IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M117 of 2012

BETWEEN:

HARRY KAKAVAS

Appellant

and

CROWN MELBOURNE LIMITED (ACN 006 973 262)

First Respondent

and

JOHN WILLIAMS

Second Respondent

and

ROWEN CRAIGIE

Third Respondent

RESPONDENTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Does the diagnosis of a 'pathological gambling' condition made in 2008/2009 (for the litigation) have the consequence, in and of itself, that the appellant was suffering from a special disability when gambling at Crown for the purposes of an unconscionable conduct claim?

3. Is there any basis for overturning the factual findings of the primary judge, and on review of the Court of Appeal, that the appellant was not at a special disadvantage vis-à-vis Crown?

4. Did the appellant's exclusion from a New South Wales casino by the New South Wales police in 2000 constitute a special disadvantage?

5. Did Crown act unconscientiously vis-à-vis the appellant?

6. Can the appellant claim equitable relief when all of his gambling activities at Crown were illegal?

RESPONDENTS' SUBMISSIONS

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Form 27D

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Part III: *Judiciary Act 1903* (Cth)

7. No notice is required under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Material Facts

8. During the special leave application Senior Counsel for the appellant said that there were no factual findings sought to be put in controversy in this appeal.[1]

9. However, Part IV of the appellant's submissions inaccurately and selectively sets out some 'facts'. Other relevant factual findings accepted by the appellant are set out below, together with a clarification of inaccuracies in the appellant's submissions and accompanying chronology.

10. The appellant commenced gambling at Crown in July 1994 (J[81]).[2] In 1994 the appellant defrauded Esanda Finance Corporation Ltd of approximately $286,000 (J[82]). Crown later became aware of the fraud. The appellant attributed his criminal conduct to a gambling addiction (J[1]). Crown was sceptical (J[2]).

11. On 8 November 1995, the appellant applied for and was granted a self-exclusion order from Crown (J[87]). Neither Mr Horman, nor any Crown officer, knew or believed the appellant's self-exclusion 'was to address genuine gambling problems' (J[471–3]).

12. In early 1998 the appellant served four months in gaol for the Esanda fraud. After his release, the appellant arranged to see Mr Horman about an armed robbery with which he was suspected of involvement (J[112]). He also sought revocation of his self-exclusion order (J[113]). The signed revocation application included an acknowledgment that the appellant had given careful consideration to the matter and would contact Crown immediately if he had any concerns about his decision (J[113]). The appellant put himself forward as a man untroubled by any gambling problems, and continued thereafter to present to Crown in this way (J[4]).

13. Mr Watson-Munro (a psychologist) provided Crown with a report dated 3 June 1998 in connection with the appellant's revocation application (J[114]), which stated that his treatment of the appellant had been 'very successful' and that the appellant 'no longer [felt] the pathological compulsion to gamble which had plagued him in earlier times' (J[114]). Crown accepted this report as true (J[5]). Mr Horman regarded Mr Watson-Munro's report as unsatisfactory because he did not believe that the appellant had ever felt the pathological compulsion to gamble (J[121]).

14. On or about 18 June 1998 the appellant's self-exclusion was revoked but was replaced by a withdrawal of licence to enter or remain in the casino or on Crown premises (**WOL**) (J[122]). The WOL was related to the armed robbery charges (J[112], [124]). The primary judge found the WOL was warranted in these circumstances and was not connected with any concern as to the appellant's gambling (J[6]).

15. The appellant moved to the Gold Coast and appeared to make a lot of money in property development. From about 2000, he held himself out as a very successful Gold

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[1] [2012] HCA Trans 348.
[2] 'J' references are to *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559 (**primary judgment**).

Coast businessman who had managed seamlessly to combine the roles of real estate salesman and recreational gambler (J[7]).

16. Between 1998 and 2001 the appellant repeatedly but unsuccessfully sought re-entry to Crown and revocation of the WOL (J[129], [132], [135], [153–4]).

17. On or about 28 September 2000, the New South Wales Police Commissioner directed that the appellant be excluded from the Star City Casino (J[138]) (**NSW exclusion**). The NSW exclusion was not, as the appellant states, an 'Interstate Exclusion Order'.

18. In July 2003, the appellant met with Mr Ishan Ratnam, then Manager of VIP services for Crown (J[173]). During this meeting they spoke about how well the appellant was doing and his trips to gamble in Las Vegas (J[175]). The appellant asked Mr Ratnam if he could talk to Mr Horman about allowing him to return to Crown. Subsequently Mr Ratnam briefly mentioned this meeting to Messrs Williams and Aldridge (J[176]). No step was taken by Crown in respect of the appellant at this time.

19. In early 2004, Crown became aware the appellant was gambling in Las Vegas (J[177]). Although internal enquiries were made about allowing the appellant back to Crown, no step was taken by Crown in respect of the appellant at this time (J[179]). On 27 October 2004, Mr Williams sent an email to Messrs Aldridge and Horman regarding the steps required for the appellant to return to Crown (J[181]). Mr Horman initiated some internal checks in relation to the appellant's position and discovered that the appellant had been very successful in legitimate business ventures (J[188]).

20. On 29 October 2004, there was a meeting of a committee described variously as the '*Persons of Interest Committee*' (J[192–3]) or the '*WOL Committee*' (J[198]). The meeting considered the question of the appellant's return to Crown. Minutes of the meeting recorded that the appellant was then attending Star City Casino (J[478]). The conclusion reached was that he should be allowed to return to Crown (J[195]). Neither Mr Williams nor Mr Craigie participated in these internal committees. The appellant never loomed large in Mr Craigie's thinking at any time (J[486]).

21. Although he did not think the appellant had a gambling problem, Mr Horman thought the appellant should obtain a report from a psychologist or psychiatrist (J[197]). Crown wished to protect itself against an allegation that it had breached a duty of care to the appellant by allowing him to gamble, even though it regarded the appellant's history since 1998 as giving him in relevant aspects a clean bill of health (J[493]).

22. On 12 November 2005 Mr Ratnam telephoned the appellant and said that Mr Williams had asked for his number (J[204–6]). The appellant was happy for Mr Ratnam to pass on his number (J[204]) and said *during this conversation* that he was happy to recommence gambling at Crown.[3] Mr Ratnam gave the appellant's number to Mr Williams (J[204]) who did not immediately call the appellant (J[212], [218]). A week later, on 19 November 2004, the appellant called Mr Williams, leaving three voicemail messages (J[218]). Mr Williams returned the calls, and eventually made contact with the appellant (J[212]).

[3] Transcript of trial proceedings, 211.26–29.

23. On 9 or 10 December 2004, the appellant was met at Coolangatta Airport by Mr Doggett of Crown to sign a letter in respect of his return to Crown (J[223]). The letter stated that it enclosed a letter from a psychiatrist or psychologist who had made a current assessment of the appellant. In fact, the appellant had not then been assessed (J[223]).

24. Subsequently, Ms Brooks (a psychologist) prepared a report dated 23 December 2004 (**Brooks report**) to support the appellant's return to Crown (J[12]). She reported that the appellant told her that between 1990 and 1998 he was a compulsive gambler but had turned his life around (J[225]). He said he had conquered his past demons, but if he had a relapse he would again self-exclude (J[225]). Ms Brooks noted that the appellant was an intelligent, highly motivated, and goal driven individual who had in the past shown himself able to self-regulate his behaviour evidenced by his self-exclusion from Crown (J[225]). She referred to the appellant's 'relapse plan', which the appellant said he 'would not hesitate to implement' (J[225]).

25. The appellant was perfectly capable of disclosing to Ms Brooks any vulnerability about which he was concerned, but did not do so (J[584]). Crown was entitled to accept the appellant's representations as made through Ms Brooks (J[500]).

26. A decision was made in January 2005 to revoke the WOL. Mr Fleming issued the notice on 9 February 2005.[4] On the same day, Mr Horman noted in an email that 'there is no rush to progress this matter' (J[582]).

27. Before he recommenced gambling at Crown the appellant never suggested that he had any gambling problems (J[8]). Crown accepted what the appellant wanted Crown to believe: that, by November 2004, he had become a highly respected Gold Coast businessman whose liking for the gaming tables had caused problems in the past, but who had since conquered those problems to the extent that he had been able to amass wealth from his business activity (J[441]). As Crown saw it, the central question in late 2004 was not whether the appellant's gambling was a problem, but whether there remained any of the behavioural issues which had led to the WOL (J[471]).

28. In late January 2005, the appellant was invited to be Crown's guest at the Australian Open (J[232]). The appellant did not gamble at Crown during this visit (J[238]). However, he met with Mr Williams and sought to negotiate the privileges he would receive at Crown and these discussions continued after the appellant returned to the Gold Coast (J[241–2]). Among other things, they discussed the use of Crown's private jet, gambling rebates, accommodation for the appellant and guests, and applicable table limits for bets.

29. The appellant bargained with Mr Williams by reference to the privileges offered to large gamblers in Las Vegas, including travel by private jet (J[241]). Mr Williams said Crown would not be willing to provide the jet until he had made a number of visits (J[241]). The appellant stayed at the Crown Hotel for an evening on 5 March 2005 but did not gamble during this visit (J[243]). The appellant gave evidence that he did not gamble because Crown would not agree to the hand limit he was seeking (J[243]).

[4] Trial Court Book, 459.

30. Although the WOL was revoked in January 2005, the appellant did not gamble at Crown until 24 June 2005 (J[259]).

31. Between 24 June 2005 and 17 August 2006, the appellant visited Crown to gamble on 28 occasions and entered into 30 separate gambling programs. However, he did not gamble at Crown between October 2005 and March 2006. As at 13 March 2006, he had made profits of over $2.69M on a turnover of around $480M.[5] By August 2006, his gambling with Crown had generated $1.479B in turnover and he had lost $20.5M to Crown (J[32–3]).[6] During and after this period he continued to gamble in other casinos around the world.

32. The appellant's patterns of play between June 2005 and August 2006 were generally consistent with the picture of himself which he sought to present to the world: that of a successful businessman who enjoyed gambling, who entertained friends at the casino and enjoyed outside entertainment and meal breaks and who displayed an appropriate awareness of the need for balance (J[520–1]). The appellant promoted his financial capacity to Crown throughout. This included a boast that he had a gaming bank (J[557]). Between June 2005 and mid-August 2006, the appellant never suggested to Crown that he was other than financially capable of maintaining his high roller status, and keen to do so (J[18]). Crown thought him to be a person of considerable means (J[557]).

