

Changes to Interactive Gambling Regulation? It is Anyone's Bet

Niranjan Arasaratnam and a team of lawyers from the Allens TMT practice group take a look at proposed changes to interactive gambling laws.

The interactive gambling industry will face significant regulatory changes if the Federal Government adopts the recommendations of the Department of Broadband, Communications and the Digital Economy's *Interim Report on the Interactive Gambling Act 2001* (the **Report**).¹

The Interactive Gambling Act 2001 (Cth) (the **Act**) currently prohibits most forms of online gambling. Despite these prohibitions, as many as 30 per cent of Australians over the age of 16 use illegal offshore gambling services, losing an estimated \$1 billion each year.² The online gambling industry is also growing at an estimated rate of between 10 to 20 per cent each year.³

The Report proposes to streamline the Act's enforcement provisions, increase awareness of the Act amongst directors and principals of prohibited IGS services and relevant overseas authorities, and restrict access to prohibited IGS²⁹

Since its release on 29 May 2012, the Report has received mixed responses from industry stakeholders.⁴ The Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, however, appears committed to reforming interactive wagering and gaming. On 29 June 2012 Senator Conroy announced that the Government had agreed with broadcasters to ban the promotion of live betting odds during sports games.⁵ These reforms are expected to come into effect in 2013 and would complement the changes recommended in the Report.

Part 1 and 2 of this article describe the current regime and the key reforms proposed in the Report. Part 3 considers the likely impact of the proposed reforms on various stakeholders and participants in the interactive gambling sector including, gambling and online poker operators, sports wagering operators, sports bodies, broadcasters, search engines, international gambling operators and financial institutions.

If adopted, the recommendations would change how gaming and wagering operators conduct business in Australia, and alter the

obligations on broadcasters, financial institutions, internet service operators (**ISPs**) and search engines.

The Report follows a series of inquiries and reports about the gambling industry, namely the Productivity Commission's Inquiry Report on Gambling in 2010 (the **Productivity Commission's Report**)⁶ and the Second Report of the Parliamentary Select Committee on Gambling Reforms Inquiry into online gambling and gambling advertising (the **Select Committee Report**) in 2011.⁷

As part of the Federal Government's review into interactive gambling, stakeholders have had the opportunity to make submissions on the Report and on the Department of Broadband, Communications and the Digital Economy's *Interactive Gambling Act 2001 Discussion Paper – call for submissions* (the **Discussion Paper**).

The reforms proposed in the Report (and earlier reports) are dependant on implementing legislation being introduced into and passed by Parliament.

PART 1: The Act's Existing Provisions

The Act aims to minimise problem gambling amongst Australians by limiting the provision of online gambling services.⁸ The Act creates numerous offences, key among them, the provision and advertising of prohibited interactive gambling services (**IGS**).

Section 15 of the Act prohibits the provision of prohibited IGS to customers present in Australia. Prohibited IGS include services for betting, conducting lotteries or supplying lottery tickets and services for games of chance and games which are a mixture of chance and skill.⁹

However, the provision does not prohibit:

- telephone betting;
- wagering on horse, harness or greyhound races;
- wagering on sporting events or other events or contingencies;
- online lotteries, provided they are not highly repetitive, instantaneous or frequently drawn;
- gaming services provided to customers in a public place (for example poker machines in a club or casino); or
- services that have a designated broadcasting or data-casting link (for example television shows that involve viewers voting in order to win prizes).¹⁰

1 Department of Broadband, Communications and the Digital Economy (Cth) *Review of the Interactive Gambling Act 2001- Interim report for consultation* (2012) (the **Report**).

2 Department of Broadband, Communications and the Digital Economy (Cth) *Review of the Interactive Gambling Act 2001 Discussion paper – call for submissions* (24 August 2011) (the **Discussion Paper**).

