The Australian Federal Government has opened another front in its war on problem gambling in the form of yet another joint select committee inquiry, this time into the impact of advertising and promotion of gambling on sport. The inquiry has been called amid ongoing concerns regarding what many believe is excessive and inappropriate advertising, promotion and sponsorship by certain Australian licensed betting operators around and during sporting events.

Background

Australian betting operators are required to be licensed in at least one State or Territory in order to lawfully offer their services to the Australian public. Each State and Territory has its own governing legislation and rules relating to the provision of wagering services. In the past, some Australian States had legislative restrictions and prohibitions on the operations of interstate betting operators in place to afford them greater control over the gambling practices conducted in their jurisdictions. Relevantly, they consisted of advertising and promotional bans on wagering operators not licensed in that State.

In 2008, the Tasmanian-licensed betting exchange operator, Betfair, commenced proceedings in the High Court of Australia against the State of Western Australia (WA) (Betfair Case). WA had recently introduced restrictions into its legislation that prohibited WA residents from placing bets using an online gambling exchange, meaning that local gamblers could not utilise Betfair’s services. The High Court unanimously held that WA’s new prohibitions were unconstitutional as they imposed discriminatory and protectionist burdens on interstate trade in contravention of the Australian Constitution, which protects the freedom of interstate trade and commerce. This High Court decision resulted in great uncertainty as to the validity of all interstate restrictions, particularly the advertising and promotional bans found in the wagering legislation of various States.

Given the decision in the Betfair Case, and also facing their own Federal Court challenges to the validity of such provisions, both Victoria and NSW removed their bans on advertising by licensed interstate betting operators. The sudden deregulation of the advertising environment resulted in a dramatic increase in the level of marketing, particularly advertising and promotion, by some obviously well funded betting operators in an apparent fight for
brand recognition and market share. The focus has been on the eastern States of NSW and Victoria with the largest populations and, therefore, the most potential customers.

Up until very recently, there has been little, if any, restraint exercised by some of these operators, little pressure from the Federal Government, little intervention by the State and Territory wagering authorities and little action by sporting bodies and media industries benefiting from this massive marketing spend.

The inquiry

The terms of reference of the inquiry are:

‘To inquire into and report on the advertising and promotion of gambling services in sport, including:

• in-ground and broadcast advertising;
• the role of sponsorship alongside traditional forms of advertising;
• in-game promotion and the integration of gambling into commentary and coverage;
• exposure to, and influence on, children;
• contribution to the prevalence of problem gambling, and mechanisms to reduce that prevalence;
• effect on the integrity of, and public attitudes to, sport;
• the importance of spot betting and its potential effect on the integrity of sporting codes;
• the effect of inducements to gamble as a form of promotion of gambling services, and their impact on problem gambling; and
• any related matters.’

The key concern giving rise to the inquiry is that the current level and type of advertising and exposure to betting odds during sports broadcasts may be significantly influencing vulnerable people, and children in particular, risking a future generation of problem gamblers who intrinsically connect sport with gambling. As put by some, televised sporting events have become an interactive gambling experience.

However, Australian Senators involved in the inquiry have also been quick to link this key concern with the findings of a recent Australian Crime Commission (ACC) investigation into the integrity of Australian sport. The ACC report was released to the Australian public on the same day that the Australian Senate voted in favour of forming this new advertising inquiry. It identified the widespread use of prohibited substances in Australian professional sport and also noted increasing evidence of personal relationships between athletes and organised criminal identities and groups.

The advertising debate appears to have become somewhat caught up in the heat generated by the ACC report, with the prominent argument being that sporting codes cannot effectively avoid conflicts of interest and decrease the risk of match-fixing whilst receiving monetary incentives from betting operator sponsorship deals. Despite this argument becoming a key issue debated in the inquiry’s public hearings, the ACC report actually said very little about the risk of match-fixing in Australia. It simply drew a correlation with the overseas experience and speculated that as the wagering amounts increase so does the risk of infiltration of crime groups and the pressure on athletes to participate in match-fixing. Further, there does not appear to be any substantive evidence, in the ACC report or in the inquiry’s public hearings to date, that directly links increased advertising to a higher risk of match-fixing. Ultimately, the ACC report and any proposed advertising reform are entirely separate matters, and the fusion of the issues risks kneejerk responses which can lead to bad law making.

The inquiry has undergone three public hearings to date, with each hearing focused on considering and questioning key stakeholder submissions in relation to the terms of reference noted above. The inquiry is due to report on its findings on 16 May 2013.

The future of advertising sports betting

It is unfortunate that the advertising practices of some operators have got to the point where the Federal Government has had to step in, which it has the power to do under the Australian Constitution. The extent of any proposed reform is yet to be seen, and will likely depend upon the outcome of the inquiry. Some stakeholders are suggesting that tightly regulated national standards are most appropriate, whilst others are calling for the advertising to be banned altogether.

Online betting operators are enjoying a far more liberal advertising environment compared to other land-based gaming activities. For example, in Australia, gaming machine advertising is heavily restricted and there is a compelling argument that with the break-down of effective geographic boundaries between States and the ever
increasing rise of remote access gambling, competitive neutrality across all forms of gambling should be a primary goal of regulators.

There has been some progress amongst various stakeholders, including sporting codes and broadcasters, to introduce and implement their own self-imposed advertising industry standards in the hope of reining in the current advertising practices. As a result of the recommendations of the Council of Australian Governments' Select Council on Gambling Reform back in 2011, principles have been developed to restrict the promotion of live odds during sporting coverage. These are intended to be incorporated into amended codes to be registered by the Australian Communications and Media Authority. However, these principles are currently still in the process of being formally implemented by major broadcasters and sporting codes, despite the Federal Government requesting the amended codes to be in place by June 2012. The introduction of self-regulated industry advertising codes is obviously a more desirable solution for the stakeholders who profit from betting operator advertising, compared to the alternative of potentially stringent legislative regulation. However, it may be a case of too little action too late.

With a Federal election on the horizon and given the Government’s lacklustre response to the recent Final Report on the Interactive Gambling Act Review, it remains to be seen whether any substantive reform will come out of this inquiry. Regardless, it would be wise for betting operators to take this time to exercise some restraint and introduce responsible advertising, promotional and inducement controls in order to attempt to preserve as much of the marketing freedom this sector of the industry currently enjoys as possible.

We will continue to monitor all developments.

Written by:

Tony Rein | Partner
Gaming & Leisure Industry Group
+61 2 8248 3438
trein@thomsonslawyers.com.au

Jessica Cameron | Lawyer
Gaming & Leisure Industry Group
+61 2 8248 3461
jcameron@thomsonslawyers.com.au


For further information, please click here to contact our national Gaming & Leisure Industry Group.

www.thomsonslawyers.com.au

This Alert is produced by Thomsons Lawyers. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under Professional Standards Legislation.