

Casino Control and Other Legislation Amendment Bill 2022

Statement of Compatibility

FOR

Amendments to be moved during consideration in detail by the Honourable Shannon Fentiman MP

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (the HR Act), I, the Honourable Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to amendments to be moved during consideration in detail (ACiDs) of the Casino Control and Other Legislation Amendment Bill 2022 (the Bill).

In my opinion, the ACiDs are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The objectives of the Bill are to:

- ensure casino integrity and modernise gambling legislation;
- introduce a framework for wagering on simulated events;
- extend New Year's Eve gaming hours; and
- introduce a cross-border recognition scheme for charitable fundraising.

In relation to casino integrity, the Bill achieves its objectives by amending the *Casino Control Act 1982* (Casino Control Act) to implement a range of reforms including imposing a duty to cooperate on casino entities (i.e. casino licensees, casino lessees, and casino operators under a casino management agreement), introducing the ability to direct a casino entity to engage and pay for a qualified external adviser, and providing for a financial penalty as a form of disciplinary action, amongst other matters.

Amendments during consideration in detail (ACiDs)

An independent External Review of the Queensland casino operations of The Star Entertainment Group Limited was established on 30 June 2022 and led by the Honourable Robert Gotterson AO KC (Gotterson Review). The Gotterson Review was established following allegations of money laundering, organised crime, and other integrity issues at Star Group casinos.

The report of the Gotterson Review was released publicly on 6 October 2022. The report concluded that Treasury Brisbane and The Star Gold Coast have been operated by their licensees (which are Star Group subsidiaries) in a way that is inconsistent with the objectives of the Casino Control Act, and that a finding of unsuitability in relation to the licensees of The Star's Queensland casinos appears open.

In his report, Mr Gotterson refers to the ability of other jurisdictions (namely New South Wales and Victoria) to appoint a special manager to oversee the affairs of casino entities, at the cost of the casino entity. The primary objective of the ACiDs is to provide Queensland with a similar ability. A special manager will assist in the orderly management of a finding of unsuitability, for example by overseeing any continuing casino operations of the casino entity and monitoring a casino entity's implementation of an approved remediation plan.

The ACiDs are also intended to ensure the State is not liable to pay compensation as a result of regulatory action taken in relation to casinos, having regard to Mr Gotterson's view that the proper regulation of casinos demands that the State be free to impose reasonable controls on the operations of casinos, and to adjust those controls as circumstances demand and in order to protect the public interest.

The ACiDs also increase the maximum disciplinary penalty of \$50 million, to be inserted in new subsection 31(12)(b)(iv) of the Casino Control Act by clause 9(9) of the Bill, to \$100 million in line with the penalty available in New South Wales and Victoria.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

The ACiD to increase the maximum disciplinary penalty to \$100 million only affects corporate casino entities, which are not afforded human rights under HR Act.

The ACiD that ensures the State is not liable to pay compensation for taking regulatory action may limit the ability for relevant employees (including casino employees, and employees of a casino associate) or an individual associate (or former associate) to seek damages from the State. The amendment potentially engages the right to a fair hearing. This is discussed in more detail below.

The ACiDs provide the special manager with the same information gathering powers as those granted to external advisers under proposed section 91AA of the Casino Control Act (to be inserted by clause 29 of the Bill).

An external adviser will investigate casino-related matters as required by the Minister. A special manager, as proposed in the ACiDs, will be responsible for monitoring the affairs of a casino entity, ensuring the entity has an effective plan for remediation, and reporting to the Minister and chief executive about the entity's remediation progress. Thus, a special manager has a similar requirement for information, albeit for different purposes, to an external adviser.

Replicating the information-gathering power of an external adviser for a special manager will give special managers access to a broad range of information (including otherwise confidential information protected by legal professional privilege) which may be relevant to individuals involved in casino operations, such as directors, executives, and other employees. This has

implications for the right to privacy, the right to a fair hearing, and rights in criminal proceedings protected under the HR Act.

An analysis follows below, however the human rights limitations are justified on much the same basis as clause 29 of the Bill (which inserts section 91AA dealing with the appointment of an external adviser).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Special manager information gathering powers

(a) the nature of the right

The following rights are not engaged by the creation of the special manager role per se, however may be engaged if the special manager exercises powers to obtain information from casino entities that concerns individuals, especially if it is information covered by legal professional privilege.

Right to privacy

The right to privacy in section 25(a) of the HR Act protects against interferences with a person's privacy, family, home, or correspondence. It covers personal information and data collection as well as intrusions into activities that are related to a person's autonomy. However, an interference with the right may be justified if it is not arbitrary (that is, as long as it is not capricious, unpredictable, unjust, unreasonable, and disproportionate).