3 Ibid.

4 Submissions received by the Department of Broadband, Communications and the Digital Economy in response to the DBCDE Interim Report are available at: http://www.dbcde.gov.au/broadband/online_gambling/2011_review_of_the_interactive_gambling_act_2001/submissions_received_for_the_iga_review.

5 Minister for Broadband, Communications and the Digital Economy (Cth), 'Government achieves agreement to reduce the promotion of live odds in sports broadcasts' (Media Release, 29 June 2012).

6 Productivity Commission, *Inquiry Report on Gambling (2010)*, Report No 50 (2010).

7 Joint Select Committee on Gambling Reform, Parliament of Australia, *Second Report on Interactive and online gambling and advertising* (2011).

8 Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth).

9 *Interactive Gambling Act 2001* (Cth), ss 4, 5, 6.

10 *Interactive Gambling Act 2001* (Cth), ss 6(3), 8A, 8B.

The offence of providing IGS applies to operators of those services based in Australia and offshore and the maximum *daily* penalty is \$220,000 for an individual and \$1.1 million for a corporation. The Act also prohibits the supply of IGS from Australia to countries designated by the Minister.¹¹ Individuals are not, however, prohibited from accessing or using a prohibited IGS.

Section 61EA of the Act makes it an offence to publish or broadcast an advertisement of a prohibited IGS in Australia. This offence covers all forms of advertising, including electronic and print media, broadcast services and billboards and carries a maximum penalty of \$13,200 for individuals and \$66,000 for corporations. However, there is an exception for accidental or incidental publications or broadcasts of a prohibited IGS.

The Australian Communications and Media Authority (the **ACMA**) enforces the Act. It investigates complaints about prohibited content hosted overseas. If the content is prohibited by the Act, the ACMA will notify approved PC filter vendors under the Internet Industry Association Code. Where the complaint relates to Australian-based content, the ACMA may refer the matter to the Australian Federal Police (the **AFP**) for further investigation.

PART 2: The Report's Key Recommendations

National standard of harm minimisation and consumer protection

The Report proposes a new national standard for harm minimisation and consumer protection. The standard would include:

- the implementation of limits on the types of inducements that consumers may be offered and the third party arrangements (such as commissions) that service operators are entitled to use to attract consumers;
- inclusion of prominent responsible and problem gambling messages on online gambling sites and other advertising;
- protection against IGS operators misappropriating consumer funds, failing to payout funds and failing to remit funds to consumers after account inactivity; and
- selfexclusion provisions to enable consumers to suspend themselves from one or more IGS websites or all IGS.¹²

These requirements would apply to all gaming operators legally permitted or licensed (under the proposed poker licensing scheme) to offer IGS to Australians.

Online gaming - licensed online poker trial

The Report proposes that for a five year 'trial period', the Act would permit online gaming sites to be licensed in Australia on the condition that the licensed operators:

- cease offering high-risk gaming services (such as online poker machines) to Australians;
- only offer online tournament poker; and
- adopt the harm minimisation and consumer protection measures proposed in the Report, which are discussed above.¹³

Deregulating the provision of online poker is one of the Report's most significant and controversial proposals. The Report's recommendation in respect of online poker resonates with international trends in gambling regulation.¹⁴ The Report noted the recent inquiries in South Africa and Canada which determined that because prohibition does not extinguish demand, gambling should be regulated 'so as to accrue economic benefits and to better ensure player protection'.¹⁵ In France online operators are licensed. Ninety-five per cent of French poker players access online gaming through these licensed operators.¹⁶

The Productivity Commission had earlier also proposed a 'managed liberalisation' of online gaming, beginning with online poker. However, in response to that report the Government, in 2010, said it was 'not convinced that liberalising online gaming would have benefits for the Australian community which would outweigh the risks of an increased incidence of problem gambling'.¹⁷ The Select Committee Report recommended against liberalisation.

