

# **“Gambling, the law and the 21<sup>st</sup> century”**

## **Remarks for LAWASIA 2021 ‘Virtual’ Annual Conference**

**Judicial Session, Tuesday 16 November 2021**

**The Hon. Justice A S Bell  
President of the Court of Appeal  
Supreme Court of New South Wales**

- 1 The topic for this session – “Gambling, the law and the 21<sup>st</sup> Century” recognises the very significant role that gambling plays in the economies of many of the countries associated with LAWASIA.
- 2 In this context, the interests of the state are no longer entirely tender and selflessly protective of the citizenry against the vices of “Deceitful, Disorderly and Excessive Gaming”, to borrow the title of the Gaming Act of 1664 passed by the Parliament at Westminster. The modern state has become a financially self-interested player as a licensor of the right, for example, to operate casinos or bet on horse racing and other sports. Cricket comes to mind. Sports betting has grown exponentially in recent times.
- 3 Casinos also not only generate revenues for government through licensing fees but often play an important economic role acting as a magnet for tourism and thereby inward currency flows. In Australia, in the last two decades in particular, casinos have been closely associated with tourism and entertainment. There are significant economic spin-offs. The same is and has been true of a number of other countries in the region.
- 4 Allied with the increasing economic significance of gambling have been technological developments and the growth of the phenomenon of internet and interactive gambling. This poses a host of additional challenges for

governments and regulators, opening up the ability for gambling activities to be undertaken transnationally and in cyberspace.

- 5 The moral hazards peculiar to this form of gambling are immediately apparent. For one, it is not subject to geographical or temporal limitations and thus, constitutes “a quantum leap” in gambling accessibility.<sup>1</sup> Interactive gambling over the internet permits a greater frequency of play, exposing vulnerable persons to an increased risk of developing addiction and, more straightforwardly, increasing the prospect of excessive gambling by all gamblers. The remote operation of such activity precludes gambling service providers from monitoring the behaviour of gamblers in any real way. The use of algorithms may also allow the targeting of people susceptible to the temptations of on line gaming and gambling.
- 6 There is tension for governments which, on the one hand, benefit from gambling activity as a result of revenue raised by way of taxation and licensing fees and associated in-bound tourism but which, on the other hand, need to deal with the anti-social consequences for a society that excessive gambling may lead to. Governments are also concerned with the actual and perceived association between some gambling operations, organised crime and the laundering of money.
- 7 In many respects, this tension is not new – gambling has always presented the law with challenges, both moral and regulatory – but these challenges have become even greater with the rise of online and interactive gambling opportunities through internet platforms, electronic funds transfer and the proliferation and legalisation of casinos. The commercialisation of international sports such as cricket has also been closely associated with betting on such events.
- 8 For many years governments throughout the region have sought to strike a balance through the regulation of betting on horse racing, for example, which

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<sup>1</sup> See Explanatory Memorandum, *Interactive Gambling (Moratorium) Bill 2000* (Cth) 1-3; J Tierney, ‘Online Gambling’ (2001, Autumn) *The Sydney Papers* 131, 134.

ensures a flow of revenue for government whilst keeping a tight control over the bodies that are authorised to allow betting on such events. Another way in which governments seek to strike a measure of balance is through limiting the number of casinos that may legally operate in a particular state or territory.

- 9 Many disputes whose subject matter relates to gambling are litigated through to appellate levels including apex courts. This is often because the stakes are extremely high.
  
- 10 Last year, for example, in *Atlantic Lottery Corporation Inc. v. Babstock*,<sup>2</sup> the Supreme Court of Canada ruled that a class action lawsuit about video lottery games could not go forward. The lead plaintiff's case was an ambitious one, seeking to use "waiver of tort" as a basis for a claim that the Atlantic Lottery Corporation (which was constituted by the governments of the four Atlantic provinces and which had approved the operation of video lottery terminals) should have to pay the group members all the profits it made, even if none of them could demonstrate any harm or loss. Part of this claim was based on the allegation that video lottery games were inherently dangerous and deceptive. Claims in restitution and for breach of contract were also struck out.
  
- 11 Another famous example of gambling related litigation finding its way to an apex court was the seminal House of Lords decision on the modern law of restitution in *Lipkin Gorman v Karpnale Ltd (Lipkin Gorman)*.<sup>3</sup> The case arose from a solicitor's unauthorised use of trust funds to play the tables at the Playboy Club in London, and concerned the law firm's ability to recover monies from the operator of the licensed casino. And more recently, in *Ivey v Genting Casinos (UK) Ltd*,<sup>4</sup> a case involving an apparently legendary professional gambler who sued a casino to recover his winnings but where the casino refused to pay out because it believed he had cheated at Punto Banco, a variation of baccarat, the United Kingdom Supreme Court has

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<sup>2</sup> (2020) SCC 19

<sup>3</sup> [1991] 2 AC 548.