33. Mr Craigie gave evidence that the appellant would have been one of Crown's largest Australian players but not in the same league as Crown's top international players.[7] Mr Craigie gave evidence that, although he had not specifically looked, he did not think the appellant was in the top 30 players in terms of Crown's history.[8]

34. The primary judge found that while the appellant gambled at Crown: he had the capacity to self-exclude (J[11]); demonstrated a capacity to participate in the cut and thrust of offer and counter-offer (J[18]); regularly completed programs with funds to his credit (J[522], [527–30]); and was quite capable of declining — not for a week or even a fortnight, but for considerable periods (eg, January 2005 to June 2005, and October 2005 to March 2006) — to visit Crown (J[18]).

35. The appellant last gambled at Crown on 17 August 2006. During this visit, he had a conversation with Mr Williams, who gave evidence that this conversation was the first time that the appellant had raised his losses with him, or had expressed any concern or anxiety. Mr Williams responded by suggesting that the appellant 'have a rest for a while' (J[417]). The appellant did not until that day discuss with any Crown officer the losses he had sustained (J[418]). After 17 August 2006, the appellant repeatedly pressed Crown to allow him to gamble at the Casino [J[423]). On at least three occasions the appellant asked to deposit millions of dollars in his Crown account but Crown declined (J[423]). The appellant gambled and lost money at Casinos in Las Vegas, the Bahamas and New Zealand between August and November 2006 (J[4245]).

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[5] Exhibit D29 (Program Player History Report).
[6] The full details of the appellant's gambling at Crown during this time are set out at [259–422] of the primary judgment.
[7] Transcript of trial proceedings, 1153.
[8] Transcript of trial proceedings, 1153–1154.

Part V: Legislative Provisions

36. Part VII of the appellant's submissions identifies provisions of the *Casino Control Act 1991* (Vic) (**CCA**) which the appellant considers are relevant to this appeal. The respondents consider that sections 72 and 74 are also relevant, and authorised versions including these provisions as at 6 December 2000 (version no. 44), 19 June 2002 (version no. 051), 1 July 2004 (version no. 060) and 14 September 2005 (version no. 67) are annexed to these submissions. The respondents do not take issue with the substance of the appellant's summary of the legislative history of the CCA.

Part VI: Respondents' Argument

Issue 1: Pathological Gambling

37. The appellant argues that 'pathological gambling' is a condition which, in and of itself, amounts to a special disadvantage. However, the experts who gave evidence all relied upon the textbook source for the condition, which specifically contradicts this argument. The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (known as *DSM-IV*) under the headings 'Use of Clinical Judgment' and 'Use of DSM-IV in Forensic Settings' states that it is a classification of mental disorders developed for use in clinical, educational, and research settings and that:

> 'When the DSM-IV categories, criteria and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis ... In determining whether an individual meets a specified legal standard ... , additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability. ...
>
> Moreover, the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviours that may be associated with the disorder. Even when diminished control over one's behaviour is a feature of the disorder, having diagnosis of itself does not demonstrate that a particular individual is (or was) unable to control his or her behaviour at a particular time.'[9]

38. These were correctly regarded as important qualifications by the primary judge (J[443–4]) and in the Court of Appeal.[10] DSM-IV also contains a specific 'Cautionary Statement' about Pathological Gambling which was included in DSM-IV for the assistance of clinicians and investigators, and its inclusion:

> 'does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder or mental disability. The clinical and scientific consideration involved in the categorisation of these conditions as

[9] Exhibit D1 (DSM-IV, xxii-iii).
[10] *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95, [25] (Mandie JA), [207] (Bongiorno JA).

> mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability, determination and competency.'[11]

39. The diagnosis of the appellant as a pathological gambler was made retrospectively by expert witnesses during the course of the proceeding, based on interviews with the appellant after the commencement of proceedings. It was made entirely within the construct of DSM-IV and is inherently subject to its qualifications and cautions. It cannot be given a separate meaning without regard to these matters, as the appellant seeks to do.

40. Further, the relevant legal principles do not focus on a person's ability to conserve their interests in isolation. A special disability is rarely manifest 'at large', but is inextricably linked to the circumstances surrounding the dealing and the relationship between the parties. Merely having limited English in *Amadio*, infatuation in *Louth v Diprose* or old age and failing health in *Bridgewater v Leahy* was not sufficient.[12]

41. Mandie JA correctly found that (at [27]):

> 'His Honour's finding about the plaintiff's pathological gambling condition (taking it at its highest) did not necessitate a finding that the plaintiff was in a position of special disability when dealing with Crown or, more precisely, when entering his various gambling transactions (i.e. making his wagers). His Honour was entitled to consider the whole of the evidence about the plaintiff's behaviour and conduct before deciding whether he was in a position of special disability or disadvantage.'

42. This is entirely consistent with the relevant authorities cited above, where this court undertook a careful and detailed scrutiny of the facts in each instance, looking to the entire set of relevant circumstances relating to the impugned transaction and focusing most attention on whether the disadvantaged party was able to conserve his or her interests in the relevant dealings with the other party. For example:

(a) 'The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other': *Blomley v Ryan* (at 405 per Fullagar J); *Berbatis*[13] (at 63 per Gleeson CJ);

(b) 'whenever one party to a transaction is at a special disadvantage in dealing with the other party': *Blomley v Ryan* (at 415 per Kitto J);

(c) 'whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-à-vis another': *Amadio* (at 462 per Mason J);

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[11] Exhibit D1 (DSM-IV, xxxvii).

[12] In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (***Amadio***), Deane J said at 477 that the disability resulted from a combination of factors and other circumstances relevant to the dealing: 'the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document'. In *Louth v Diprose* 175 CLR 621, Mr Diprose was 'extremely susceptible to influence' (629–30 (Mason CJ)) by Ms Louth in the circumstances of the transaction at issue, particularly as Ms Louth 'manufactured an atmosphere of crisis ... where none really existed' (626 (Mason CJ)). Similarly in *Bridgewater v Leahy* (1998) 194 CLR 457 all the circumstances of the transaction were considered along with Mr York's strong emotional dependence upon his nephew (490–2 (Gaudron, Gummow and Kirby JJ)).

[13] *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (***Berbatis***).

(d) 'circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them': *Amadio* (at 474 per Deane J); and

(e) 'a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee': *Louth v Diprose* (at 626 per Brennan J).

43. This is the analysis the primary judge undertook. He carefully examined all the circumstances and, giving detailed reasons and examples, found that the appellant was perfectly capable of conserving his own interests in dealing with Crown. The misconceived suggestion that the primary judge 'rejected these principles' and 'applied a new test' was addressed and rejected by the Court of Appeal. Mandie JA said that the primary judge had proper regard to the plaintiff's ability to protect his own interests in the relevant transactions (i.e. the wagering transactions) and this is evident from the detailed judgment itself (at [32]).

44. In any event, it is plain that the point the primary judge was making (at J[432]) was that it is often difficult for a court to determine what is (or is not) in a person's best interests where there are complexities in the dealing. While an improvident transaction such as the sale of a property at a gross undervalue is more straightforward, some transactions are not so easy to address objectively. Gambling is one such transaction. The appellant's case is founded on each particular gambling transaction, i.e. each baccarat hand. On its face, *every* gambling transaction is not in the best financial interests of the gambler, because the risk of losing outweighs the chance of winning. However, this ignores the excitement and enjoyment gamblers derive from gambling and the potential for a win, being the *quid pro quo* of the transaction. How is the court to decide what level of gambling is acceptable for any individual and what is not? The appellant received the *quid pro quo* for every bet. If he had stopped when he was $2.69M ahead would he claim the gambling was improvident? If he stopped when he was $1M, $2M or $5M down would it still be improvident?

45. In assessing the position, it is also relevant to note that evidence during the trial made it clear the appellant's finances were entirely opaque. It was unclear how much money he had available and where he had got it from, other than by misleading his financiers (J[278]) and taking large undocumented loans from associates (J[260], [267]). Yet he had significant other funds available and gambled millions of dollars overseas.

46. After his own careful review of the evidence, Mandie JA found that the primary judge considered and rejected the argument that the appellant suffered from a special disability based on an ability to conserve his interests, and was entitled on the evidence to do so (at [33]). Bongiorno JA likewise held that 'it is clear that his Honour made findings of fact which, on any view, precluded the appellant from succeeding. He found that the appellant was quite capable of conserving his own interests' (at [202]).

Issue 2: <u>All</u> the circumstances

47. The circumstances traversed in trial and in the first instance judgment are so broad it is not possible to repeat them all in these submissions. Summarised in relevant categories

they include findings that the appellant was not at a special disadvantage in his dealing with Crown because:

(a) he was able to self-exclude from the casino (J[11]), having done so previously (J[7], [49]), and had a self-avowed intention to do so again if he had a 'relapse' (as indicated in the Brooks report) (J[13], [16], [18], [108], [137], [225], [656]);

(b) there was no inequality of bargaining position between the appellant and Crown (J[16], [21], [439]);

(c) he vigorously negotiated the terms upon which he would gamble at Crown before every trip to Crown, with the appellant himself describing it as like 'negotiating with BHP ... just unbelievable' (J[18], [241], [259], [285], [293], [305], [308–9], [312], [318], [320], [324–5], [337], [390], [542], [595], [616]);

(d) he was fully aware of his negotiating strength and used the threat of gambling elsewhere as a legitimate, but effective, negotiating weapon (J[16]);

(e) he made threats to, and did, withhold his custom from Crown or direct it to other casinos (J[16], [242], [315–18], [404], [595]);

(f) he resisted the temptation to gamble for 5 months after being permitted to re-enter the casino in January 2005 (J[587]);

(g) he exhibited control in relation to various aspects of his gambling activities (J[169], [268], [305], [332–4], [358], [410], [520–3], [526–9], [592], [654–5]), and his patterns of play between June 2005 and August 2006 were generally consistent with the picture of himself which he sought to present to the world: a successful businessman who enjoyed gambling, but with an appropriate awareness of the need for balance (J[521]);

(h) he did not find it virtually impossible to resist his urges to gamble (J[592]); and

(i) his level of functioning in each of the personal, familial, financial, vocational and legal levels was unremarkable (J[444]).

