

Submission to the Review of the *Interactive Gambling Act 2001*

Introduction

The Australian Casino Association appreciates the opportunity to respond to the call for submissions issued by the Department of Communications, Information Technology and the Arts, into the review of the *Interactive Gambling Act* ("IGA"). The Australian Casino Association represents the combined interests of the Australian casino industry and has been in existence since 1992. There are thirteen casinos in Australia and almost all of these casinos have either a direct interest or an indirect interest in the interactive gambling issue.

Achieving the Aims of the IGA - Regulation versus Prohibition

The overall aim of the *Interactive Gambling Act* ("IGA") is "*to limit potential problem gambling in Australia associated with interactive gambling services*". (Issues Paper, p 3). This Association fully supports measures to combat problem gambling but remains unpersuaded that the prohibition of online gaming put in place by the IGA is the most constructive response to this challenge.

The arguments for and against the regulation and prohibition of online gambling were canvassed at length in both the Productivity Commission's *Report on Australia's Gambling Industries* and in the Senate Committee's "Netbets" Report. Both concluded regulation delivered better community outcomes than prohibition. The Association remains of the view that regulation continues to offer the more effective means of managing problem gambling than the partial prohibition introduced by the IGA.

Background Information – The Growth of Interactive Services

Broadly speaking, the global online gambling industry has not experienced the smooth growth path predicted by commentators some two years ago.

While it is difficult to ascribe a degree of importance to any particular factor, the decisions of several US banks and credit card companies to disallow the

use of those cards for online gambling has reportedly had a significant effect on turnover from the US. This has led financial commentators to lower the expected rate of growth for online gambling.

At the same time, some Asian countries (eg, Hong Kong) and European countries (eg, Denmark) have moved to strengthen their laws to restrict access to foreign online gambling, or to better enforce their laws. The extra-territorial application of laws remains a challenge.

However, other developments have helped to move online gambling more into the mainstream. For example, the last two years has seen traditional gambling providers increasingly change the method of delivery of their products from the offline to online delivery channels. This is especially true of European providers, though some significant US operators have established an online facility

At the same time, attention is being given to access channels beyond the PC/internet connection such as “m-commerce” (the use of mobile phones), along with trials of interactive television. In the United Kingdom, BskyB has expanded its iTV gaming services.

Another feature worthy of comment is the emergence of new gambling styles that are enjoying growing consumer support – examples being (1) multi-player poker sites and (2) betting exchanges, facilitating peer-to-peer betting (“Betfair”).

Some countries have announced or adopted pro-active policies, two notable examples being the United Kingdom and Ireland. The United Kingdom is soon to release a detailed regulatory framework for the regulation of interactive gaming.

Overall, the most important development relevant to this review has been the emergence of regulation over prohibition as the preferred policy position.

Except for the United States, the bulk of the European and other developed economies have adopted a regulatory foundation. Their views over permitted gambling vary, as do their preferred controls. Increasingly, the contemporary policy debate revolves around taxation, cross-border betting controls and player protection measures – that is “how” online gambling should be controlled rather than “if”.

Even in the United States, where the prohibitionist stance has been most stridently promoted (though the Kyl and Leach Bills have yet to pass into law), a Bill has been introduced seeking an examination of regulation. The Conyers Bill, H.R. 1223, would allow the States to licence and regulate internet

gambling, subject to U.S. consumer protection and criminal laws. The bill would create a five-member federal gaming commission, appointed by Congress, to study Internet gambling for one year and recommend the best methods of regulating it.

In addition to legislative changes, there have also been several Court decisions that have greater or lesser implications for online gambling.

On 27 January 2003, the district court in Arnhem, the Netherlands, handed down a decision against the UK bookmaker, Ladbrokes. The court decided that Ladbrokes, by accepting bets from Dutch residents at its UK site was in breach of the Dutch law that reserves the right to conduct sports-betting to the Dutch firm, De Lotto. The court made an order requiring Ladbrokes to terminate the accounts of any Dutch clients with its UK website. Ladbrokes is reported to have appealed this decision which, if sustained, would have significant implications for cross-border betting.

It is becoming increasingly questionable whether such action is inspired by consumer protection and crime prevention motives, or whether it is inspired by the wish to grant a *de facto* monopoly to a national gambling operator, thereby ensuring income from gambling activities is kept within a State's borders. In this regard, a recent development in the European Union may be noted.

In March 2003, the German EU Court of Justice's Advocate General, Siegbert Alber, issued a significant opinion to the effect that the Italian prohibition on the taking of cross-border bets is contrary to the EU principle of freedom to provide services. In the opinion of the Advocate General, the Italian provisions do not satisfy those requirements because, *inter alia*, they are framed in an openly discriminatory manner and are not adequate for the protection of consumers and social order. The claimed objectives of limiting the level of gambling or protecting the social order which are not (or are no longer) pursued in reality, are not sufficient to justify impeding the freedom to provide services duly authorized in other Member States. In the opinion of the Advocate General, the feared negative financial consequences for the economies of some states arising out of a relative opening up of Member States' markets for games of chance also cannot serve as justification.