<sup>4</sup> [2018] AC 391.

restated the test for dishonesty for the purposes of English law, eschewing a two-stage test which incorporated a subjective dimension.

- 12 The High Court of Australia, in *Kakavas v Crown Melbourne Ltd (Kakavas)*,<sup>5</sup> dismissed an appeal in a claim brought on the basis of unconscionable conduct by a high-stakes gambler and regular patron of the Crown Casino in Melbourne in which he alleged that Crown had used incentives to lure him to gamble, all the while knowing him to be a problem gambler. The High Court dismissed the claim on the basis that pathological gambling was not a special disadvantage in the relevant sense.<sup>6</sup> Mr Kakavas, although professionally diagnosed as a pathological gambler, was said to be “able to make rational decisions to refrain from gambling altogether had he chosen to do so”.<sup>7</sup>
- 13 In this session, Justice Abdullah and I will seek to draw your attention to the many areas of law which gambling touches, and to highlight some of the legal challenges and complexities to which modern gambling activity may give rise. In truth it is a topic to which an entire conference could be devoted, and the constraints of an hour long session mean that our modest aim can only be to endeavour to expose the tip of the iceberg.
- 14 As will already be apparent, gambling impinges on many areas of the law. In Australia, for example, issues associated with gambling have generated constitutional challenges,<sup>8</sup> and there is a veritable raft of legislation and delegated legislation at Commonwealth and State levels directed towards the regulation of gambling activity.<sup>9</sup> With the growth of internet and off-shore

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<sup>5</sup> (2013) 250 CLR 392.

<sup>6</sup> at [126]-[135]

<sup>7</sup> at [135].

<sup>8</sup> See, for example, *R v Coonare; ex parte Wawn* (1939) 61 CLR 596; [1939] HCA 18; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [2008] HCA 11; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217; [2012] HCA 12; *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298; [2012] HCA 23.

<sup>9</sup> See, for example, for the Commonwealth: *Interactive Gambling Act 2001* (Cth); *Financial Transaction Reports Act 1988* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *Gambling Measures Act 2012* (Cth). For New South Wales: *Betting and Racing Act 1998* (NSW); *Casino Control Act 1992* (NSW); *Gaming Machine Act 2001* (NSW); *Public Lotteries Act 1996* (NSW); *Unlawful Gambling Act 1998* (NSW); *Lotteries and Art Union Act 1901* (NSW). For Victoria: *Gambling Regulation Act 2003* (Vic), *Casino Control Act 1991* (Vic) and *Racing Act 1958* (Vic). For South Australia: *Authorised Betting Operations Act 2000* (SA), *Gaming Machines Act 1992* (SA) and

gambling, difficult questions concerning the extra-territorial reach of legislation can and do arise.

- 15 In the criminal context, gambling addiction and losses are often the cause of crime (in particular theft) and sentencing judges must grapple with the question of whether a prisoner has been afflicted with a gambling addiction and, if so, the relevance of that to the sentencing discretion.<sup>10</sup>
- 16 High stakes gambling may also involve the disbursement of the proceeds of crime. This consideration and concern informs much of the legislative and regulatory activity associated with the licensing of casinos and the heavy regulation of betting on horse racing. The conduct and operation of casinos may in turn lead, as it has recently done in Australia, to royal commissions or commissions of inquiry with royal commission powers.<sup>11</sup> There may also arise in this context administrative law challenges relating, for example, to the fitness of an individual or corporation to hold a gambling or casino licence.<sup>12</sup>
- 17 On the private law side, there have been many cases in common law jurisdictions concerning whether or not casinos or gambling operators owe a duty of care to gamblers and, in an extended sense, to their families and dependants who are invariably the victims of gambling addictions.<sup>13</sup>
- 18 Different jurisdictions have taken different approaches on such questions and individual cases will of course turn on their own facts. Even where

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*Lottery and Gaming Act 1936 (SA), Casino Act 1997 (SA). For Queensland: Casino Control Act 1982 (Qld), Charitable and Non-Profit Gaming Act 1999 (Qld), Gaming Machine Act 1991 (Qld), Interactive Gambling (Player Protection) Act 1998 (Qld), Keno Act 1996 (Qld), Lotteries Act 1997 (Qld), Wagering Act 1998 (Qld). For Tasmania: Gaming Control Act 1993 (Tas). For the Northern Territory: Gaming Control Act (NT), Gaming Machine Act (NT), Racing and Betting Act (NT) and Unlawful Betting Act (NT). For Western Australia: Betting Control Act 1954 (WA); Casino Control Act 1984 (WA); Racing and Wagering WA Act 2003 (WA); Gaming and Betting (Contracts and Securities) Act 1985 (WA); Gambling and Wagering Commission Act 1987 (WA);*

<sup>10</sup> See, for example, *R v Grossi* (2008) 23 VR 500; [2008] VSCA 51 at [56]; *McNab v State of Western Australia* [2010] WASCA 66 at [13].