Some operators may have to significantly overhaul their business operations to comply with the proposed requirements placing them at a competitive disadvantage to offshore operators

Sports wagering – some 'in-play' wagering but no micro-betting

Under the current Act 'in-play' bets made online during the course of an event are prohibited, but the same bets are permitted when made in person or on the telephone.¹⁸ The Report showed some support for relaxing the existing prohibition under the ACT for 'simple bets', such as betting on the outcome of an event. It noted that any such reform would resonate with the principle of platform neutrality in the regulation of in-play betting, potentially reduce compliance costs for gambling service operators and educate consumers.¹⁹

By contrast the Report also recommended retaining the restriction on 'exotic' in-play betting, namely 'micro' betting' and the extension of this prohibition to wagering services provided through other devices and technologies, namely apps and interactive television.²⁰ The Report distinguishes micro-betting as the betting on near future contingencies, for example ball-to-ball betting in cricket or point-to-point betting in tennis. The Report lists a number of circumstances which constitute 'micro-betting', including that the betting opportunity is repetitive, high frequency and that bets are placed on one of a limited number of outcomes (for example that the next serve will be a fault). The Report also recommended that the Minister for Sport be empowered to make regulations to specify particular bets as 'micro-bets'.

11 *Interactive Gambling Act 2001* (Cth), s 15A. Under the Act, the Minister can declare a country to be 'designated' for the purposes of the Act. Currently, no countries have been designated.

12 Report, above n 1, p 53.

13 *Ibid*, pp 53-4, Recommendations 1-3.

14 *Ibid*, p 99.

15 Joint Select Committee on Gambling Reform, above n 7, p 49.

16 Report, above n 1, p 100.

17 Assistant Treasurer (Cth), 'Government Response to Productivity Commission Report into Gambling' (Media Release, No. 138, 23 June 2010)

18 In play' wagering involves placing bets during an event on the outcome of a game, or better on particular contingencies (for example who scores the next goal or wins the next point).

19 Report, above n 1, p 108 -113.

20 *Ibid*, p 114, Recommendation 25.

The Report's recommendation on micro-betting means that previously legal micro-bets made in person at sports venues or on the phone would now be prohibited. The reform also somewhat addresses concerns that in-play wagering undermines the integrity of sport by encouraging match-fixing.²¹

Regulation of sports wagering by state/territory sports bodies

The Report follows the Select Committee Report's recommendation that State, Territory and National sports governing bodies be responsible for determining what categories of sports wagering are permitted for sporting events in the relevant jurisdiction.²² The Report also recommends that where the sports event is based overseas, the decision to allow sports betting should lie with the relevant Australian sports governing body for that sport.²³

The increased compliance burdens required to obtain a licence may undermine the effectiveness of the regime if it fails to provide sufficient incentives for IGS operators to become licensed.

New advertising restrictions and penalties

To address ambiguities in the current regime on advertising a prohibited IGS, the Report proposes to amend the definition of an 'accidental or incidental' advertisement in the Act.²⁴ Broadcasters would fall outside the prohibition where they rebroadcast an overseas event where prohibited IGS advertisements are present at the venue. Civil penalties would apply (in addition to the existing criminal penalties) for advertising breaches.²⁵

The Report followed the Select Committee Report's recommendation to amend the Act to clarify that links to practice sites or 'free-play' services that are associated with prohibited 'for money' sites be prohibited (because they promote prohibited IGS).²⁶ Further, the Report also proposed that advertising permitted online gaming services only be allowed during televised coverage of poker tournaments.²⁷

Expansion of enforcement tools and penalties

While the Act contains punitive provisions targeted at offshore gambling operators, the Department of Broadband, Communications and the Digital Economy (the **DBCDE**) has acknowledged that 'there is limited practical scope for Australian law enforcement agencies to pursue, with any prospect of success, international based opera-

tors'.²⁸ The Report proposes to streamline the Act's enforcement provisions, increase awareness of the Act amongst directors and principals of prohibited IGS services and relevant overseas authorities, and restrict access to prohibited IGS.²⁹

