

Social Gaming and Online Gambling

Stephanie Essey examines the blurring of the distinction between prohibited online gambling and social gaming, and the recently released report proposing measures to address online gambling services.

Introduction

The line between prohibited online gambling and social gaming is becoming increasingly blurred, with the resulting ambiguity posing risks to social media users, especially vulnerable individuals such as children. Senator Stephen Conroy, the Minister for Broadband, Communications and the Digital Economy, drew attention to the issue in a recent media release:

The Review [of the *Interactive Gambling Act 2001*] ... identified concerns in relation to casino-style gambling simulations being accessed through a variety of platforms including social media, and the potential risk that this may pose to children. I will be writing to the providers of these games and social networking services to seek more information about how they are addressing these issues.¹

The Department's *Final Report 2012 – Review of the Interactive Gambling Act 2001 (the Final Report)*, released on 12 March 2013, advocated monitoring the provision of online gambling-style services so that they do not target or mislead children by providing unrealistically favourable payout ratios.² It also proposed international consultation with regulators about measures to address children's access to online gambling-style services and the marketing of those services to children.³ The Report acknowledged that games played on social media and other platforms are becoming markedly similar to real-money gambling.⁴ Further, it registered concerns regarding the advertisement of prohibited services via social media and other platforms, given that such advertising is prohibited by the *Interactive Gambling Act 2001* (the *IGA*).⁵

Social gaming worldwide

Similar regulatory questions have arisen in other jurisdictions. The UK Gambling Commission announced in January 2013 that it was formally assessing the risks associated with social gambling. The Gambling Commission is particularly concerned about the practices of unscrupulous operators and the possibility of social gaming lead-

ing to problem gambling amongst young people or others who are vulnerable. It is considering whether consumer protection might be necessary in light of the "increasing convergence between the products of traditional gambling and social gaming businesses".⁶ Further, in April 2013, the UK Office of Fair Trading (the *OFT*) instituted an investigation into free games and in-app purchases online and on mobile devices. The investigation is aimed at determining whether children are unfairly targeted and encouraged to purchase items like virtual currency, virtual goods or status upgrades. The OFT is seeking to ensure that providers of social gaming are not misleading consumers and are complying with consumer regulations.⁷

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In the US, a class action was recently brought against Apple by a group of parents in connection with in-app purchases within "free" iPhone games. Their children had made purchases without parental permission while playing games like "Zombie Café" and "City Story".⁸ The case was settled in March 2013, with Apple providing compensation to class members who could number in the millions.⁹

Social gaming: on the fringe of the Interactive Gambling Act

Under the IGA, it is an offence to intentionally provide an "interactive gambling service" to customers physically present in Australia.¹⁰ An interactive gambling service is a "gambling service"¹¹ which is provided to customers as a business via a carriage service, a broadcasting service, any other content service or a datacasting service.¹² Many social games are not prohibited under the IGA because they are not caught by the Act's definition of a "gambling service".¹³ This

1 Senator Stephen Conroy, media release: 'Strengthened consumer protection for online gambling', 12 March 2013: http://www.minister.dbcde.gov.au/media/media_releases/2013/035.

2 Senator Stephen Conroy, media release: 'Strengthened consumer protection for online gambling', 12 March 2013: http://www.minister.dbcde.gov.au/media/media_releases/2013/035.

3 Recommendation 31, Final Report, pp 21, 146.

4 Final Report, pp 141-3.

5 Final Report, pp 131, 137-8.

6 Social media, gaming and gambling', Gambling Commission (UK):

http://www.gamblingcommission.gov.uk/research_consultations/gambling_research/research_programme/social_media_gaming_and_gambl.aspx.

7 Office of Fair Trading, press release: 'OFT investigates free children's web and app-based games', 12 April 2013: http://www.offt.gov.uk/news-and-updates/press/2013/33-13#_UWey9KtARXc.

8 Nadia Mozzafar, 'Zombie Toxin and Gems: When "Virtual Currency" Costs Real Money', *JETLaw: Vanderbilt Journal of Entertainment & Technology Law*, 22 April 2011: <http://www.jetlaw.org/?p=6297>.

9 Manatt Phelps & Phillips LLP, 'Apple, parents reach deal on in-app purchases', *Lexology*, 15 March 2013: <http://www.lexology.com/library/detail.aspx?g=172a29f4-cf04-47f6-8c3b-3d83ad5c2ee4>.

10 s15, IGA.

11 s4, IGA.

12 s5, IGA.

13 s4, IGA.

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is primarily because many are not played for money or, arguably, for "anything else of value".¹⁴ However, many of these games otherwise come very close to satisfying the three-limb test for a "service for the conduct of a game", which comprises one component of the IGA's "gambling service" definition.