Right to a fair hearing

Under the right to a fair hearing enshrined in section 31 of the HR Act, parties involved in legal proceedings are entitled to have the proceeding decided by a competent, independent, and impartial court or tribunal after a fair and public hearing. The right protects procedural fairness, which is dependent on the facts and circumstances of each case. The ability to seek legal advice with regards to civil obligations or criminal liability may be considered an aspect of the fair hearing right.

Rights in criminal proceedings

Section 32 of the HR Act provides minimum guarantees in criminal trials, including the right of a person to have adequate time and facilities to communicate with a lawyer or advisor of their choice (subsection 32(2)(b)), and to defend themselves personally or through their chosen legal representative (subsection 32(2)(d)). A person's right not to be compelled to testify against themselves or confess guilt is also protected (subsection 32(2)(k)).

These minimum guarantees relate to the right to a fair hearing. The scope of the right against incrimination is likely to include the right not to be compelled to answer questions, or produce documents, or things, if to do so might tend to incriminate the person in later proceedings.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Legal professional privilege is an important safeguard in democratic societies and is a vital source of protection of the human right to a fair trial, including in criminal proceedings. As legal advice subject to privilege may relate to the acts, omissions, or knowledge of individuals, it also relevant to the preservation of personal privacy.

Casinos, like any other business, must be permitted to seek legal advice with respect to their regulatory obligations and other potential liabilities, including criminal liabilities. Similarly, individuals that hold key roles in casino management and operations must also retain this right. There is a risk that such persons may be practically deprived of the right not only to privacy, but to procedural fairness, if confidential material is required to be provided to a person or entity, like a special manager, with reporting obligations to the executive government.

In order to ensure the orderly management of a casino should there be a finding of unsuitability, the ACiDs provide the special manager with broad powers to monitor the affairs of the relevant casino entity. The aim of appointing a special manager in most cases will be the remediation of an unsuitable casino entity. It is vital for the special manager to have access to all information relevant to the performance of their functions, including legally privileged information, to achieve this objective.

Ensuring that casinos are operated properly in turn supports the objectives of the Casino Control Act to ensure that, on balance, casino gambling benefits the State and the community as a whole (section 3). The limitation on the right to privacy, right to a fair hearing, and rights in criminal proceedings (if they are engaged) is therefore consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The purpose of the limitation is to ensure that a special manager has access to all information relevant to the performance of their functions, in pursuit of the objective of remediation of the relevant casino entity and the conduct of casino operations.

In this regard, it may be noted that on 31 August 2022, the Review of The Star Pty Ltd (Inquiry under section 143 and 143A of the *Casino Control Act* 1992 (NSW) (Bell Review) released its report which concluded that licensee of The Star Sydney was unsuitable to hold that licence. The Bell Review found that there was *an unsatisfactory understanding of the circumstances in which legal professional privilege should be claimed among Star Entertainment's most senior in-house lawyers... Inappropriate claims for privilege increase the likelihood that documents will not be produced to regulators and others, when they should instead be disclosed* (at [101]).

The special manager provisions inserted into the Bill will prevent questionable claims of legal professional privilege from being used to avoid providing a special manager with information relevant to its functions.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There is no less restrictive way to achieve the purpose of ensuring a duly appointed special manager has access to all information reasonably required to perform their functions, including information subject to legal professional privilege.

The limitation on the right to privacy, right to a fair hearing, and rights in criminal proceedings that occurs as a result is suitably moderated by a further clarification that legal professional privilege continues to attach to any privileged documents provided to special manager.

It may also be noted that section 88A of the Casino Control Act provides a protection against self-incrimination is unaffected by the ACiDs.

These moderating factors ensure the limitation on human rights is reasonable and proportionate, as it extends no further than is necessary for special manager to properly perform their functions.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

A special manager may only be appointed as a disciplinary action against a casino entity. In many cases, disciplinary action may coincide with a finding that the entity is unsuitable to be connected with the management or operation of the relevant casino.

It is considered proportionate and reasonable to permit some limitations on human rights to assist achieving the broader aim of ensuring casinos are operated properly and by suitable entities. It is also desirable to have additional disciplinary actions available, such as the appointment of a special manager, that may be taken when the grounds for disciplinary action are sufficiently serious, but a pathway back to suitability is considered achievable and consistent with the objects of the Casino Control Act.

On balance, the aim of ensuring casino operations in Queensland are conducted properly for the overall benefit of the community outweighs the breaches of privacy and rights related to procedural fairness that may arise if a duly appointed special manager exercises information gathering powers, including over legally privileged information.

(f) any other relevant factors

The report of the Gotterson Review noted: *other State legislatures have considered it prudent to make provision of the appointment of a special manager. One has been appointed in Victoria. Mr Stephen O'Bryan KC was appointed as Special Manager for the Melbourne Casino operator, pursuant to s 36B of the Casino Control Act 1991 (Vic) in January 2022. He is empowered to give directions to the casino operator to take any action or to refrain from taking any action. Certain thresholds exist before this can be done* (at [615]).