The Report also proposes to amend the Act to make the directors or principals of prohibited IGS operators liable for the company's activities.³⁰ Where the ACMA determines that an IGS operator is offering prohibited IGS, the Report recommends that it should refer the matter to the AFP and that the directors or principals of the offending organisation be placed on the Movement Alert List.³¹

The ACMA would be responsible for administering the new civil penalty provisions (by issuing infringement notices); be able to issue 'take down' notices to IGS operators of Australian-hosted content; and be able to apply to the Federal Court for injunctive relief against contraventions of the Act by Australian-based IGS operators.³² The Report also recommends that the ACMA monitor IGS operators that have been identified as offering potentially prohibited IGS, and publish a list of these operators on its website.³³

Restricting financial transactions

The Report proposes blocking financial transactions between Australian consumers and unlicensed IGS operators. The Reports recommends amending the Act to provide a 'safe-harbour' for financial institutions that establish and adopt policies to block transactions between Australians and unlicensed, illegal online gambling services operators.³⁴ In making this recommendation, the DBCDE noted the approach in the United States. The US:

- criminalises the act of gambling operators knowingly accepting US-based payments that are connected to unlawful internet gambling; and
- prohibits US financial transaction operators from processing transfers of funds to unlawful online gambling businesses.³⁵

Website listing and URL blocking

The Report recommends that online IGS operators offering prohibited IGS should continue to be included on the ACMA's list of prohibited URLs and websites that are blocked vendors of PC filters on the Internet Industry Association's family-friendly filter scheme.³⁶ This proposal does not materially change the obligations of ISPs.

PART 3: The Impact of key proposed reforms

National standard of harm minimisation and consumer protection

Stakeholder submissions to the Report have largely supported the introduction of a national standard for harm minimisation. There are concerns, however, that the recommendations are impracticable

21 Ibid, p 111.

22 Ibid, p 114.

23 Ibid, p 115, Recommendation 27.

24 Ibid, p 90, Recommendation 18.

25 Ibid, p 87, Recommendation 17.

26 Ibid, p 92, Recommendation 19.

27 Ibid, p 103.

28 Discussion Paper, above n 2, p 12.

29 Report, above n 2, p 58.

30 Ibid, p 61, Recommendation 4.

31 The Movement Alert list is a computer database administered by the Department of Immigration and Citizenship and that stores identity information and travel documents.

32 Report, above n 1, p 61, Recommendation 6.

33 Ibid, p 62, Recommendation 7.

34 Ibid, p 65.

35 Ibid, p 65.

36 Ibid, p 77, Recommendation 11.

and unduly onerous on gambling operators.³⁷ Some operators may have to significantly overhaul their business operations to comply with the proposed requirements placing them at a competitive disadvantage to offshore operators.

Other submissions emphasised ambiguities in the Report's harm minimisation regime. For example, the Report is unclear on how the betting limitations (such as time or bet limits) would be implemented.³⁸ The bookmakers' industry is concerned that the Report is ambiguous as to whether the harm minimisation requirements would apply to bookmakers' activities in the racing industry.³⁹ A significant feature of wagering in the racing industry includes the ability for bookmakers to extend to their customers a line of credit, which the DBCDE proposes to ban.⁴⁰

The harm minimisation proposals also increase obligations on operators to actively support consumer awareness of problem gambling, provide links to gambling help-lines and implement 'dynamic warning messages'. As the Report acknowledges, implementing these recommendations is dependent on compatibility with operators' software, which may currently block such pop-up messages.⁴¹

One stakeholder also called for clarification on the Report's proposal for 'significantly more prominent' responsible gambling messages. It argued instead that the alcohol industry's standard of legible responsible drinking messages be applied to the gambling industry.⁴² Radio broadcasters expressed concern about the practical complications of implementing mandatory responsible gambling messages on radio and the negative impact on advertising revenues.⁴³

Licensed online poker trial

The proposed licensed online poker trial will be conditional on IGS operators complying with the proposed harm minimisation and consumer protection measures. As a result, businesses are likely to face increased compliance costs to participate in the regulated trial, potentially reducing their ability to compete with unlicensed offshore operators.