The definition of a "gambling service" in section 4 of the IGA includes the following:

- (e) a service for the conduct of a game, where:
 - (i) the game is played for money or anything else of value; and
 - (ii) the game is a game of chance or of mixed chance and skill; and
 - (iii) a customer of the service gives or agrees to give consideration to play or enter the game; or
- (f) a gambling service (within the ordinary meaning of that expression) that is not covered by any of the above paragraphs.

Many social games are games of chance or mixed chance and skill. Popular games like Slotomania and Zynga Slingo are based on casino-style slot machines (which are combined with bingo in Zynga Slingo). Doubledown Casino provides an array of casino-style games such as slots, blackjack and roulette. Poker is another prevalent format, found in games like Zynga Poker and Poker Palace.

Players are often required to provide consideration to enter or play these games. As the Final Report notes, numerous games (particularly apps) require upfront payments in order to play.¹⁵ Even where games are free to enter, real money can routinely be used to buy virtual currency or to procure various advantages while playing.¹⁶

Virtual currency, virtual goods or prizes won within games could arguably constitute "anything else of value", particularly given the fact that there are online second-hand markets for many of the items (for instance, Zynga Poker Chips). Virtual goods and currency are regularly traded online, although contractual provisions in gaming operators' terms and conditions usually seek to prohibit this type of conduct.¹⁷ However, while many gaming providers' terms may indicate that they do not endorse virtual currency trading, the existence of markets for virtual items suggests that

those items may well be of some monetary value. Indeed, in recent cases, including in the UK and the Netherlands, virtual goods and property have been treated as "legal property capable of being alienated for value".¹⁸ This construction places social games at the very perimeter of "gambling services" as they are demarcated by the IGA.

Also, there is competitive and social value in some virtual items, because of the ability to "buy" gifts for friends with virtual currency or post notifications of prizes received on Facebook. Perhaps for this reason, the sale of virtual goods accounts for about 60 cents of every dollar of revenue social gaming operators earn.¹⁹ However, the Final Report takes the conventional view that virtual currency is not redeemable for money or "anything else of value".²⁰

The key risk is that while many examples of social gaming might not technically satisfy the IGA's definition of a "gambling service", another view is that they are, in fact, a modern, electronic form of delivering gaming content that has some gambling elements. More extreme examples of social gaming threaten to normalise gambling and render it appealing, which can prove particularly dangerous for children.²¹ Crucially, there are limited legislative measures to prevent these activities, which are very similar to gambling, from occurring unregulated via social media.

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Case study: Zynga Poker

Zynga Poker is the largest social casino game on Facebook and ranks in the five top-grossing iPhone and iPad casino apps in the US.²² It operates on several platforms, including Facebook, Zynga.com, Google+, iPhone, iPad and Android. Zynga Poker is a game of combined skill and chance.²³

It is free to begin playing Zynga Poker. Zynga Chips are required to play, and users are provided with free chips when they start playing and each time they log in to the game. Chips are also made available via various in-game offers and lotteries. Within the game, players are able to buy Zynga Chips with real money (or with third-party virtual currency, including Facebook Credits). If players run out of chips, they need to purchase more chips in order to continue playing. As a result, users provide consideration in order to play the game.²⁴ Chips can be sent to or received from other players.

Although Zynga states that chips are not to be exchanged for money, Zynga Chips are extensively resold in a secondary market online. This conduct is prohibited by Zynga's Terms of Service, which state at clause 1.11.3 ("Virtual Items") that:

14 s4, IGA.

15 Final Report, p 142.

16 Final Report, p 139.

17 Matt Pollins, 'Social gaming: on a collision course with gambling regulation?', 9 July 2012: <http://www.olswang.com/articles/2012/07/social-gaming-on-a-collision-course-with-gambling-regulation/>.

18 Jas Purewal, Osborne Clarke, 'The converging worlds of social gaming and gambling', *World Online Gambling Law Report*, June 2012, p 8.

19 GamblingData, *Gambling Data Social Gaming White Paper 2012*, October 2012, p 3: <http://www.gamblingdata.com/files/SocialGamingDataReportOct2012.pdf>.

20 Final Report, p 141.

21 Ibid.

22 GamblingData, *Gambling Data Social Gaming White Paper 2012*, October 2012, pp 3, 7 and 9: <http://www.gamblingdata.com/files/SocialGamingDataReportOct2012.pdf>.

23 See (e)(ii), "gambling service", s4, IGA.

24 See (e)(iii), "gambling service", s4, IGA.

The Final Report emphasises the difficulty of appropriately controlling the scope of legislative prohibitions, as well as the challenges posed by the requisite global enforcement

Zynga owns, has licensed, or otherwise has rights to use all of the content that appears in the Service. Notwithstanding any provision to the contrary herein, you agree that you have no right or title in or to any content that appears in the Service, including without limitation the Virtual Items appearing or originating in any Zynga game, whether “earned” in a game or “purchased” from Zynga, or any other attributes associated with an Account or stored on the Service.