48. Further, contrary to the submissions made on his behalf in this court, the case advanced by the appellant at trial was not that 'Crown acted unconscionably in inviting, inducing or allowing him to gamble'.[14] The case pleaded was that there was a 'scheme designed to lure the [appellant] back to the Casino'.[15] This case failed miserably as the primary judge found that there was no evidence at all of a conspiracy to exploit the appellant (J[20]). Accordingly, he was driven to advance two new non-pleaded cases: the 'invitation' case and the 'IEO' case. This was despite the fact that Senior Counsel for the appellant specifically stated that the case was to be run on the pleadings.[16]

49. The appellant's submissions focus primarily and erroneously on alleged errors in the reasoning and application of legal principle by the primary judge. It needs to be remembered that this is an appeal from the Victorian Court of Appeal, not the primary

[14] See appellant's submissions, [10].
[15] See Second further amended statement of claim filed 25 August 2008 (**SOC**), [17] and following.
[16] Transcript of trial proceedings, 1974.6.

judge, and the Court of Appeal reviewed all of the evidence for itself. In any event, as indicated at [47] above, the primary judge addressed directly the contention that the appellant was unable to conserve his own interests, repeatedly finding to the contrary throughout the judgment (see also J[11], [444], [521], [529], [541], [655]). The primary judge was well placed to make these assessments. His findings were unanimously confirmed by the Court of Appeal after a thorough review of the evidence.

50. The self-exclusion process affords a good example. The primary judge found that the appellant had the capacity to self-exclude. Senior Counsel for the appellant conceded during the special leave hearing that this element of the relationship between the parties was not affected by any condition from which the appellant may have been suffering. He stated that 'the impulse to gamble is that which takes control when one is playing the hands of baccarat, not when one is deciding whether one is going to come to a casino'.[17] This is also the basis on which this appeal is advanced.[18] However, the appellant's case at trial was the unconscientious nature of the so called 'scheme to lure' him back to the casino. This demonstrates why the issue of whether the appellant suffered from pathological gambling was irrelevant: it did not arise in respect of the decisions he made to attend, or not attend the casino. If, at any time, he was concerned about his gambling, he could easily have self excluded and resolved the issue. He chose not to, and that choice was not influenced by any relevant special disability.

51. The appellant's submissions now assert a new argument that his failure to self-exclude was indicative of his condition.[19] There is no evidence to support this and much that contradicts it. The relevant findings of fact made by the primary judge and confirmed on appeal are that:

(a) the appellant was fully aware of his right to self-exclude (J[16]), and could self-exclude (J[11]) 'with ease' (J[534]);

(b) the appellant told Janine Brooks the truth when he asserted, in effect, that he knew how to secure a self-exclusion order, and would do so if in his judgment his gambling problem resurfaced (J[13]);

(c) the appellant self-excluded from other casinos (J[7]); he made an application to self-exclude from Jupiter's Casino on the Gold Coast and from the Treasury Casino in Brisbane on 6 August 2000; from the Burswood Casino in Perth on 6 April 2001; and from Sky City Casino in Adelaide on 7 September 2004 (J[45]);

(d) in June 1997, Mr Healey formed the view that the appellant had learned 'a valuable technique to prevent the exploitation of impulses to gamble ... not necessarily to control them but certainly to prevent their fulfilment' (J[108]);

(e) the appellant excluded himself from Burswood Casino in part as an 'attempt to close off one avenue for gambling' (J[162]); and

(f) it was open to the appellant 'at any time, and most particularly during [his] two substantial periods of absence, to take steps to self-exclude. He knew the

[17] [2012] HCA Trans 348.
[18] Appellant's submissions, [25].
[19] Appellant's submissions, [26].

procedure, and he had been able to do so in the past - in relation both to Crown and to other casinos' (J[655]).

52. Faced with this key difficulty, the appellant's submissions endeavour to marginalise the relevance of the choice made by the appellant not to self-exclude. However, the emphasis placed by the primary judge on the appellant's ability to self-exclude does not, as the appellant submits, ignore the issue of whether there was any underlying disability of the appellant when he was gambling. Rather, it addresses the facts and circumstances of the appellant's dealings with Crown (*Amadio* at 474 per Deane J), being circumstances which affected the appellant's ability to conserve his interests (*Blomley v Ryan* at 415 per Kitto J).

53. The authorities on unconscionable dealing do not disavow the importance of one's responsibility for, or ability to control, a state of disability. Mere self-induced intoxication, for example, is insufficient to enliven the protection of equity.[20] The primary judge found that the appellant was aware of the risks involved in gambling (J[247]), including the risk of losses (or the opportunity of significant gains). The appellant decided to attend the casino, a decision made when he was not subject to the influence of his alleged condition. He did so with a full understanding of what he was doing (risks and rewards) and with undiminished capacity to prevent it (i.e. by utilising the self-exclusion mechanism).[21] By seeking to narrow the focus of the enquiry to each individual gaming transaction, the appellant attempts to avoid scrutiny of the free and conscious decisions he made to attend the casino. That was essentially a lifestyle choice to gain the status and privileges associated with being a 'high roller'.

54. The appellant further submits that his gambling losses are, of themselves, indicative of a disabling condition. There is no evidence to support this. As the primary judge observed: 'the fact that the [appellant] lost large sums of money in a very short time while playing high stakes baccarat is not necessarily prima facie evidence that he was a pathological gambler; *any* gambler playing [baccarat at the level of $300k per hand] may lose big and lose fast' (or win big and win fast) (at [251]). The logical extension of this argument is that every 'high roller' is a pathological gambler.

55. It is important to understand the sequence and detail of the appellant's gambling at Crown in 2005 and 2006. As at 13 March 2006, the appellant had made profits of over $2.69M on a turnover of around $480M.[22] Had Crown decided to prevent him from entering the casino at this point, the appellant would no doubt have complained that Crown was unjustifiably preventing him from (successfully) combining recreational gambling with his other business endeavours. This is particularly the case given the appellant's long history of threatening to sue Crown when he did not get his way (see, eg, J[141]). Second, had the appellant sought to vitiate the gambling transactions (the relief sought in this appeal) the consequence would have been a liability on the part of the appellant to the respondent in the amount of $2.69M. It is difficult to imagine the appellant agitating such a claim. At this time, the risks he freely and consciously assumed were paying healthy dividends.

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[20] *Blomley v Ryan*, 405 (Fullagar J); *Cooke v Clayworth* (1811) 18 Ves Jun 12, 51–16 (Sir William Grant); *Shaw v Thakray* (1853) 17 Jur 1045, 1046 (Stuart VC); *Cory v Cory* (1747) 1 Ves Sen 20, 20; *Osmond v Fitzroy* (1731) 3 P WMS 129, 131 (Sir Joseph Jekyll).

[21] Cf *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ).

[22] Exhibit D29 (Program Player History Report).

Issue 3: The NSW exclusion

56. The NSW exclusion was issued in September 2000 by the NSW Police Commissioner. It is a behavioural exclusion imposed when the NSW Chief Commissioner determined that it was in the public interest that the appellant be excluded from Star City Casino. It is hard to fathom how this exclusion could constitute a 'special disability' from which to found an equitable claim. It was never pleaded as one.

57. Although Crown learned informally of the NSW exclusion in November 2000 (J[25]), it was meaningless to it at the time. The appellant was not a patron of Crown having been excluded by the WOL. The NSW exclusion had no operation other than in NSW.

58. Following an amendment to the Victorian gaming laws effective from 19 June 2002,[23] a person subject to an exclusion like the NSW exclusion (now designated an 'IEO') was automatically excluded from Victorian casinos as well (J[22]). From 2002, s 77(2) of the CCA[24] made it a criminal offence for a person the subject of an IEO to enter or remain in a casino. It is important to note that the prohibition was directed to the individual. From a later date, 1 July 2004,[25] s 78B of the CCA provided that any person who is the subject of an IEO and who commits the offence of entering a casino must forfeit to the State all gaming winnings paid or payable to him or her (J[23]).

59. Thus responsibility for complying with the CCA fell on the appellant, who knew at all relevant times that he was subject to the NSW exclusion. In contrast, Crown's obligation under the relevant provisions was to maintain a list of persons who it was aware were the subject of an IEO.[26] Crown employees were also required to notify an inspector as soon as practicable if they reasonably believed that a person the subject of an IEO was in the casino.[27] As the primary judge found, neither Crown nor its employees had the relevant awareness or belief in 2005 or 2006 to trigger action under these provisions (J[24],[27], [570]).

60. There was no evidence that, after November 2000, Crown was updated as to the status of the NSW exclusion. The appellant was at pains not to disclose it when he did come back to Crown in 2004. The only information Crown had was to the contrary, i.e. the appellant was going to Star City Casino as of late 2004 (J[194], [478]). Accordingly, Crown allowed him to enter the casino and gamble and paid him all his winnings. As mentioned above, in mid-March 2006, he was $2.69M 'in front',[28] all of which had been paid to and banked by the appellant.

61. The appellant regarded his non-disclosure to Crown as a significant impediment to his case and accordingly gave false evidence that he had informed Mr Horman about it. The primary judge rejected that evidence (J[556]).

62. The (unpleaded) 'situational' special disability relied upon by the appellant is that he did not know he *should* forfeit his winnings. However, he alone knew that he was subject to a current IEO. As a result he committed a criminal offence by attending Crown. In effect, the appellant is seeking to use an equitable remedy to profit from his

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[23] *Gaming Legislation (Amendment) Act* 2002 (Vic), s 12.
[24] From 14 September 2005, s 77(3) of the CCA contained the same prohibition.
[25] *Gambling Regulation Act* 2003 (Vic), s 12.1.2 (Schedule 5, item 94).
[26] CCA, s 76.
[27] CCA, s 78AA.
[28] Exhibit D29 (Program Player History Report).

own criminal conduct. He received all the benefits of his dealings with Crown, such as complimentary jets, limousines, accommodation, meals and gambling rebates and he did not *actually* forfeit his winnings. Thus, no actionable disability existed, it was not taken advantage of, and there is nothing to be compensated for.