Consumers may therefore choose to use offshore IGS operators who can offer a potentially greater range of gaming and gambling services. Further because a licensed poker operator will be prohibited from also offering 'higher risk' gaming services (for example online 'cash games'), offshore IGS operators looking to legally enter the Australian market would be required to divest or separate their existing operations. The increased compliance burdens required to obtain a licence may undermine the effectiveness of the regime if it fails to provide sufficient incentives for IGS operators to become licensed.

The five-year sunset clause on the poker trial may mean licensed operators could be prohibited from offering online poker to Australians, where the Government of the day decides not to extend the pilot. Given the costs of establishing and running an online poker business and the uncertainty of future business prospects following the trial period, operators may be reluctant to obtain licensing.

Sports wagering: implications for wagering operators and sports governing bodies

The Report uses the principle of platform neutrality in the context of gambling reforms in sports wagering to justify the deregulation of 'simple' in-play betting and the expansion of restrictions on micro-betting. Consequently for wagering operators and sporting bodies, the practical implications of any future regulation of in-play betting remain uncertain.

The Report recommends that a five-minute gap between placing a bet and knowing the outcome is sufficient to constitute a 'micro' bet.⁴⁴ This definition appears out of step with industry perceptions.

In particular, it is not clear which in-play bets will be classified as 'micro' and therefore prohibited under the proposed regime. The Report recommends that a five-minute gap between placing a bet and knowing the outcome is sufficient to constitute a 'micro' bet.⁴⁴ This definition appears out of step with industry perceptions. Various wagering organisations suggested that given that five minutes is the typical duration of, for example, a game of tennis or an over of cricket, betting on the outcome of these contingencies should be classified as in-play rather than 'micro' betting.⁴⁵ In addition, horse-racing wagering operators have expressed concerns that the recommendations would now prohibit 'in run' bets, which are currently a popular and legal form of wagering.⁴⁶

The Report's recommendations also establish an unwieldy mechanism which requires operators to apply to the Minister for a determination of whether a bet is 'micro' (and prohibited) or merely in-play (and allowed). The Report does not make clear how the Minister for Sport's ability to determine what constitutes a 'micro' bet, interacts with the ability for sporting bodies to determine permissible forms of sports wagering. Similarly, wagering organisations have questioned the authority of Australian sporting bodies to determine what is a suitable bet for an offshore sport event.⁴⁷

37 See, for example Betfair, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*; bet365 Group Limited, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

38 Bwin.Party Digital Entertainment plc, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

39 Australian Bookmakers' Association Pty Ltd, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

40 Ibid.

41 Report, above n 1, p 52.

42 Betfair and bet365 Group Limited, above n 37.

43 Commercial Radio Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, 25 June 2012.

44 Report, above n 1, p 115.

45 See, for example Betfair and bet365 Group Limited's submissions, above n 37.

46 Australian Bookmakers' Association Pty Ltd, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, 25 June 2012.; Harness Racing Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, June 2012.

47 Betfair and bet365 Group Limited, above n 37; Australian Bookmakers' Association, above n 47.

Advertising: implications for broadcasters and search engines

While the Report seeks to clarify the obligations of advertisers and broadcasters of IGS, the recommendations have the potential to increase regulatory burdens and confusion in these industries. FreeTV Australia, the representative body for Australian free-to-air broadcasters, has noted that the introduction of civil penalties for breaches of the Act's advertising prohibitions adds unnecessarily to the regulation of broadcasters.⁴⁸ Currently, the ACMA has a broad range of powers to enforce a breach of the Act's advertising offences by a broadcaster, including seeking criminal penalties, suspension or cancellation of a broadcasting licence, or issuing a remediation direction under the *Broadcasting Services Act 1992* (Cth). There is also likely to be inconsistency between the proposed reforms and the *Commercial Television Industry Code of Practice* in respect of when and where gambling may be advertised.