It is noted that the European Court of Justice is not bound by this view and is not expected to rule on the case for some months. Even so, this has significant implications for the sensible regulation of cross-border betting and for licensing new operators in particular jurisdictions. Should this view be accepted, it is possible the laws of many European countries may need to be reviewed to ensure consistency with EU laws.

It is suggested that a policy position of “equivalent treatment” points the way to a sensible and workable scheme for regulation with both national and international application. In Australian terms, there would be a “mutual recognition” of the licensing undertaken and the controls imposed by another jurisdiction.

Finally, it is helpful to note briefly the High Court’s decision in Dow Jones v Gutnick, a decision for which a wider application has been claimed than perhaps the actual decision supports. The decision was to the effect that in the context of defamation law, “publishing” occurs where the material is received. The argument has been raised by some commentators that this means offshore and interstate gambling operators are in breach of the anti-publishing laws of a State simply by virtue of their websites being accessible in that State.

It is not clear that the High Court will be prepared to give such a wide legal application to the decision, and in the Australian context, there are issues to do with the freedom of interstate trade and commerce contained in the Australian Constitution. It is also unclear how such an open definition of “advertising” or “publishing” would operate in other areas of the law or, at a practical level, stop the State’s own operators from being open to a similar claim. In short, if this wide interpretation of “publishing” was accepted, everyone would simultaneously be in breach of everyone else’s law. The decision is understood to be under appeal to the United Nations.

To sum up, in the Association’s view, the key points relevant to this review that emerge from recent developments are:-

- there remains significant and sustained consumer demand for online gambling, though the projected rate of growth is less than that put forward two years ago, and
- the predominant policy position that is emerging internationally is regulation over prohibition.

The Social and Commercial Impact of Interactive Services

The principal social concern the IGA is intended to address is that interactive gambling provides a “quantum leap” in access and an increased risk of problem gambling.

The Association remains unpersuaded that a prohibitionist stance will deliver the best social outcome, when the prohibition is ineffective and its main result is to put gambling based on the most “player-friendly” technical platform beyond the reach of Australian players.

One of the most important distinctions between interactive and non-interactive technology is that interactive technology can be better used to promote responsible gambling practices. Examples of these practices, designed to both improve consumer awareness and to change the dynamics of gambling, have been implemented by Lasseters and were cited with approval by the Productivity Commission.

It is apparent that some of the new strategies can only be delivered on an interactive platform. Enabling individuals to set loss limits, bets limits, deposit limits – even effective self-exclusion mechanisms – are achievable interactively but almost impossible to cost-effectively implement in the offline world.

At a time when increasing attention is being given to technical methods of mitigating the extent of problem gambling, interactive technology allows new ideas to be trialled or implemented more quickly and cheaply than with their terrestrial equivalents.

The decision to put these technical advantages beyond the reach of Australians would be understandable if the prohibition was effective. But it isn't. It appears the offence provision is largely unenforceable and has done nothing to stop access by Australians to almost every gambling site in the world. This is to be expected - access is a fact of internet life.

The sensible outcome would be to exempt online gaming operations that meet the Australian regulatory and player-protection standards as set out in the AUS Model.

Apart from putting aside the technical tools to better combat problem gambling, the IGA also has the result that Australia has little or no reliable data about the extent of online gambling and any problem associated with it. Australian operators are unable to offer hard data about the level of Australian online gaming, and this information is now less likely to be accurately volunteered in community surveys.

The Association is unable to offer any useful data on global compliance with the offence provisions, but is unaware of any discernable reduction in sites prepared to accept Australian registrations. The Association is also unable to provide any evidence of current online gambling trends by Australians and the extent to which it has been affected by the passage of the IGA. Based on earlier ABS surveys, the ACA would be surprised to see a marked increase in the level of online gambling; equally, it would be surprised to see a marked decrease.

But when the principal concern is said to be the welfare of problem gamblers, the Association is unable to see merit in a scheme that encourages Australian interactive gamblers to gamble offshore on sites offering lesser controls and lower levels of accountability than our own.

A downstream outcome of the IGA is the removal of a revenue stream to fund problem gambling and counselling services. Any gamblers who develop a problem with online gambling will be a cost payable by Australia, but revenue to meet those costs has been spent overseas.

A final and significant indirect cost is the lessening of Australia's competitive position. Australia's gambling providers are increasingly competing in a global market. Should Australian providers be precluded from using cheaper interactive technology, they will be in no position to compete with their global counterparts. Ultimately, it is the gambling provider that is the "front line" in delivering responsible gambling strategies – something which is impossible if the provider is out of business.