It should be noted that the special manager provisions enacted in Victoria provide that a person is not excused from providing information to the special manager where the information is the subject of legal professional privilege (section 36F(6) of the Victorian Casino Control Act). The Victorian legislation goes further than what is proposed for Queensland to provide that a person is not exempt from providing information to the special manager even where the information might tend to incriminate them (section 36F(5)).

The Victorian provisions described above were considered to engage sections 24 and 25 of the *Charter of Human Rights and Responsibilities Act 2006* (respectively the right to a fair hearing and rights in criminal proceedings) in the statement of compatibility accompanying the *Casino and Gambling Legislation Amendment Act 2021* (Vic).

With regards to legal professional privilege, the Victorian provisions were considered to be reasonable and demonstrably justified on the basis that providing privileged information to the special manager does not waive legal privilege (section 36F(6)), a person may notify the special manager about the potential for self-incrimination (section 36F(2)), and a use immunity applies to ensure that material given to the special manager is inadmissible in criminal proceedings against a person (section 36F(5)). The current ACiDs also ensure privilege is not waived and persons are protected against self-incrimination.

The Victorian human rights statement of compatibility concluded that the amendments were proportionate and justified because they provided for information gathering powers needed to enable the special manager to effectively discharge its functions and duties.

It is considered appropriate to enact special manager provisions largely consistent with other Australian jurisdictions that are also dealing with casino integrity issues. It is also considered that the waiver of legal professional privilege introduced by the ACiDs is justified on similar terms as those provided to the Victorian legislature.

No compensation for regulatory action taken by the State

(a) the nature of the right

The nature of the right to a fair hearing is outlined above. On a broad reading the right may also encompass the right of all persons to equal standing before courts and tribunals and access to the courts of the State.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Depending on the regulatory action taken by the State, the practical effect of the no compensation provision is to limit the court proceedings a casino employee or an individual associate may be able to initiate.

The new provision actions comments made by the Gotterson Review in its report that the State legislature ought not be fettered in its capacity to impose controls upon casinos in Queensland (at [629]). The breadth of the application of the no compensation provision is necessary to ensure this intent is achieved.

In this regard, it may be noted that the operation of a casino is a privilege rather than a right. This is due to the risks posed by casino gambling, including the risk of criminal infiltration and the risk of unsafe gambling, which are reflected in the objects of the Casino Control Act related to probity and minimising the potential risk of gambling harm (sections 3(2)(b)-(c)). Based on the findings of recent casino inquiries, including the Gotterson Review, these risks have manifested in casinos throughout Australia.

In that context, it is considered reasonable and demonstrably justified to restrict even an individual employee or associate's potential right to compensation for regulatory actions taken by the State.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation helps achieve the purpose by providing a clear legislative statement of the power of the State to take action to ensure the proper regulation of Queensland casinos.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There is no less restrictive way to ensure the State has an unfettered ability to regulate casinos for the benefit of the State and the community as a whole, in accordance with the objects of the Casino Control Act (section 3).

It may be noted that regulatory actions for which the State is not liable are limited in scope to actions that are relevant to casino regulation, for instance amendments to the Casino Control Act or another law that relates to casino regulation, and the appointment of a special manager.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The primary objective of the State in regulating casinos must be to ensure that casinos operate for the overall benefit of all Queenslanders, and that casinos are operated fairly, remain free from criminal infiltration, and that potential gambling harms are minimised.

While the rights of relevant employees and casino associates are important, these considerations should not be permitted to hinder the State in the achievement of the overarching objectives of casino regulation. This is especially the case where recent inquiries into casinos in New South Wales, Victoria, Western Australia and Queensland have uncovered serious casino integrity failures and highlighted the need for stronger casino regulation.

On balance, the amendments are considered to be reasonable and demonstrably justified, consistent with the values of a free and democratic society.

(f) any other relevant factors

The provision which excludes the State from liability for certain regulatory actions is similar to section 7B of the *Casino (Management Agreement) Act 1993* (Vic) (Casino Management Act) that was introduced by the *Casino and Casino and Gambling Legislation Amendment Act 2021* (Vic) (Amendment Act) following an inquiry into the Melbourne Casino Operator. That provision limits the liability of the State to any person as a result of taking a range of actions, including the appointment of a special manager.

In the statement of compatibility for the Amendment Act it was considered that the right to a fair hearing protects procedural fairness. As section 7B of the Casino Management Act affects an individual's substantive right rather than the procedure by which the right is determined, the

right to a fair hearing (protected under section 24 of the Victorian Charter of human rights) was not considered to be engaged.

It may be open to conclude that the ACiD does not engage the right to a fair hearing on the same basis.

Conclusion

In my opinion, the amendments to be moved during consideration in detail of the Bill are compatible with human rights under the HR Act because they either do not limit a human right or limit a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HR Act.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice,
Minister for Women and Minister for the Prevention of
Domestic and Family Violence

© The State of Queensland 2022