63. The mere fact of the IEO cannot be enough. Even if his argument were otherwise tenable, the appellant could only succeed by establishing that Crown knew not just of the existence of the NSW exclusion, but that it was current and operative as an IEO in 2005 and 2006 and that the appellant did not know of the legal effect of that IEO on his ability to retain gambling winnings at Crown. No such case was advanced at trial.

64. The appellant's submissions about the IEO are artificial. He seeks the repayment of losses that are unrelated to the supposed special disability, which he concealed from Crown and which arose from decisions made by the NSW police that he was an undesirable member of the public to access NSW casinos. The appellant seeks to take equity a long way from its source through this claim. The equitable doctrine of unconscionability is not concerned with an alleged 'disability' of such a character. Like the primary judge (J[26–7]), the Court of Appeal correctly found that the appellant's IEO was 'irrelevant' and that Crown did not act unconscionably in permitting the appellant to gamble (Bongiorno JA, [234]).

Issue 4: Did Crown act unconscientiously?

65. Deane J stated in *Amadio* (at 474) that unconscientious conduct occurs only if the special disability was sufficiently evident to the 'stronger party' to make it prima facie unfair to procure or accept the weaker party's assent to the impugned transaction in the circumstances in which it was procured or accepted. In the same case, Mason J (at 467) referred to 'actual knowledge' of special disadvantage in relation to an intended transaction, and the result being the same if the stronger party is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person.

66. In *ACCC v Radio Rentals* Finn J said:

> 'While the courts subsequently [to *Amadio*] have resorted to various formulae to encapsulate the knowledge falling short of actual knowledge which will nonetheless be sufficient, sight must not be lost of what is the subject of the required knowledge (be it actual or something less). It is knowledge of a particular state of affairs which itself embodies a judgment as to the disabled party's ability to conserve his or her own affairs in the parties' dealing. It is that state of affairs which is to be "sufficiently evident" to the stronger party.'[29]

67. The issue of knowledge in this proceeding has been made less clear because of the appellant's failure to identify with precision the 'dealing' in question. In the pleading and at trial the appellant's focus was 'the scheme to lure' the appellant back to the casino. The problem with this 'dealing' is that it was the appellant who was actively asserting that he was a successful businessman with a gambling bank who was a sought after patron of casinos around the world. The appellant's case at trial was that the respondents had sufficient knowledge to see through his numerous lies about his wealth and his mental state and/or had some sort of duty to the appellant to have him

[29] (2005) 146 FCR 292, [21].

independently psychiatrically assessed. However, these points are unhelpful and irrelevant to an unconscionable conduct claim. In any event, the withdrawal of the WOL in February 2005 did not cause the appellant any loss at all. He did not even gamble at the casino until June 2005 when he won $1M, which he took home.

68. The appellant now divides knowledge into two components: the 'pathological gambling' condition and the IEO. Further, as in the appeal, the appellant disavows the relevant dealing being the pleaded 'scheme to lure' but focuses on each individual gambling transaction, both winning and losing.[30]

Knowledge — Pathological Gambling

69. The primary judge rejected the appellant's arguments about knowledge, finding that:

(a) Crown believed the appellant was capable of conserving his own interests (J[19], [21], [463], [506], [656]), and did not at any time categorise the appellant as being at a special disadvantage (J[441], [528], [541]) or exploitable (J[441], [487], [540–1]);

(b) Crown had reason to be sceptical about the pathological nature of the appellant's gambling behaviour (J[2], [118], [454], [475], [619]);

(c) Crown was entitled to accept the medical report provided in connection with the appellant's application for revocation of self-exclusion in 1998 as true (J[5]);

(d) Crown had reason to believe that the appellant was a successful businessman in control of his affairs and with a gambling bank (J[4], [7], [18], [441], [520–3], [557], [592], [619]), and was entitled to accept the appellant as a successful and independent businessman who had conquered his gambling problem and was quite capable of self-regulation particularly by self-exclusion (J[619]);

(e) the Brooks report told Crown, and Crown accepted, that the appellant was not under a disability (J[506]);

(f) Crown was acutely aware, as at late 2004, that the appellant might not accept the conditions it wished to impose upon him and, if he came to that view, he would not recommence gambling or would withdraw his patronage (J[16]);

(g) the appellant did not at any time before he recommenced gambling at Crown suggest to Crown that he had any gambling problems (J[8]) or that he was other than financially capable of maintaining his high-roller status (J[18]);

(h) Crown had no reason to view the appellant's gambling behaviour as out of the ordinary (J[18], [482], [521], [539–41], [545–6]); and

(i) Crown's knowledge of rapid turnover and losses of large sums of money while playing baccarat does not equate with knowledge of special disability (J[539]).

70. The primary judge also made reference to the difficulties which experts have identified in gaming staff identifying problem gamblers (J[518]). As Professor Blaszczynski (one of the experts who gave evidence on behalf of the appellant) has observed (J[518]):

[30] See appellant's submissions, [25]. There are, however, echoes of the scheme to lure case at [38] and [39].

> 'In essence, there are no behaviours and signs that a problem gambler may display that can be used as a reliable and valid index for use by gaming staff ... the task of identifying problem gamblers is fraught with difficulty, potentially involves issues related to intrusions of privacy, and, beyond responding to direct approaches, may be outside the skills or legitimate role of gaming staff.'

71. In the Court of Appeal, Bongiorno JA accepted that knowledge can be found where a person 'is aware of facts that would raise in the mind of any reasonable person' the prospect that the other party was specially disadvantaged in entering into the transaction (at [223]),[31] but found that Crown had no such knowledge. He also considered and rejected a case based on 'constructive knowledge', doing so by applying established principles[32] to the findings made by the primary judge (at [223–4]). The appellant does not put forward any reasoned basis for disturbing these findings.

72. After careful consideration of the primary judge's findings, Bongiorno JA (at [224]) concluded that 'the principle of constructive knowledge has no application', as 'in all the circumstances, Crown was entitled to accept the appellant as he sought to be accepted'. Knowledge of all of the relevant facts known by Crown would not raise the possibility of special disadvantage in the mind of any reasonable person.

73. The appellant's submissions overlook that the knowledge required in order to trigger the intervention of equity is something more than knowledge of a particular condition or disability in the abstract. It is knowledge of a special disadvantage in the full context of the dealings between the parties. This context includes the assurances that the appellant gave Crown that he had no gambling issues and would self-exclude if it became necessary to do so.

74. Because the facts are so strongly against him, the appellant's submissions seek to extend the test for knowledge beyond its established limits. The appellant states in his submissions that 'a defendant will be deemed to have knowledge for the purpose of the equitable jurisdiction where "any reasonable person" *would be put on enquiry*' (at [29]). The appellant further states that the findings of the primary judge were also such as to have put any reasonable person on inquiry, and that 'in such circumstances, Crown could not shelter behind its failure to make proper inquiry' (at [32]). This goes beyond established principle and, as with the appellant's submissions that focus on what Crown might have, or should have, done, stray impermissibly from equity to the law of negligence.

75. The Court of Appeal's findings concerning Crown's knowledge are consistent with the approach endorsed by this court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd.*[33] Although that case concerned the rule in *Barnes v Addy*,[34] it involved similar equitable concepts. The knowledge requirements for each limb of *Barnes v Addy* were explained by this court in similar terms to those used by the Court of Appeal in this case.[35] In particular, this court confirmed that concepts of constructive notice do not apply.

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[31] Quoting *Amadio*, 467 (Deane J).
[32] Applying Mason J in *Amadio*, 467 and the dictum of Lord Cranworth LC in *Owen & Gulch v Homan* (1853) 4 HL Cas 997. Mandie JA and Almond AJA agreed with Bongiorno JA on this issue.
[33] (2007) 230 CLR 89.
[34] (1874) LR 9 ChApp 244.
[35] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [122], [173], [174], [177–8] (the Court).

Other matters relevant to unconscientious conduct – Pathological gambling

76. Contrary to his pleaded case, the appellant submits that passive acceptance of a benefit would be a sufficient basis to ground relief. The findings of the primary judge in respect of Crown's knowledge render this submission untenable. However, the appellant also asserts that Crown went further by engaging in 'deliberate conduct' designed to ensnare the appellant. These submissions disregard the following findings:

(a) the appellant agreed to return to Crown during an initial two and a half minute conversation with a Crown employee prior to any discussion regarding the terms of the appellant's play (J[202–4]);

(b) after that telephone call to the appellant, a period of a week elapsed, after which time the appellant called Mr Williams three times (J[212]);

(c) although the appellant was free to gamble at the casino from January 2005, he did not do so until 24 June 2005;[36]

(d) there was no evidence that Crown made any attempt to encourage the appellant's return to the casino during this period (J[590]);

(e) the appellant planned to gamble at Crown in February 2005, and made certain demands, including the use of Crown's private jet. When his demands were not met, he cancelled his bookings and went elsewhere (J[241–2]);

(f) the appellant stayed at Crown in March 2005, but didn't gamble because Crown would not agree to the hand limit he was seeking (J[243]); and

(g) when the appellant decided to resume gambling at Crown on 24 June 2005, he did so notwithstanding Crown's ongoing refusal to provide him with 'lucky money' before this visit (J[599]) or the use of its private jet (J[594]).

77. As the primary judge observed, this resistance to the appellant's requests is hardly consistent with the assertion that Crown was offering up inducements in order to lure the appellant back to Crown (J[595]). The respondents' treatment of the appellant was — adopting the language of Spigelman CJ in *Reynolds v Katoomba RSL All Services Club Ltd*[37] — in no way extraordinary. In fact, as the primary judge held, the appellant was not treated as a special case by Crown (J[591]). The appellant was provided with 'complimentaries' in connection with his visits to Crown, including food and beverages, accommodation, 'lucky money', and the use of Crown's private jet. However, these incentives were invariably provided in response to requests by the appellant (J[591], [594], [610], [615], [634]) and were standard benefits in the industry for VIP gamblers.

