licence, would be in breach of wagering prohibitions.

Game of chance?

The IGA prohibits the supply of interactive gambling services to persons resident in Australia. For a virtual game, such as fantasy sports, to constitute a gambling service (which is one of the key elements of an "interactive gambling service" in the IGA), it must:

(a) be a game of chance or of mixed chance and skill; and

(b) involve consideration; and

(c) be played for money or anything else of value.

Any view that fantasy sports, if a participation fee were charged, meets these criteria rests upon an assumption that fantasy sports involve a game of chance or mixed chance and skill.

[4] Kyle Clapham, "Fantasy sports becoming a big business as popularity continues to rise", *Medill Reports,* 14 May 2012. Accessed via http://news.medill.northwestern.edu/chicago/news.aspx?id=205473 on 21 May 2012.

[5] Dominic Rolfe, "Dream On", *Good Weekend*, 12 May 2012 at page 9.

[6] For example: News Limited, Submission to the Department of Broadband, Communications and the Digital Economy's 2011 Review of the *Interactive Gambling Act 2001* (Cth). Accessed via http://www.dbcde.gov.au/__data/assets/pdf_file/0007/142594/News_Limited_submission.pdf on 16 July 2012.

However, the level of chance, or more specifically, the mix of chance and skill, in fantasy sports is a contentious issue. For example, it is arguable that the outcome of a fantasy sports competition is not dependent on chance to the same extent as an online casino game. In most cases, the outcome of a casino game played online is dependent to a significant expect on a random number generator.

The fantasy sports participant's objective is to apply their knowledge of the past behaviour of players and teams in the relevant sports competition on which their fantasy game is based in making decisions relating to the fantasy game about the future behaviour of these players and teams.

Is there an element of chance present? Many would argue that, aside from the premise that past behaviour is (generally) indicative of future behaviour, the outcome of the real players' involvement in a future game is ultimately uncertain. Whether this is a factor that cause the fantasy game to be a "game of mixed skill and chance" is far from certain and will be dependent on various factors inherent in the relevant product itself.

Wagering product?

An alternative view is that fantasy sports are a wagering product. Along with lotteries, wagering products are exempt generally from the IGA. However, the provision of online wagering and sports betting is permitted subject to regulation at the State and Territory level. In other words, if fantasy sports were a wagering product, a wagering licence may be required (and a fantasy sports operator is likely to require, for example, a bookmaking, totalisator or betting exchange licence).

A wager requires, by definition, consideration to be staked on an uncertain outcome. Importantly, this outcome is determined by the skill of a party other than the person who is making the bet. This can be contrasted with the position where a tennis player who pays an entry fee to participate in a tennis tournament who, when paying that entry fee, is not considered to be placing a bet on their performance in that tournament. Whereas, another person who stakes consideration on that tennis player winning the tournament's grand final is placing a bet.

As outlined above, fantasy sports participants are making decisions about the future performance of athletes and sports teams, like the customers of any bookmaker, totalisator or betting exchange. This suggests fantasy sports should be treated as wagering.

On the other hand, the level of involvement required by a participant in a fantasy sport context makes their involvement similar to that of a coach. This leads to the argument that the outcome is dependant on their skill rather than being dependant on contingencies outside their control.[7]

Also, a fundamental difference between a fantasy sports competition and a wager is that, whilst the latter is traditionally limited to the performance of a single team or athlete in a single event, a fantasy sports competition is not typically based on the performance of any single team, athlete or single event. Whether this distinction is still relevant in the context of multi-bets is a moot point.

Skill?

An alternative view is that fantasy sports are outside the ambit law of Australian gambling law altogether as they are skill-based games. At the simplest level, fantasy sports require the application of a participant's skill to draft, play and trade their players.

Further, most fantasy sports competitions require a participant's involvement to be season long and consistent (although this involvement is likely to be significantly lesser in respect of short term fantasy sports competitions, for example, competitions in respect of a single game).

Participants skill levels will improve through constant reviews of the actual competition and analysis of performances, injuries and player selections (details of which is available on the relevant site). As evidenced by the NRL's experience, many participants engage in significant research as part of their participation.

Additionally, it is arguable that many similarities can be drawn between fantasy sports and other activities and occupations which Australian law does not recognise as gambling. For example:

- trading in shares and/or other financial products, which usually involves the investor "staking" their money on a company the performance of which is (usually) completely outside the investor's control. Where the portfolio is diverse and includes financial products relating to a variety of companies, the analogy between financial trading and fantasy sports is even more appropriate.
- talent scouts, whose income is based on their ability to judge the potential of people (who are usually both unknown and professionally inexperienced) to succeed in whichever industry the scout is employed in; and

[7] Anthony N. Cabot & Louis V. Csoka, "Fantasy sports: one form of mainstream wagering in the United States", (2007) 40 J. Marshall L. Rev 1195.

- coaches of actual sporting teams.

However, whilst it is arguable that a significant level of skill is required to participate successfully in a fantasy competition, it is unclear whether this is sufficient to bring the activity outside the realm of the IGA.

This difficulty is illustrated by, the views expressed by various Australian regulatory authorities, that poker falls within the IGA prohibitions. Even though it is clear that experienced players (those players with higher skill levels) will win more often, poker has been viewed not as a game of skill, but as a game of mixed skill and chance.

The US position

Fantasy sports are exempt from the prohibitions in the Unlawful Internet Gambling Enforcement Act (the **UIGEA**), the US federal statute which imposes restrictions on internet gambling, provided that they meet the following criteria:

- All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
- All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
- No winning outcome is based on the score, point-spread, or any performance or performances of any single real world team or any combination of such teams; or solely on any single performance of an individual athlete in any single real-world sporting or other event.

This exemption is based on the premise that fantasy sports are skill-based games. This is despite the existence of any clear US court determination which clarifies whether fantasy sports are games of chance or skill.

Certainly, it is unlikely that this carve-out would have been secured were it not for the level of interest (and support from the professional leagues) that fantasy sports had achieved in the US prior to the UIGEA's passage through the US Congress. To illustrate, in 2005, a year prior to the enactment of the UIGEA, the US fantasy sports industry was a billion dollar industry. In 2006, 15 million Americans played fantasy sports and, perhaps more importantly, the professional leagues received millions of dollars from fantasy sports operators in licensing fees in exchange for the operators' use of the leagues' statistics and intellectual property.

If fantasy sports fell within the ambit of the UIGEA, it is likely that the revenues of these leagues would have been reduced.

Conclusion

The Australian fantasy sports market, in contrast to its US counterpart:

- first, did not exist prior to the passage of online gambling legislation; and
- secondly, and perhaps as result of its immaturity, is not likely to be – or have been – a significant source of funding for any Australian sporting league.

These differences alone make it extremely unlikely that a wholesale exemption, such as that in the UIGEA, will be enacted into Australian law.

Rather, fantasy sports operators in Australia operate in an unclear legal environment. Clarification on a number of issues is required, most significantly whether fantasy sports are games of skill or wagering. Once these issues are addressed, the most appropriate licensing framework under which operators can offer fantasy sports products can be assessed.