Under a US-style system, financial institutions would be required to identify and block transactions to prohibited IGS operators. The inherent difficulty is trying to differentiate between and separate lawful and unlawful transactions, and the costs associated with doing so.

The Report's recommendations leave open the question as to the liability of search engine operators for paid links. It is common for search engines to display paid advertising links associated with relevant keywords, in response to keyword searches.⁴⁹ The Report recommends that links to 'free play' services constitute a contravention of section 61EA of the Act, and says that 'it is likely that an advertisement on an Australian-specific search engine or news site with an Australian focus would be prohibited'.⁵⁰

Enforcement against international offenders

While the Report acknowledges the limitations in seeking to enforce the Act against overseas offenders, it offers only fleeting comments on how these obstacles could be overcome. Enforcing the proposed new offences against directors and principals of companies that offer prohibited IGS to Australians will still face significant jurisdictional hurdles.⁵¹ This has been a continuing problem for the Act, and in the absence of any significant enforcement case history in Australia against overseas offenders, it remains to be seen how this issue would be overcome in the future.

Financial Institutions

The recommendation to permit restrictions on financial transactions has various implications for banking and financial institutions. Of primary concern is that, in order for the 'safe harbour' to operate successfully, financial institutions voluntarily undertaking to restrict or block transactions would need assurances from the Government

that the safe harbour protects the institution from legal action by local and offshore illegal gambling operators.⁵²

Whether the mechanism is voluntary or mandatory, financial institutions would face considerable compliance costs. Under a US-style system, financial institutions would be required to identify and block transactions to prohibited IGS operators. The inherent difficulty is trying to differentiate between and separate lawful and unlawful transactions, and the costs associated with doing so. This model was rejected by the Joint Senate Committee Report.⁵³

Alternatively, financial institutions could block financial transactions to prohibited gambling operators that are featured on a central 'black list'. The Report suggests that this list could be based on the ACMA's list of prohibited IGS operators.⁵⁴ However, even if the list is regularly updated, this system could be circumvented, for example by operators operating under multiple company names, using mirroring sites and providing different banking details to different groups of customers.

Various submissions in response to the Report highlighted that blocking financial transactions through banks or other intermediaries (for example PayPal) will not prevent Australians from accessing illegal IGS. This has been the experience in the US, where despite the implementation of a transaction blocking system, illegal online gambling persists, through the use of alternative electronic funds transfer products.⁵⁵

Conclusion

The Report recommends substantial changes to the regulation of IGS in Australia. If the recommendations are adopted, the operations of gaming and wagering businesses in Australia may be significantly affected. Broadcasters and financial institutions may also face increased costs and challenges. While some enhancement of the ACMA's enforcement tools has been recommended, the challenges of trans-border enforcement may continue to undermine the perceived and actual effectiveness of the Act.

The extent and timing of any reforms is anyone's guess; the DBCDE was expected to provide its final report to the government by the middle of this year. It is not clear whether the final report will result in implementing legislation. In the meantime, on-going discussion of the short-comings and potential to reform Australia's interactive gambling regulatory landscape is, however, a sure bet.

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48 Free TV Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*, 25 June 2012.

49 Brian Fitzgerald et al, *Internet and E-Commerce Law, Business and Policy* (2011), p 1128.

50 Report, above n 1, p 86.

51 Christina Franngard, 'Issues of jurisdiction and enforcement in internet gambling' (2007) 10(7) *Internet Law Bulletin* 83 p 86.

52 Sportsbet and Sportingbet Group Australia, Submission to the Department of Broadband, Communications and the Digital Economy, *Review of the Interactive Gambling Act 2001- Interim report for consultation*.

53 Joint Select Committee on Gambling Reform, above n 7, p 148.

54 Ibid, p 73.

55 Report, above n 1, p 70.