78. The primary judge also observed that the benefits provided to the appellant 'should be seen in the context of a highly competitive international market for VIP gamblers' (J[591]). The appellant knew, and exploited, this fact. The appellant had a lot with

[36] At trial, this five month gap and Crown's apparent indifference during that period to whether the appellant gambled or not, assumed importance. The appellant attempted to address this with more false evidence (J[590, 600]), namely that his five month absence from Crown was the result of Mr Williams expressed concern not to be seen to be encouraging his return. The primary judge rejected that evidence.

[37] (2001) 53 NSWLR 43, 48.

which to bargain, and 'seized it' (J[11]). The primary judge also found that the appellant demonstrated an ability to participate in the cut and thrust of offer and counter-offer, to reject certain Crown proposals and accept others, and to win terms more consonant with his wishes but which Crown was reluctant to concede (J[18]).

79. The appellant seeks to impugn the gambling transactions themselves, but the fact is that the appellant gambled on better terms than most patrons. The appellant's new assertion that the transactions were not fair 'because he could not receive or retain any winnings' stands entirely divorced from reality — he did receive and retain winnings. Equity does not step in to correct hypothetical dealings, equity addresses what actually happened.

80. There are multiple findings that underscore the primary judge's conclusion that the respondents did not act unconscionably in their dealings with the appellant:

(a) the appellant had, for a considerable period, vigorously pursued re-entry to the casino in the context of his ongoing recreational gambling at Australian and overseas casinos (J[6], [8]);

(b) the appellant was not enticed by Crown to gamble at the casino (J[15–16], [336]);

(c) there was no exploitation of, or plan to exploit, any special disability from which the appellant might have been suffering (J[20–1], [339], [654], [661]), and no plan to lure the appellant back to the casino (J[577]);

(d) Crown transacted with the appellant at arm's length and on a commercial basis consistent with dealings in the 'high roller' market (J[441]), and treated the appellant as a fully informed gambler, perfectly capable of making judgments about his own best interests (J[621], [634]);

(e) incentives provided to the appellant were a part of the general bargain struck between the appellant and Crown (J[263], [592], [595–6], [598–9], [606], [610–13], [615]); and

(f) Crown negotiated and initiated changes to the appellant's gambling programs to protect itself against exploitation by the appellant (J[621], [649]).

Knowledge — NSW Exclusion

81. The primary judge found that neither the appellant nor Crown was aware that the appellant was caught by the 2002 and 2004 amendments to the CCA and thus unable to retain his winnings (J[24]).

82. The evidence established merely that Messrs Horman and Craigie were aware in 2000 of the NSW exclusion (J[144], [150]). At that time, the NSW exclusion had no particular relevance to Crown. Only later (from 19 June 2002) did such an order operate as an IEO and later still (from 1 July 2004) did the existence of such an order impact upon gaming winnings. There was no evidence that Messrs Horman or Craigie had any knowledge of the status of the NSW exclusion in November 2004. In fact, the evidence based on Crown's contemporaneous records is to the contrary. Internal documents (one from 2004 (J[194]) and the other from 2006 (J[381]) show that Crown believed the appellant was still gambling at the NSW Star City Casino.

83. The appellant's submissions consistently misstate the findings of the primary judge as to Crown's knowledge of the NSW exclusion. The appellant asserts that 'Mr Horman became aware of the IEO in 2000' but the concept of an IEO did not then exist. The appellant incorrectly states that 'the primary judge found that the IEO resonated in Mr Horman's mind in late 2004 when Crown was actively contemplating the Appellant's return', however the primary judge made no such finding. In fact, his unchallenged findings are to the contrary effect. He found that, at the time the respondent was deciding whether to permit the appellant to re-enter the casino, 'the relevant officers at Crown did not appreciate the significance of the 2000 exclusion' and that 'Crown did not bring the NSW position to mind' (J[570]). Bongiorno JA (with whom Mandie JA and Almond AJA agreed), after careful review of the evidence in respect of the IEO, endorsed the primary judge's conclusion that Crown did not realise the effect or significance of the NSW exclusion (at [228–9]).

84. The appellant attempts to escape the adverse factual findings of the primary judge by resort to some propositions of law. First, the appellant submits that, under the principles of attribution, knowledge once gained by a corporation is not forgotten or lost.[38] This is not correct. The authorities establish that attribution of past knowledge to a corporation depends on the nature and importance of the information,[39] and that knowledge can be lost or forgotten. The appellant was not a patron of Crown in 2000 at the time Mr Horman was informally told of the NSW exclusion. Even if he had been gambling at Crown in 2000, it would not have had significance. The information was simply not of sufficient importance to register, and then be retained despite the passing of time.

85. Second, the appellant also submits that actual knowledge is not required; it is sufficient if the respondents ought to have known of the disabling condition or circumstances.[40] The appellant submits that the Court of Appeal brushed aside the primary judge's finding that Crown was 'seriously careless' in not recognising the significance of the IEO, and further that 'carelessness goes directly to the issue of constructive knowledge.'[41] However, as Bongiorno JA [231] observed, 'this is not a negligence case.' The issue is whether Crown acted unconscientiously. As Kirby J observed in *Garcia v National Australia Bank*[42] '[c]onstructive notice should not be sufficient for unconscientious dealing'.

86. Third, the appellant submits that under the rules of attribution, the knowledge of several officers can be aggregated to form the state of mind of a company.[43] Whatever the reach of those rules,[44] the appellant concedes that they are not relevant on the facts.[45]

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[38] Appellant's submissions, [11].
[39] *Beach Petroleum NL & Anor v Johnson & Ors* (1993) 43 FCR 1, 32 (von Doussa J).
[40] Appellant's submissions, [23].
[41] Appellant's submissions, [53].
[42] (1998) 194 CLR 395, 430. In the related context of *Barnes v Addy* liability see also *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 412–13 (Stephen J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [176–8] (the Court).
[43] Appellant's submissions, [15].
[44] See, eg, *Re Chisum Services Pty Ltd* (1982) 7 ACLR 64; *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563; *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685; *Meridian Global Funds Management Asia Ltd v Securities Commissions* [1995] 2 AC 500; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 160 (Ashley AJA); *K&S Corporation Ltd v Sportingbet Australia* [2003] SASC 96.
[45] Appellant's submissions, [51].

Other matters relevant to unconscientious conduct – NSW exclusion

87. Even if it be assumed that the IEO imposed some kind of special disadvantage on the appellant, Crown did not exploit it or act unconscientiously. The appellant did not forfeit his winnings (J[27]), because Crown paid them. The appellant argues that this conclusion was not open in light of the primary judge's finding that, had the appellant known the true position, he would have declined to have anything to do with the casino (J[26]). It is, however, unclear how this hypothetical arises from any alleged unconscientious conduct by Crown.

88. The appellant's submissions are apt to give the impression that the IEO claim was central to his complaints at trial.[46] It was not. More particularly, the existence of the IEO was not even pleaded by the appellant as a special disability impairing his ability to make a worthwhile judgement as to what was in his best interests.[47] References in the pleading to the IEO were for other purposes.[48] The trial was conducted in accordance with the pleadings. Senior counsel for the appellant stated that he would not seek to go beyond the pleaded case.[49] The appellant's closing submissions went beyond the pleaded case to include a submission that he suffered from a 'situational disability in the form of an inability to win at Crown'.[50]

89. The primary judge (J[558–70]) rejected those submissions, but he need not have done so. Nor did he feel it necessary to deal with Crown's pleaded case that the appellant was seeking to use the equitable principles discussed in *Amadio* to profit from his own illegal conduct in entering the casino (J[660]).

Issue 5: Discretionary Considerations and Illegality[51]

90. All of the appellant's claims for relief in equity ought to fail for another reason. The appellant was legally disentitled from gambling at Crown (J[22]). Each time the appellant entered, remained or gambled in the casino throughout 2005 and 2006, he did so in breach of the CCA (J[69], [558]). It is well settled that courts will not lend 'aid to a man who founds his cause of action upon an immoral or illegal act.'[52]

91. As mentioned above, the appellant was paid all his winnings and had the benefit of all the privileges afforded him, but now seeks to recover all his losses in circumstances where he was committing an offence each time he attended the casino. He is not coming to equity with clean hands.

92. Further, any legal or equitable rights arising from, or based on, the appellant's gambling at Crown would be extinguished by virtue of the doctrine of illegality. The clear scope and purpose of ss 77(2) and 78B (to use the language of Mason J in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*[53]) was to ensure that individuals such as the appellant did not enter the casino, gamble in the casino or stand

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[46] Appellant's submissions, [2(b)].
[47] SOC, [12–13], [26]; noted by Mandie JA, [14].
[48] SOC, [8–10], [15–16], [25], [29].
[49] Transcript of trial proceedings, 1974.6.
[50] Plaintiff's closing trial submissions, Part 4C, [1].
[51] The primary judge did not deal substantively with the defence of illegality (J[660]).
[52] *Holman v Johnson* (1775) 1 Cowp 341, 1121 (Lord Mansfield). See also *Nelson v Nelson* (1995) 184 CLR 538, 550–51 (Deane and Gummow JJ).
[53] (1978) 139 CLR 410 (**Yango**).

to win any money by gambling in the casino. In *Yango*, Mason J cited with approval the statement of Fry LJ in *Cleaver*: 'no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.'[54] This policy applies in the present case to the appellant.

