

Navigating 'Play to Earn' and NFTs Within Malaysia's Legal Framework

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1. Introduction

The landscape of digital gaming, especially with the 'Play to Earn' models and Non-Fungible Tokens (NFTs) in Malaysia, presents a unique set of challenges and opportunities for businesses. The integration of these models into the gaming industry could potentially trigger the provisions of Malaysia's existing online gambling laws, such as the Common Gaming Houses Act 1953, Pool Betting Act 1967, Lotteries Act 1952 and the Betting Act 1953. These laws currently do not explicitly address the nuances of 'Play to Earn' and NFTs, leading to a legal grey area.



The Malaysian government, acknowledging the evolution of digital gaming and its potential overlap with gambling activities, has repeatedly expressed the intention to overhaul these legislations. Earlier last year, the Prime Minister, Datuk Seri Anwar Ibrahim, indicated that the Ministry of Finance is actively reviewing these gaming legislations. The objective is to introduce amendments that will provide the government with a more comprehensive framework to enforce and regulate licensed gambling activities and online gambling, covering trends like 'Play to Earn' and NFTs within the digital gaming sector.

2. Gambling law

Until now, gambling in Malaysia is deemed legal only if a license or permit is granted by the Unit Kawalan Perjudian (Betting Control Unit) of the Ministry of Finance. Games involving an element of chance are predominantly controlled by the Malaysian Common Gaming Houses Act 1953 ("CGHA") and the Lotteries Act 1952 ("LA").

The CGHA defines "gaming" as the playing of any game of chance, or mixed chance and skill, for money or money's worth. Similarly, "lottery" is defined by the LA to include any game, method, or device whereby money or money's worth is distributed or allotted in any manner dependent upon chance or lot. In short, games of chances and games of mixed chances and skill are prohibited unless they have the requisite licenses issued by the Ministry of Finance.

However, online gambling in Malaysia currently resides in a grey area. The CGHA has not been updated to include explicit provisions to define and regulate online gambling. Recent court cases, notably *Public Prosecutor v Multi Electrical Supply & Services & Others* [2022] 5 CLJ 113, even suggest that online gambling may not be explicitly prohibited by the law. In that case, the Court concludes Section 4B of CGHA cannot be legitimately used to establish the offence of online gambling. The language used in those provisions is so plain and clear that they are incapable of conveying any further meaning to cover online gambling.

3. Penalties

Violations of gambling-related laws can lead to severe punishments. For instance, operating common gaming houses, as covered under Section 4 of the CGHA, is considered a significant offence. On conviction, individuals are liable to a fine of not less than five thousand ringgit and not more than fifty thousand ringgit. In addition to these monetary penalties, they can also face imprisonment for a term not exceeding three years. The seriousness of the offence is further underscored by an additional fine ranging between five thousand to fifty thousand ringgit for every gaming machine seized in connection to the breach.

Furthermore, convicted individuals for dealing with gaming machines, outlined in Section 4B of CGHA, can expect to pay a fine of not less than ten thousand ringgit and not more than one hundred thousand ringgit for every gaming machine seized. Moreover, they can also be punished with imprisonment for a term not exceeding five years.

Possessing machines used for promoting a lottery, as detailed in Section 10A of the LA, is another offence with significant penalties. Upon conviction, individuals are liable to imprisonment for a term not exceeding three years, a fine not exceeding ten thousand ringgit or both.

4. “Play to earn” Model

Navigating the world of online gaming, particularly the increasingly popular "Play to Earn" model, involves understanding complex legislation and finding ways to mitigate associated legal risks. The "Play to Earn" model allows gamers to earn real-world value through their online activities. However, to avoid falling under Malaysia's legal definition of gambling, the key lies in minimizing the element of chance within these games.

Models such as Stepn, where rewards are earned through movement or physical activity rather than games of chance, provide an interesting blueprint. This framework detaches the potential to earn from random outcomes and instead directly ties it to the user's activity level. This demonstrates how online gaming can potentially circumvent the gambling law by significantly reducing the element of chance, thereby shifting the model away from gambling and into a realm of reward-based activity.

5. NFTs in Online Gaming

(1) How NFTs are regulated?

The Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 classifies both "Digital Currency" and "Digital Tokens" identically under Malaysian law.

Under the Order, a Digital Currency is a type of security recorded on a digital ledger and can be used to buy goods and services, just like physical money, except it is not backed by any central authority. On the other hand, Digital Tokens means a digital representation which is recorded on a distributed digital ledger. However, unlike digital currency, digital tokens may not necessarily function as a medium of exchange in the same way as traditional currency.¹ Some digital tokens, such as non-fungible tokens (NFT), may represent unique assets that have a specific value. In the case of NFTs, they are unique and so cannot be exchanged for one another as each NFT represents a one-of-a-kind asset.