Commercially, the IGA has seen the curtailment of Australian-based investment decisions and development in favour of other countries. As well, several Australian operators have either moved offshore or are now considering their position.

The Operation of the IGA

The Australian Casino Association has challenged above the principles that form the foundation of the IGA. The following comments are made subject to that caveat.

(1) The effect of existing exclusions

The Association has argued above as to why online gaming should be treated in a similar manner to other current "exemptions". Regulation is preferable. On this basis of principle, the ACA supports the current exemptions.

(2) The Offence Provisions and the Complaints Scheme

The Association is unable to see any scope for realistically strengthening the provisions of the Act – the possible penalty \$1.1 million a day for breach, is one of the most severe monetary penalties on the statute books.

A complaint-based regime is the appropriate mechanism for instituting any action under the Act. It accurately reflects community concerns and is cost-effective by comparison with these functions being dedicated to a particular law-enforcement agency. On the anticipated current low levels of Australian

participation in online gambling, more active enforcement of the Act could not be justified on any cost/benefit analysis.

(3) “Dedicated Countries”

The Act contains a provision allowing the Minister to prohibit Australian operators from accepting bets from a designated country.

The Association accepts the point of principle on which this amendment was based, being an equivalence of treatment between the requesting country and Australia.

The Association sees this as being the only basis on which this provision could be maintained. To allow the Minister to designate a country on any basis other than direct equivalence would be to involve the Minister and the Australian Government in what are, at heart, trade disputes.

As averted to by the EU Court of Justice's Advocate General, open economic discrimination is being masked behind stated claims of protecting consumers and the social order. It is difficult to accept an approach supposedly based on consumer protection and social concerns, when a country allows the same form of gambling to be provided to its citizens under similar terms, by other operators. It would be inappropriate to involve the Minister in these kinds of disputes.

It would also be unwise to act in a bi-lateral rather than a multi-lateral manner. The Association is of the view that greater international co-operation is necessary to develop effective long-term controls, and this requires a commitment to regulation.

Technological Developments

The Association is unaware of any technological developments over the past two years which materially alter the policy landscape. There is no technical “silver bullet” allowing either better enforcement of the IGA approach or which renders it completely unworkable. Our understanding is that the observations contained in the Gartner Report, prepared for the previous inquiry, remain valid.

Filtering illegal gambling traffic at the ISP-level remains an impractical option, with the costs far outweighing the benefits.

Feasibility of Regulating Financial Transactions

The Issues Paper outlined two broad options to alter the status of financial transactions associated with illegal interactive gambling.

The first was to render financial agreements for the provision of illegal interactive services to Australians as unenforceable.

The Issues Paper noted the problems arising with agreements made internationally, and the risk that Australian financial institutions may bear the ultimate financial burden of unenforceable agreements.

The Association notes that the laws of almost all of the States and Territories provide that illegal gambling contracts are unenforceable, which supplements the position at common law whereby the courts, as a matter of public policy, will refuse to enforce illegal contracts.

Against these factors, the ACA sees little merit on proceeding with this option.

The second option was to require financial institutions to block credit card transactions related to illegal interactive gambling.

There are costs on the financial institutions in taking pro-active steps to block these transactions, which will fall on all consumers. Some transactions are lawful under the IGA but because there is likely to be a difficulty in identifying legal from illegal transactions, it is probable that banks would disallow credit card usage for all gambling transactions. This is not consistent with the IGA objective.

Furthermore, there are policy risks in promoting this option. Credit cards provide a level of regulatory comfort to ensure that underage players are not permitted to gamble, and to mitigate any identity fraud.

More importantly, though, a strong case has been made that restricting credit card usage would cause more harm than good.

In its comments of 23 September 2002 on the Interim Report on Internet Gambling, the United States General Accounting Office noted that *“banking and gambling regulatory officials did not view internet gambling as particularly susceptible to money laundering, especially when credit cards that create a transaction record ... are used for payment. Industry gaming officials noted that increased blocking of credit card transactions for internet gambling could help promote newer forms of electronic payment methods that may be more susceptible to money laundering.”*

The latter point has been developed by US attorney, Mark Schopper, who has observed that a ban on credit cards would have *“tremendous unintended*

consequences encouraging money laundering.” In his view, the blocking of credit card usage would encourage the growth of e-cash, which is anonymous and leaves no money-trail.

Given the (expected) current low level of online gambling by Australians, it is suggested the costs of any intervention in this area would be disproportionate to the costs.

Overall, the Association sees no sound basis for any intervention in this area.

Process of Consultation

The Australian Casino Association appreciates this opportunity to comment on issues arising with the IGA.

Previous policy development in this area has not been as inclusive as it could have been, with a number of comments being made in the debate that were not accurate and were not tested, but were subsequently accepted by some commentators as being valid.

The ACA offers its assistance to the Department in providing informed comment on proposals that have not been canvassed in the Issues Paper but which arise in course of consultation.