Loss and Damage

93. The appellant's claim in equity is confined to compensation for loss or damage caused by the respondents. The appellant has elected, in his prayer for relief, to claim equitable compensation, and not an account of profits. Having made such an election,[55] the appellant's claim is confined to compensation for loss caused by breach of the equitable duty.[56] Similarly, to the extent the appellant's claim is for relief under the *Trade Practices Act 1974* (Cth) (**TPA**), it is also confined to compensation for loss or damage caused by the respondents. Orders under sections 82 and 87 of the TPA are available only when a person suffers, or is likely to suffer, 'loss or damage *by* conduct of another person'. As McHugh, Hayne and Callinan JJ said in *Marks v GIO Australia Holdings Limited*, '[t]hat inquiry is one that seeks to identify a causal connection between the loss or damage that it is alleged has been or is likely to be suffered and the contravening conduct.'[57]

94. The respondents did not cause the gambling losses sustained by the appellant. If not at Crown, the appellant would have, and did, gamble elsewhere (J[369]).[58] As his Honour observed, 'Harry Kakavas had chosen to gamble. The only remaining choice was where' (J[427]). The quantification of the appellant's loss 'cannot as a matter of law ignore the other probable consequences of his gambling propensity'.[59]

Part VII: Notice of Contention

95. Not applicable.

Part VII: Estimate of Time for Oral Argument

96. Approximately 4 hours will be needed for the presentation of oral submissions.

Dated: 15 February 2013

N.J. Young

Nick Hopkins

[54] (1978) 139 CLR 410, 427–8, citing *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156.
[55] See *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 521 (Lord Nicholls); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (the Court).
[56] See *AMP Services Ltd v Manning* [2006] FCA 256; *Hill v Rose* [1990] VR 129, 144 (Tadgell J).
[57] (1998) 196 CLR 494, [38].
[58] See *Calvert v William Hill Credit Ltd* [2008] All ER (D) 170, [195–7], [209–15] (Briggs J); *Calvert v William Hill Credit Ltd* [2009] 2 WLR 1065, [10], [45–8] (Sir Anthony May P).
[59] *Calvert v William Hill Credit Ltd* [2009] 2 WLR 1065, [47] (Sir Anthony May P).

Version No. 044

Casino Control Act 1991

Act No. 47/1991

Version incorporating amendments as at 6 December 2000

TABLE OF PROVISIONS

"**casino operator**" means a person who is the holder of a licence;

"**chips**" means any tokens used instead of money for the purpose of gaming;

"**decision**" in relation to the Director or the Authority, includes determination;

"**Director**" means the Director of Casino Surveillance appointed under section 94;

"**electronic monitoring system**" means any electronic or computer or communications system or device that is so designed that it may be used, or adapted, to send or receive data from gaming equipment in relation to the security, accounting or operation of gaming equipment;

S. 3(1) def. of "electronic monitoring system" inserted by No. 93/1993 s. 4(1)(a).

"**employ**" includes engage under a contract for services;

"**exclusion order**" means a written or oral order under section 72 prohibiting a person from entering, or remaining in, a casino;

S. 3(1) def. of "exclusion order" amended by No. 17/1996 s. 24(a).

"**game**" means a game of chance or a game that is partly a game of chance and partly a game requiring skill;

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S. 3(1) def. of "Gaming Commission" inserted by No. 93/1993 s. 4(1)(b), repealed by No. 37/1994 s. 229(b).

"gaming operator" has the same meaning as in the **Gaming Machine Control Act 1991**;

S. 3(1) def. of "gaming operator" inserted by No. 44/1995 s. 4.

"inspector" means a person appointed under Division 3 of Part 7;

S. 3(1) def. of "inspector" substituted by Nos 37/1994 s. 229(c), 17/1996 s. 24(b).

"jackpot" means the combination of letters, numbers, symbols or representations required to be displayed on the reels or video screen of a gaming machine so that the winnings in accordance with the prize payout scale displayed on the machine are payable from money which accumulates as contributions are made to a special prize pool;

S. 3(1) def. of "jackpot" inserted by No. 93/1993 s. 4(1)(e).

"junket" means an arrangement whereby a person or a group of people is introduced to a casino operator by a junket organiser or promoter who receives a commission based on the turnover of play in the casino attributable to the persons introduced by the organiser or promoter or otherwise calculated by reference to such play;

S. 3(1) def. of "junket" inserted by No. 36/1994 s. 4.

"licence", except in Part 4, means a licence granted under Part 2;

"linked jackpot arrangement" means an arrangement whereby 2 or more gaming machines are linked to a device that—

S. 3(1) def. of "linked jackpot arrangement" inserted by No. 93/1993 s. 4(1)(f).

(a) records, from time to time, an amount which, in the event of a jackpot or other result being obtained on one of those machines, may be payable, or part of

72. ***Exclusion orders***

(1) The Director or a casino operator or the person for the time being in charge of a casino, may, by order given to a person orally or in writing, prohibit the person from entering or remaining in the casino.

(1A) An oral order lapses after 14 days.

S. 72(1A) inserted by No. 17/1996 s. 30.

(2) If a person is given an oral order and the person requires the order to be given in writing, the oral order is suspended while the order is put in writing (but only if the person remains available in the casino to be given the written order).

(2A) The Director or a casino operator may give a written order under this section to a person, on the voluntary application of the person, prohibiting the person from entering or remaining in a casino.

S. 72(2A) inserted by No. 36/1994 s. 10.

(2B) An application under sub-section (2A) must be in writing and signed by the applicant in the presence of a person authorised by the Authority to witness such an application.

S. 72(2B) inserted by No. 36/1994 s. 10.

(3) As soon as practicable after a casino operator gives a written order under this section, the operator must cause a copy of the order to be given to the Authority and the Director.

Penalty: 50 penalty units.

(4) This section does not authorise the exclusion from the casino of an inspector or other authorised person, or a police officer.

73. ***Appeal to Authority***

that person for a reason considered by him or her to be a sufficient reason.

(7) An appeal against a direction does not prejudice the effectiveness of the direction pending the Authority's decision.

74. ***Chief Commissioner of Police may order person to be excluded***

(1) The Chief Commissioner of Police may direct a casino operator in writing to exclude a person from the casino by giving the person or causing the person to be given an order under section 72, and the casino operator must comply with the direction.

Penalty: 50 penalty units.

(2) The Chief Commissioner of Police may give such a direction in anticipation of the person entering the casino.

(3) Where practicable, the Chief Commissioner of Police must make available to the casino operator a photograph of the person who is the subject of the direction and must give the person notice of the direction.

75. ***Duration of exclusion orders***

(1) An exclusion order remains in force in respect of a person unless and until it is revoked by the person who gave the order.

(2) An exclusion order given by a person for the time being in charge of a casino may be revoked by any other person who is for the time being in charge of the casino or by the casino operator.

(3) An exclusion order given at the direction of the Chief Commissioner of Police cannot be revoked

exclusion order of which the operator becomes aware during that day.

Penalty: 50 penalty units.

(3) A person must not provide any part of a list prepared under sub-section (1) to any person except—

(a) the casino operator; or

(b) a casino employee; or

(c) the Authority; or

(d) the Director; or

(e) an inspector; or

(f) a person approved by the Director for the purpose.

Penalty: 10 penalty units.

77. ***Excluded person not to enter casino***

A person the subject of an exclusion order relating to a casino must not enter or remain in the casino.

Penalty: 20 penalty units.

78. ***Removal of excluded persons from casino***

(1) This section applies to the following persons in a casino—

(a) the person for the time being in charge of the casino;

(b) an agent of the casino operator;

(c) a casino employee.

(2) A person to whom this section applies who knows that a person the subject of an exclusion order is

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(b) as a result of making a bet on the device, winnings may become payable—

and includes any machine declared to be a gaming machine under sub-section (3) but does not include interactive gaming equipment within the meaning of the **Interactive Gaming (Player Protection) Act 1999** that is used or intended to be used for the purposes of interactive games within the meaning of that Act and not for gaming of any other kind;

"gaming operator" has the same meaning as in the **Gaming Machine Control Act 1991**;

S. 3(1) def. of "gaming operator" inserted by No. 44/1995 s. 4.

"inspector" means a person appointed under Division 3 of Part 7;

S. 3(1) def. of "inspector" substituted by Nos 37/1994 s. 229(c), 17/1996 s. 24(b).

"interstate Chief Commissioner" means the chief officer (however designated) of the police force of another State or a Territory;

S. 3(1) def. of "interstate Chief Commission-er" inserted by No. 38/2002 s. 3(2)(b).

"interstate exclusion order" means an order made by an interstate Chief Commissioner of a similar nature to an exclusion order made under section 74;

S. 3(1) def. of "interstate exclusion order" inserted by No. 38/2002 s. 3(2)(b).

(2) An inspector may enter, and remain in, a casino, or any part of a casino, in the performance of functions conferred or imposed on the inspector by this Act.

71. ***Police powers of entry to a casino***

(1) For the purpose of the discharge of the duty of a police officer, any part of a casino to which the public has access is to be considered to be a public place.

(2) A police officer may, on being authorised by the Authority, the Director or an inspector so to do, enter any part of a casino to which the public does not have access and may remain there for the purpose of discharging his or her duty as a police officer.

(3) Such an authorisation may be given in a particular case or generally and may be given so as to operate on a specified occasion or throughout a specified period.

(4) The Authority, the Director or an inspector giving such an authorisation to a police officer must inform the casino operator or the person for the time being in charge of the casino as soon as practicable.

(5) Nothing in this section affects any power a police officer has by law to enter any part of a casino.

72. ***Exclusion orders***

(1) The Director or a casino operator or the person for the time being in charge of a casino, may, by order given to a person orally or in writing, prohibit the person from entering or remaining in the casino.

S. 72(1A) inserted by No. 17/1996 s. 30.

(1A) An oral order lapses after 14 days.

(2) If a person is given an oral order and the person requires the order to be given in writing, the oral order is suspended while the order is put in writing (but only if the person remains available in the casino to be given the written order).

S. 72(2A) inserted by No. 36/1994 s. 10.

(2A) The Director or a casino operator may give a written order under this section to a person, on the voluntary application of the person, prohibiting the person from entering or remaining in a casino.

S. 72(2B) inserted by No. 36/1994 s. 10.

(2B) An application under sub-section (2A) must be in writing and signed by the applicant in the presence of a person authorised by the Authority to witness such an application.

(3) As soon as practicable after a casino operator gives a written order under this section, the operator must cause a copy of the order to be given to the Authority and the Director.

Penalty: 50 penalty units.

(4) This section does not authorise the exclusion from the casino of an inspector or other authorised person, or a police officer.

73. ***Appeal to Authority***

(1) A person receiving a direction in writing under section 72 prohibiting the person from entering or remaining in a casino may within 28 days after receiving the direction appeal against the direction to the Authority.

(2) The appeal must be made in writing and specify the grounds on which it is made.

(3) The Authority may cause such inquiries to be made by the Director in relation to the direction as the Authority thinks fit and the results of the inquiries to be reported to it.

S. 73(3A) inserted by No. 36/1994 s. 11.

(3A) If the exclusion order was given on the application of the person to whom it applies, the inquiries made by the Director are, if possible, to include inquiries made of the witness to the application.