¹ While Digital currency and Digital token may be treated the same legally, these digital assets have fundamental differences. Digital currencies are meant to serve as a medium of exchange, like traditional currency, while digital tokens often represent a value or a utility within a specific ecosystem. As legislation adapts to rapidly developing technologies, these assets could potentially be subject to differentiated legal treatment in the future

An NFT fits the definition of a "digital token" because it is a unique digital item whose ownership and details are securely recorded on a blockchain, a type of distributed digital ledger. Unlike regular digital tokens that can be exchanged on a one-to-one basis like money, each NFT is distinct, making it non-fungible or not interchangeable with others. However, like other digital tokens, NFTs are managed through cryptographic methods to ensure security and authenticity, aligning with the broad definition of a digital token as something digital that is recorded on a ledger, whether it uses cryptographic security or not.

Thus, NFTs fall under the definition of "Digital Tokens" under the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019. As a result, they will fall within the purview of the Capital Markets and Services Act 2007 and being regulated as securities. This classification brings NFTs under a comprehensive legal framework, imposing specific regulations on their purchase and sale, empowers the Securities Commission to scrutinize NFT transactions and requires traders to maintain a register of NFTs in which they have interests.

However, this classification of NFTs as securities under this legal framework has an area of ambiguity, particularly in relations to Section 3(2)(d) of the Order. This subsection states that for NFTs (along with other digital tokens and digital currencies) to be classified as securities, there must be an expectation of a return from their trading, conversion, redemption, or appreciation. Therefore, if an NFT is acquired without any anticipation of financial gain, it challenges its classification as a security.

In online gaming, NFTs serve as digital assets that can represent a wide display of in-game items, such as exclusive skins, characters, weapons, and virtual land, among others. The primary intention behind purchasing these NFTs is to enhance the gaming experience, access unique content, or personalize one's in-game presence. For instance, a player might buy an NFT to acquire a rare skin for their character, without the anticipation of selling it for a profit but to distinguish themselves within the game or to enjoy exclusive benefits that come with the ownership of that NFT.

Moreover, the mindset of game users when acquiring NFTs often revolves around the pursuit of enjoyment or completing specific in-game objectives/missions. These motivations are distinct from the investment-driven mentality that characterizes traditional securities transactions. For example, a player might invest in an NFT that grants them ownership of virtual land within a game not because they expect the land's value to appreciate, but because it allows them to build, customize, and control aspects of the game environment, thereby enhancing their personal gaming experience and enjoyment.

Another aspect to consider is the social and competitive elements of online gaming, which often influence NFT transactions. Players may acquire NFTs to participate in exclusive events, compete in tournaments, or simply to showcase their collection to peers within the game. These actions are driven by the desire for social recognition, competitive advantage, or personal satisfaction, rather than the expectation of a financial return.

Thus, while NFTs in online games can be traded and may appreciate in value, their primary purpose and the context in which they are acquired and used suggest a departure from the traditional securities model. The intrinsic value of gaming NFTs to players underscores a fundamental difference in the nature and expectation associated with NFT purchase, challenging their classification as securities under regulatory frameworks that emphasize financial return as a defining element.

(2) Does the use of NFTs violate the Gambling law?

The introduction of Non-Fungible Tokens (NFTs) to the online gaming scene has raised further challenges in the context of gambling law. NFTs are unique digital assets stored on a blockchain. When incorporated into gaming platforms, they present opportunities and complex legal considerations. Two key concepts within this are NFT Gacha and NFT Mint/Breed.

The NFT Gacha model mirrors the mechanics of Gacha games, where in-game currency is spent to receive a random item. When applied to NFTs, users spend money to receive a random NFT, which can vary in rarity and value. This element of chance and randomness gives it the "Gacha" label. However, this can raise gambling concerns, particularly if there's a significant difference in earning potential based on rarity. This could make the act of buying NFTs more akin to a game of chance, where users speculate on the 'gain or loss' outcome based on the rarity of the NFT they purchase.

On the other hand, the NFT Mint/Breed model refers to the process of creating new NFTs ("minting") or combining existing ones to generate a new unique NFT ("breeding"). This process might also involve an element of chance, particularly when determining the traits of the new NFT. Although there is no traditional "win or lose" condition, the element of chance could potentially attract regulatory scrutiny under Malaysian law.

6. Conclusion

In conclusion, the legal landscape for online gambling in Malaysia is intricate and in a state of flux. Businesses in the online gaming industry must ensure compliance with all existing laws and regulations, especially gambling law to avoid legal pitfalls and continue to offer enjoyable gaming experiences.

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Before returning to Malaysia, he worked at a London based charity where he provides legal advice, case preparation and advocacy in social security tribunal cases. He also did some employment tribunal cases when he was there.

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