<sup>11</sup> See, for example, *Attorney General for New South Wales v Melco Resorts & Entertainment Limited* [2020] NSWCA 40.

<sup>12</sup> *Darling Casino Ltd v New South Wales Casino Control Authority* [1997] HCA 11; (1997) 191 CLR 602.

<sup>13</sup> See, for example, *Reynolds v Katoomba RSL All Services Club Limited* (2001) 53 NSWLR 43; [2001] NSWCA 234; *Preston v Star City Pty Ltd (No 3)* [2005] NSWSC 1223; *Calvert v William Hill Credit Ltd* [2008] EWHC 454; *Ross v British Columbia Lottery Corporation* [2014] BCSC 320.

unsuccessful, however, such cases have often led to regulatory reform and, in some cases, pro-activity by gaming houses.

- 19 Allied to claims in tort, attempts have been made in Australia to invoke consumer protection statutes as avenues for recourse by individuals either seeking to escape liability for gambling debts or to recoup extensive losses.<sup>14</sup>
- 20 Perhaps of even greater interest are questions which arise under the law of contract, especially in the context of gambling contracts formed over the internet.<sup>15</sup> When an internet gambler sets up an account, he or she will invariably need to agree to standard form terms and conditions. These terms may or may not include choice of law and jurisdiction or arbitration clauses. If they do, questions may arise as to their enforceability.
- 21 Questions may also arise as to where a particular contract has been formed which may be relevant to questions of a domestic court's jurisdiction to entertain any dispute in relation to it and/or the law by which the contract is governed. And if questions of public policy as to the enforceability of such a transnational contract arise, what public policy is relevant – that of the forum, that of the place where the contract was formed, that of the country the law of which governs the contract, or all three or a combination of the three? And what if the contract of public policy differs between jurisdictions?
- 22 In one sense, these issues are private international law “chestnuts” but they are given new life by the explosion of internet gambling.
- 23 Another context in which public policy arguments have been invoked relates to attempts to enforce gambling debts.
- 24 In *Kok v Resorts World at Sentosa Pte Ltd*,<sup>16</sup> the Supreme Court of Western Australia enforced a Singapore judgment in relation to a gambling debt even

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<sup>14</sup> See, for example, *Guy v Crown Melbourne Limited (No 2)* [2018] FCA 36; *MacMillan v Sportsbet Pty Ltd* [2013] VCAT 2028; *MacMillan v Sportsbet Pty Ltd* [2013] VCAT 581.

<sup>15</sup> See *Centrebet Pty Ltd v Baasland* (2012) 272 FLR 69, [2012] NTSC 100; *Centrebet Pty Ltd v Baasland* [2013] NTSC 59.

<sup>16</sup> (2017) 323 FLR 45; [2017] WASCA 150.

though, had the underlying claim been governed by or litigated in accordance with the law of Western Australia, it may not have been enforceable. Notwithstanding this, the WA Court of Appeal rejected an argument to the effect that the judgment should not be enforced on the basis that it was contrary to public policy.

25 In what is a fascinating contrast, in 2019, Star Entertainment Qld Ltd (**Star**) had proceedings to recover a A\$40 million plus debt incurred by a Singaporean gambler at its casino in Brisbane struck out by the Singapore International Commercial Court on the basis that s 5(2) of the *Civil Law Act* of Singapore provided that “no action shall be brought or maintained in the Court for recovering any sum of money or valuable thing alleged to be won on any wager.”<sup>17</sup> The Court summarily dismissed Star’s plea that the public policy of Singapore did not require s 5(2) to be applied,<sup>18</sup> and held that the clear words of s 5(2) had to apply.<sup>19</sup>

26 This necessarily brief survey has sought to demonstrate the very great range of areas where gambling and the law interact. The problems are universal. The statutory and common law responses, including conceptions of public policy, may differ between jurisdictions. It is a dynamic area in which there is much to be gained from judges and practitioners having an awareness of developments in other jurisdictions.

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<sup>17</sup> This is the equivalent of s 4(1)(a) of the *Gaming and Betting (Contracts and Securities) Act 1985* (WA).

<sup>18</sup> [2020] SGHC(I) 15 at [54].

<sup>19</sup> [2020] SGHC(I) 15 at [55].