(4) Upon a consideration of the grounds of appeal specified by the appellant and any matters reported upon to the Authority by the Director in relation to the direction, the Authority may—

(a) reject the appeal; or

(b) allow the appeal.

(5) The decision of the Authority shall—

(a) be communicated in writing to the appellant and the casino operator;

(b) be final and conclusive and shall not be appealed against, reviewed, quashed or in any way called in question in any court on any account whatsoever.

(6) The allowance of the appeal by the Authority revokes the direction without prejudice to the right of the casino operator or person in charge of the operation of the casino at a particular time, acting in good faith, to give a further direction to that person for a reason considered by him or her to be a sufficient reason.

(7) An appeal against a direction does not prejudice the effectiveness of the direction pending the Authority's decision.

S. 74 substituted by No. 38/2002 s. 10.

74. ***Exclusion orders by Chief Commissioner of Police***

(1) The Chief Commissioner of Police may, by written order given to a person, prohibit the person from entering or remaining in a casino.

(2) As soon as practicable after making an exclusion order, the Chief Commissioner of Police must—

(a) give a copy of the order to the casino operator and the Director and, if practicable, make available to the casino operator a photograph of the person who is the subject of the order; and

(b) notify each interstate Chief Commissioner of the making of the order.

(3) For the avoidance of doubt, an exclusion order given under this section is not subject to appeal under section 73.

75. *Duration of exclusion orders*

(1) An exclusion order remains in force in respect of a person unless and until it is revoked by the person who gave the order.

(2) An exclusion order given by a person for the time being in charge of a casino may be revoked by any other person who is for the time being in charge of the casino or by the casino operator.

S. 75(3) substituted by No. 38/2002 s. 11.

(3) If the Chief Commissioner of Police revokes an exclusion order, he or she must notify each casino operator, the Director and each interstate Chief Commissioner of the revocation.

(4) When an exclusion order is revoked by a casino operator or by the person for the time being in charge of a casino, the casino operator must give notice of the revocation to the Director as soon as practicable after it occurs.

Penalty: 20 penalty units.

76. *List of excluded persons*

S. 76(1) amended by Nos 36/1994 s. 20(l), 38/2002 s. 12(1)(a).

(1) A casino operator must, immediately before gaming or betting commences in the casino on any day—

(a) prepare a list of names bearing the date of that day; or

(4) As soon as practicable after becoming aware of the making or revocation of an interstate exclusion order, the Chief Commissioner of Police must notify each casino operator and the Director.

S. 76(4) inserted by No. 38/2002 s. 12(2).

77. ***Excluded person not to enter casino***

S. 77 amended by No. 38/2002 s. 12(3) (ILA s. 39B(1)).

(1) A person the subject of an exclusion order relating to a casino must not enter or remain in the casino.

Penalty: 20 penalty units.

S. 77(2) inserted by No. 38/2002 s. 12(3).

(2) A person the subject of an interstate exclusion order must not enter or remain in a casino.

Penalty: 20 penalty units.

78. ***Removal of excluded persons from casino***

(1) This section applies to the following persons in a casino—

(a) the person for the time being in charge of the casino;

(b) an agent of the casino operator;

(c) a casino employee.

S. 78(2) amended by No. 38/2002 s. 12(4).

(2) A person to whom this section applies who knows that a person the subject of an exclusion order or interstate exclusion order is in the casino, must notify an inspector as soon as practicable.

Penalty: 20 penalty units.

(3) The inspector must remove the person from the casino or cause the person to be removed from the casino.

(4) It is lawful for a person to whom this section applies, using no more force than is reasonably necessary—

S. 78(4)(a) amended by No. 38/2002 s. 12(4).

(a) to prevent a person the subject of an exclusion order or interstate exclusion order from entering the casino; and

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S. 3(1) def. of "inspector" substituted by Nos 37/1994 s. 229(c), 17/1996 s. 24(b), 114/2003 s. 12.1.2 (Sch. 5 item 1(e)).

"inspector" has the same meaning as in the **Gambling Regulation Act 2003**;

S. 3(1) def. of "interstate Chief Commiss-ioner" inserted by No. 38/2002 s. 3(2)(b).

"interstate Chief Commissioner" means the chief officer (however designated) of the police force of another State or a Territory;

S. 3(1) def. of "interstate exclusion order" inserted by No. 38/2002 s. 3(2)(b).

"interstate exclusion order" means an order made by an interstate Chief Commissioner of a similar nature to an exclusion order made under section 74;

S. 3(1) def. of "jackpot" inserted by No. 93/1993 s. 4(1)(e).

"jackpot" means the combination of letters, numbers, symbols or representations required to be displayed on the reels or video screen of a gaming machine so that the winnings in accordance with the prize payout scale displayed on the machine are payable from money which accumulates as contributions are made to a special prize pool;

S. 3(1) def. of "junket" inserted by No. 36/1994 s. 4.

"junket" means an arrangement whereby a person or a group of people is introduced to a casino operator by a junket organiser or promoter who receives a commission based on the turnover of play in the casino attributable to the persons introduced by the organiser or promoter or otherwise calculated by reference to such play;

(2) A police officer may, on being authorised by the Commission or an inspector so to do, enter any part of a casino to which the public does not have access and may remain there for the purpose of discharging his or her duty as a police officer.

S. 71(2) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 86).

(3) Such an authorisation may be given in a particular case or generally and may be given so as to operate on a specified occasion or throughout a specified period.

(4) The Commission or an inspector giving such an authorisation to a police officer must inform the casino operator or the person for the time being in charge of the casino as soon as practicable.

S. 71(4) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 86).

(5) Nothing in this section affects any power a police officer has by law to enter any part of a casino.

(6) A function of the Commission under this section may be performed by any commissioner.

S. 71(6) inserted by No. 114/2003 s. 12.1.2 (Sch. 5 item 87).

72. Exclusion orders

(1) The Commission or a casino operator or the person for the time being in charge of a casino, may, by order given to a person orally or in writing, prohibit the person from entering or remaining in the casino.

S. 72(1) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(a)).

(1A) An oral order lapses after 14 days.

S. 72(1A) inserted by No. 17/1996 s. 30.

(2) If a person is given an oral order and the person requires the order to be given in writing, the oral order is suspended while the order is put in writing (but only if the person remains available in the casino to be given the written order).

S. 72(2A) inserted by No. 36/1994 s. 10, amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(a)).

(2A) The Commission or a casino operator may give a written order under this section to a person, on the voluntary application of the person, prohibiting the person from entering or remaining in a casino.

S. 72(2B) inserted by No. 36/1994 s. 10, amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(b)).

(2B) An application under sub-section (2A) must be in writing and signed by the applicant in the presence of a person authorised by the Commission to witness such an application.

S. 72(3) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(c)).

(3) As soon as practicable after a casino operator gives a written order under this section, the operator must cause a copy of the order to be given to the Commission.

Penalty: 50 penalty units.

(4) This section does not authorise the exclusion from the casino of an inspector or other authorised person, or a police officer.

S. 72(5) inserted by No. 114/2003 s. 12.1.2 (Sch. 5 item 89).

(5) A function of the Commission under this section may be performed by any commissioner.

S. 73 amended by No. 36/1994 s. 11, substituted by No. 114/2003 s. 12.1.2 (Sch. 5 item 90).

73. Appeal to Commission

(1) If a written order under section 72 prohibiting the person from entering or remaining in a casino is made by—

(a) a single commissioner; or

(b) a casino operator; or

S. 74 substituted by No. 38/2002 s. 10.

74. Exclusion orders by Chief Commissioner of Police

(1) The Chief Commissioner of Police may, by written order given to a person, prohibit the person from entering or remaining in a casino.

(2) As soon as practicable after making an exclusion order, the Chief Commissioner of Police must—

S. 74(2)(a) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 91).

(a) give a copy of the order to the casino operator and the Commission and, if practicable, make available to the casino operator a photograph of the person who is the subject of the order; and

(b) notify each interstate Chief Commissioner of the making of the order.

(3) For the avoidance of doubt, an exclusion order given under this section is not subject to appeal under section 73.

75. Duration of exclusion orders

(1) An exclusion order remains in force in respect of a person unless and until it is revoked by the person who gave the order.

(2) An exclusion order given by a person for the time being in charge of a casino may be revoked by any other person who is for the time being in charge of the casino or by the casino operator.

S. 75(3) substituted by No. 38/2002 s. 11, amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 91).

(3) If the Chief Commissioner of Police revokes an exclusion order, he or she must notify each casino operator, the Commission and each interstate Chief Commissioner of the revocation.

S. 76(3) substituted by No. 114/2003 s. 12.1.2 (Sch. 5 item 92).

(3) A person must not provide any part of a list prepared under sub-section (1) to any person except—

(a) the casino operator; or

(b) a casino employee; or

(c) the Commission; or

(d) an inspector; or

(e) a person approved by the Commission for the purpose.

Penalty: 10 penalty units.

S. 76(4) inserted by No. 38/2002 s. 12(2), amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 93).

(4) As soon as practicable after becoming aware of the making or revocation of an interstate exclusion order, the Chief Commissioner of Police must notify each casino operator and the Commission.

S. 77 amended by No. 38/2002 s. 12(3) (ILA s. 39B(1)).

77. Excluded person not to enter casino

(1) A person the subject of an exclusion order relating to a casino must not enter or remain in the casino.

Penalty: 20 penalty units.

S. 77(2) inserted by No. 38/2002 s. 12(3).

(2) A person the subject of an interstate exclusion order must not enter or remain in a casino.

Penalty: 20 penalty units.

78. Removal of excluded persons from casino

(1) This section applies to the following persons in a casino—

(a) the person for the time being in charge of the casino;

(2) For the purposes of sub-section (1), a casino operator does not send or direct material to a person only because the casino operator makes the material available generally to members of the public.

Examples

Examples of making material available generally to members of the public include publishing it on the Internet, television or other medium or displaying it on a billboard.

S. 78B inserted by No. 114/2003 s. 12.1.2 (Sch. 5 item 94).

78B. Forfeiture of winnings

(1) This section applies to a person who is—

(a) subject to an exclusion order; or

(b) subject to an interstate exclusion order; or

(c) a minor.