Zynga prohibits and does not recognize any purported transfers of Virtual Items effectuated outside of the Service, or the purported sale, gift or trade in the “real world” of anything that appears or originates in the Service, unless otherwise expressly authorized by Zynga in writing. Accordingly, you may not sublicense, trade, sell or attempt to sell in-game Virtual Items for “real” money, or exchange Virtual Items for value of any kind outside of a game, without Zynga’s written permission. Any such transfer or attempted transfer is prohibited and void, and will subject your Account to termination.²⁵

The fact that the resale of chips for real money occurs widely (in spite of Zynga’s Terms and the company’s efforts to detect and prevent fraud) arguably makes Chips something “of value” under section 4 of the IGA.²⁶

Users are initially provided with eight units of Casino Gold, but can purchase additional Gold. Casino Gold is not transferable between players. Given that it allows users to skip rounds, gain entry to exclusive tournaments and purchase Premium Gifts, Casino Gold might also constitute something “of value” to users.²⁷

Zynga has also recently begun to provide real-money online poker and casino games, ZyngaPlusPoker and ZyngaPlusCasino.²⁸ Although at this stage this development has only occurred in the UK, it suggests that social gaming could serve as a gateway to real-money gambling.

The future of social gaming in Australia

Various commentators have proposed methods of regulating social gaming. Senator Nick Xenophon has advocated amending the scope of the IGA’s definition of a “gambling service” to ensure that social gaming is covered.²⁹ The Final Report discusses

but does not adopt similar suggestions. It emphasises the difficulty of appropriately controlling the scope of legislative prohibitions, as well as the challenges posed by the requisite global enforcement.³⁰ Ultimately, the Report and the Minister endorse further consultation, research and monitoring rather than more active measures.³¹

The Final Report also canvasses the addition to the IGA of a civil penalty regime addressing the provision of prohibited services. Under such a regime, the Australian Communications and Media Authority (the **ACMA**) might be made responsible for issuing infringement notices, enforcing penalties and seeking injunctive relief for breaches of the civil penalty provisions.³² Alternatively, social gaming could be addressed via an industry code or standard. The use of industry codes is being considered in other jurisdictions, such as the UK.³³ In Australia, the Interactive Gambling Industry Code was developed by the Internet Industry and Association and is registered with ACMA pursuant to the IGA.³⁴ It applies to internet service providers (**ISPs**) and does not specifically address social gaming. Ultimately, though, a code applying at the ISP level (the only type of code the IGA contemplates) could be too blunt an instrument with which to address the subtle and varied phenomenon of social gaming.

Both visually and in their addictive appeal, many social games increasingly mimic real-money gambling

Social games are becoming markedly similar to more traditional forms of online gambling. Both visually and in their addictive appeal, many social games increasingly mimic real-money gambling. Access to these games is often unrestricted and players are enticed to spend real money. In spite of these risks, social gaming operates outside the sphere of regulation. With the global social gaming market set to boast 1.5 billion players and generate \$14.6 billion in annual revenue by 2015,³⁵ concerns about the way it is conducted and monitored are likely to persist.

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The views expressed in this article are the views of the author only and do not represent the views of any organisation.

25 Zynga, “Terms of Service”, last updated 30 September 2011: <http://company.zynga.com/legal/terms-of-service>.

26 See (e)(i), “gambling service”, s4, IGA.

27 See (e)(i), “gambling service”, s4, IGA.

28 Trevor Mogg, ‘Online gambling: Zynga bets on real-money games to bring in the cash with UK launch’, *Digital Trends*, 3 April 2013: <http://www.digitaltrends.com/international/zynga-launches-real-money-gambling-games-in-uk/>.

29 Nick Xenophon in bid to close gambling app loophole’, *The Australian*, 13 January 2013: <http://www.theaustralian.com.au/national-affairs/nick-xenophon-in-bid-to-close-gambling-app-loophole/story-fn59niix-1226552960088>.

30 Final Report, pp 141-2.

31 Final Report, pp 144-5; Senator Stephen Conroy, media release: ‘Strengthened consumer protection for online gambling’, 12 March 2013: http://www.minister.dbcde.gov.au/media/media_releases/2013/035.

32 Final Report, p 67.

33 ‘Social media, gaming and gambling’, Gambling Commission (UK): http://www.gamblingcommission.gov.uk/research__consultations/gambling_research/research_programme/social_media_gaming_and_gambl.aspx.

34 Part 4, IGA; Internet Industry Association, ‘Interactive Gambling Industry Code, December 2001’, ACMA: http://www.acma.gov.au/WEB/STANDARD/pc=PC_90087.

35 GamblingData, *Gambling Data Social Gaming White Paper 2012*, October 2012, pp 3-4: <http://www.gamblingdata.com/files/SocialGamingDataReportOct2012.pdf>.