(2) If a person to whom this section applies enters or remains in a casino in contravention of this Act, all winnings (including linked jackpots) paid or payable to the person in respect of gaming on gaming machines or playing any game approved under section 60 in the casino—

(a) are forfeited to the State; and

(b) must be paid to the Commission for payment into the Community Support Fund under the **Gambling Regulation Act 2003**.

(3) If winnings referred to in sub-section (2) comprise or include a non-monetary prize, the casino operator must pay the value of that prize to the Commission for payment into the Community Support Fund under the **Gambling Regulation Act 2003**.

(4) In determining the value of a non-monetary prize for the purposes of sub-section (3), any amount of GST payable in respect of the supply to which the prize relates is to be taken into account.

(5) Any dispute between a person to whom this section applies and a casino operator as to the amount of winnings forfeited under this section must be investigated and determined by an inspector.

79. Gambling in the casino by certain persons prohibited

(1) An authorised person must not gamble or bet in a casino except to the extent that it may be necessary to do so in the exercise of his or her functions in the course of the administration of this Act.

S. 79(1) amended by No. 36/1994 s. 20(n).

(2) A special employee (as defined in Part 4) in a casino must not gamble or bet in the casino.

Penalty: 20 penalty units.

S. 79(2) substituted by No. 36/1994 s. 12.

(2A) If a person—

(a) has a special relationship with a casino within the meaning of section 40(1); and

(b) is required under section 40(2) to apply for a licence and—

(i) the requirement has not been withdrawn in writing; or

(ii) the association or employment constituting the special relationship is not terminated—

the person must not gamble or bet in the casino.

Penalty: 20 penalty units.

S. 79(2A) inserted by No. 36/1994 s. 12.

(3) If an authorised person ceases to be an authorised person, he or she must not gamble or bet in a casino during the next 12 months.

Penalty: 20 penalty units.

S. 79(3) amended by No. 36/1994 s. 20(o).

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"interstate Chief Commissioner" means the chief officer (however designated) of the police force of another State or a Territory;

S. 3(1) def. of "interstate Chief Commissioner" inserted by No. 38/2002 s. 3(2)(b).

"interstate exclusion order" means an order made by an interstate Chief Commissioner of a similar nature to an exclusion order made under section 74;

S. 3(1) def. of "interstate exclusion order" inserted by No. 38/2002 s. 3(2)(b).

"jackpot" means the combination of letters, numbers, symbols or representations required to be displayed on the reels or video screen of a gaming machine so that the winnings in accordance with the prize payout scale displayed on the machine are payable from money which accumulates as contributions are made to a special prize pool;

S. 3(1) def. of "jackpot" inserted by No. 93/1993 s. 4(1)(e).

"junket" means an arrangement whereby a person or a group of people is introduced to a casino operator by a junket organiser or promoter who receives a commission based on the turnover of play in the casino attributable to the persons introduced by the organiser or promoter or otherwise calculated by reference to such play;

S. 3(1) def. of "junket" inserted by No. 36/1994 s. 4.

"licence", except in Part 4, means a licence granted under Part 2;

(2) A police officer may, on being authorised by the Commission or an inspector so to do, enter any part of a casino to which the public does not have access and may remain there for the purpose of discharging his or her duty as a police officer.

S. 71(2) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 86).

(3) Such an authorisation may be given in a particular case or generally and may be given so as to operate on a specified occasion or throughout a specified period.

(4) The Commission or an inspector giving such an authorisation to a police officer must inform the casino operator or the person for the time being in charge of the casino as soon as practicable.

S. 71(4) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 86).

(5) Nothing in this section affects any power a police officer has by law to enter any part of a casino.

(6) A function of the Commission under this section may be performed by any commissioner.

S. 71(6) inserted by No. 114/2003 s. 12.1.2 (Sch. 5 item 87).

72. Exclusion orders

(1) The Commission or a casino operator or the person for the time being in charge of a casino, may, by order given to a person orally or in writing, prohibit the person from entering or remaining in the casino.

S. 72(1) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(a)).

(1A) An oral order lapses after 14 days.

S. 72(1A) inserted by No. 17/1996 s. 30.

(2) If a person is given an oral order and the person requires the order to be given in writing, the oral order is suspended while the order is put in writing (but only if the person remains available in the casino to be given the written order).

S. 72(2A) inserted by No. 36/1994 s. 10, amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(a)).

(2A) The Commission or a casino operator may give a written order under this section to a person, on the voluntary application of the person, prohibiting the person from entering or remaining in a casino.

S. 72(2B) inserted by No. 36/1994 s. 10, amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(b)).

(2B) An application under sub-section (2A) must be in writing and signed by the applicant in the presence of a person authorised by the Commission to witness such an application.

S. 72(3) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 88(c)).

(3) As soon as practicable after a casino operator gives a written order under this section, the operator must cause a copy of the order to be given to the Commission.

Penalty: 50 penalty units.

(4) This section does not authorise the exclusion from the casino of an inspector or other authorised person, or a police officer.

S. 72(5) inserted by No. 114/2003 s. 12.1.2 (Sch. 5 item 89).

(5) A function of the Commission under this section may be performed by any commissioner.

S. 73 amended by No. 36/1994 s. 11, substituted by No. 114/2003 s. 12.1.2 (Sch. 5 item 90).

73. Appeal to Commission

(1) If a written order under section 72 prohibiting the person from entering or remaining in a casino is made by—

(a) a single commissioner; or

(b) a casino operator; or

S. 74 substituted by No. 38/2002 s. 10.

74. Exclusion orders by Chief Commissioner of Police

S. 74(1) amended by No. 55/2005 s. 8(1)(a)(b).

(1) The Chief Commissioner of Police may, if he or she considers it necessary in the public interest, by written order given to a person, prohibit the person from entering or remaining in a casino or the casino complex.

S. 74(1A) inserted by No. 55/2005 s. 8(2).

(1A) An order under sub-section (1) made in respect of the casino complex must include a copy of the plan lodged in the Central Plan Office of the Department of Sustainability and Environment and numbered LEGL./05–141.

(2) As soon as practicable after making an exclusion order, the Chief Commissioner of Police must—

S. 74(2)(a) amended by No. 114/2003 s. 12.1.2 (Sch. 5 item 91).

(a) give a copy of the order to the casino operator and the Commission and, if practicable, make available to the casino operator a photograph of the person who is the subject of the order; and

(b) notify each interstate Chief Commissioner of the making of the order.

(3) For the avoidance of doubt, an exclusion order given under this section is not subject to appeal under section 73.

75. Duration of exclusion orders

(1) An exclusion order remains in force in respect of a person unless and until it is revoked by the person who gave the order.

(2) An exclusion order given by a person for the time being in charge of a casino may be revoked by any other person who is for the time being in charge of the casino or by the casino operator.

77. Excluded person not to enter casino or casino complex

S. 77 amended by No. 38/2002 s. 12(3), substituted by No. 55/2005 s. 10.

(1) A person the subject of an exclusion order under section 72 relating to a casino must not enter or remain in the casino.

Penalty: 20 penalty units.

(2) A person the subject of an exclusion order under section 74 relating to a casino or the casino complex must not enter, or remain in, the casino or casino complex.

Penalty: 20 penalty units.

(3) A person the subject of an interstate exclusion order must not enter or remain in a casino.

Penalty: 20 penalty units.

77A. Proceedings against certain excluded persons

S. 77A inserted by No. 55/2005 s. 11.

Despite section 10.5.31 of the **Gambling Regulation Act 2003**, a proceeding for an offence against section 77(2) or (3) may only be brought by a member of the police force.

78. Removal of excluded persons from casino

(1) This section applies to the following persons in a casino—

(a) the person for the time being in charge of the casino;

(b) an agent of the casino operator;

(c) a casino employee.

(2) A person to whom this section applies who reasonably believes that a person the subject of an exclusion order under section 72 is in the casino, must notify an inspector as soon as practicable.

S. 78(2) amended by Nos 38/2002 s. 12(4), 55/2005 s. 12(1)(a)–(c).

Penalty: 20 penalty units.

(3) The inspector must remove the person from the casino or cause the person to be removed from the casino.

S. 78(4) amended by No. 33/2004 s. 208(1).

(4) It is lawful for a person to whom this section applies, using no more force than is reasonably necessary—

S. 78(4)(a) amended by Nos 38/2002 s. 12(4), 55/2005 s. 12(2).

(a) to prevent a person the subject of an exclusion order under section 72 from entering the casino; and

(b) to remove such a person from the casino or cause such a person to be removed from the casino—

but nothing in this section authorises a person to do anything in contravention of the **Private Security Act 2004**.

S. 78AA inserted by No. 55/2005 s. 13.

78AA. Notification requirements for exclusion orders made under section 74

(1) This section applies to the following persons in a casino—

(a) the person for the time being in charge of the casino;

(b) an agent of the casino operator;

(c) a casino employee.

(2) A person to whom this section applies who reasonably believes that a person the subject of an exclusion order under section 74 or an interstate exclusion order is in the casino, must notify a member of the police force as soon as practicable.

Penalty: 20 penalty units.

S. 78B inserted by No. 114/2003 s. 12.1.2 (Sch. 5 item 94).

78B. Forfeiture of winnings

(1) This section applies to a person who is—

(a) subject to an exclusion order; or

(b) subject to an interstate exclusion order; or

(c) a minor.

(2) If a person to whom this section applies enters or remains in a casino in contravention of this Act, all winnings (including linked jackpots) paid or payable to the person in respect of gaming on gaming machines or playing any game approved under section 60 in the casino—

(a) are forfeited to the State; and

(b) must be paid to the Commission for payment into the Community Support Fund under the **Gambling Regulation Act 2003**.

(3) If winnings referred to in sub-section (2) comprise or include a non-monetary prize, the casino operator must pay the value of that prize to the Commission for payment into the Community Support Fund under the **Gambling Regulation Act 2003**.

(4) In determining the value of a non-monetary prize for the purposes of sub-section (3), any amount of GST payable in respect of the supply to which the prize relates is to be taken into account.

(5) Any dispute between a person to whom this section applies and a casino operator as to the amount of winnings forfeited under this section must be investigated and determined by an inspector.