



**Submission to the Productivity
Commission**

Inquiry into Gambling

August 2009

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Executive Summary

The way Australians gamble is changing constantly with the growth and increasing proliferation of new communications technologies such as the internet. It is clear that online gambling is already an established part of the Australian gambling landscape.

One such area of online gambling that has seen a growth in popularity is online poker. It is arguable that its rise has been promoted on the back of the growing popularity of poker in licensed premises and homes around Australia. Statistics show that there are more than 363,000 unique online poker accounts in Australia, and this number is expected to increase to 425,000 by 2010. This is despite the provisions of the *Interactive Gambling Act 2001*.

It is important to note the distinction between electronic gaming machines (pokies) and online poker as they can sometimes be confused. By 'electronic gaming machines' we refer to coin/note operated electronic gaming machines in licensed premises. By 'online poker' we refer to games of poker played over the internet.

This submission explores the regulatory and policy background of online gambling, and different legislative approaches taken to its existence. We note the comprehensive historical outline provided in the iBus submission to this inquiry (no. 178) and the submission from Mr John Beagle (no. 249).

This submission makes a series of observations of issues pertinent to the Productivity Commission's inquiry.

The prohibitionist model advocated by various groups in relation to online gaming will do more harm than good. It will lead to the risk of new operators commencing business in jurisdictions with little or no regulatory oversight. Australian governments will have no control over harm minimisation mechanisms in respect of online gambling services provided to their residents and no access to taxation streams. Australian players will inevitably find new ways of gaining access to prohibited online gaming services.

By prohibiting online poker, governments are foregoing a significant taxation and revenue stream. This is in contrast to other jurisdictions around the world that have moved towards a regulated model in order to ensure taxation benefits are realised. Countries in this grouping include Italy, the United Kingdom, Malta, and Sweden amongst others. An appropriate and commercially viable taxation regime that complemented a regulated environment would deliver tangible benefits to Australians.

One potential means of enforcement of a prohibitionist model is explored in this submission; namely, current regulatory and technical proposals that seek to block online gaming services through the use of internet filtering technologies. Past literature concerning this policy is explored and reasons given for the ineffectiveness and disadvantages of such an approach. Principally, consumers would find ways to bypass such technologies and there would be less control exercisable by Australian regulators and authorities over responsible gambling measures suitable for Australians.

This submission notes the great deal of misinformation and unsupported claims regarding the purported link between the prevalence of online poker and problem gambling. It is noted that online poker is a significantly lesser concern, both in terms of the scale of participation and the adverse consequences, when compared with other mediums such as electronic gaming machines.

This submission also puts forward the proposition that responsible gambling mechanisms are able to be applied more effectively to online forms of gambling. There is greater capacity to monitor and intervene in an individual player's gaming activities through online gaming, than other 'offline' forms of gambling.

Finally, there is an inherent inconsistency in the *Interactive Gambling Act 2001* that makes an arbitrary and unfair distinction between two forms of online gambling – wagering and gaming. Consideration should be given to removing this distinction allowing both to be regulated. If not, an exemption should be provided for other games like poker which are more of a game of skill than other forms.

This submission makes a number of recommendations including:

- 1. That the Commission notes the risks and shortcomings of prohibitionist regulatory models in response to online gambling;*
- 2. That the Commission notes the shortcomings of policy responses that seek to enforce a prohibition of online gaming through internet filtering technologies;*
- 3. That further research into the prevalence of online gambling and consumer habits is required before any legislative changes in order to ensure there is a solid 'evidence base' to any proposed legislative reforms or recommendations;*
- 4. That should the Commission wish to examine and propose an appropriate legislative model for online gaming, that a regulated model would provide the best means of protecting consumers and ensuring benefits flow through to the community, as opposed to a prohibitionist model;*
- 5. That online poker is seen as a distinct form of online gambling in terms of this inquiry process and any proposed regulatory framework; and,*
- 6. That an appropriate forum such as a Senate Committee examines the provisions of the IGA relating to the differentiation that is made between online wagering and gaming, with a view to treating both forms in a consistent policy manner.*

The Interactive Gaming Council

The International Gaming Council (“IGC”) is an international non-profit industry association comprising leading companies involved with the interactive gaming industry from around the globe.

Members are operators of internet gaming sites, software suppliers, e-commerce providers, information-providers or other companies involved in the industry.

The IGC exists to provide a forum for interested parties to address issues and advance common interests in the global interactive gaming industry, to establish fair and responsible trade guidelines and practices that enhance consumer confidence in interactive gaming products and services, and to serve as the industry’s public policy advocate and information clearinghouse.

The IGC supports principles of:

- responsible gambling service provision
- ‘evidence-based’ policy and research into the online gaming industry
- a regulated approach over prohibition

Members are required to adhere to a code of conduct that includes the following principle relating to responsible gambling service provision:

“IGC Members will promote responsible gambling measures and, where applicable, implement procedures aimed at identifying and curtailing compulsive / problem gambling. The procedures instituted should be consistent with the IGC’s Responsible Gambling Guidelines, including, but not limited to, providing referral and direct access to help and counseling organizations.”

Our website can be found at www.igcouncil.org

Introduction

The IGC welcomes the opportunity to provide this submission to the Productivity Commission in conducting its inquiry into gambling in Australia.

The Council makes particular note of the following term of reference:

“The implications of new technologies (such as the Internet), including the effect on traditional government controls on the gambling industries.”¹

The development of new communications technologies has had a major impact on the gambling service sector in Australia – this is particularly true of gambling services provided through the internet. For the purposes of this submission, ‘online gambling’ refers to gambling services provided over the internet.

Permitted forms of online gambling are a significant contributor to Australia’s gambling sector. A Global Betting and Gaming Consultants (GBGC) study calculated Australia’s total online gross gambling yield to be more than US\$1 billion in 2008.² ‘Gross gambling yield’ refers to gambling turnover less the amount paid out to players as winnings.

Corresponding to the increased popularity of online gambling has been the enthusiastic take-up of online poker. ‘Online poker’ is a game of poker played over the internet. Statistics point to its rise in popularity internationally and domestically. Online poker was estimated to be a US\$3.4 billion worldwide industry in the aforementioned GBGC study.³

Its rise has coincided with the popularity of poker card games being facilitated in clubs and pubs, played in homes and on television, and other forums. It is noted that its prevalence is nowhere near the levels of participation in other forms of gambling such as lotteries and electronic gaming machines (not to be confused with online poker), which is explored later in this submission.

In Australia, various parliamentary and investigative forums have examined the growth of this activity and made recommendations that have largely remained consistent. Yet these have contrasted with the general direction of current legislation governing online gaming. This submission explores this background and some of the issues for consideration stemming from it, as well as proposing some recommendations that would bring greater clarity to this area.

¹ <http://www.pc.gov.au/projects/inquiry/gambling-2009/termsreference>

² Global Betting & Gaming Consultants (2009), *Interactive Gambling Report – Assessment of the Interactive Gambling Market*, (hereafter “GBGC Report”). This figure includes online casino games, bingo, poker and sports betting.

³ Ibid

The legislative framework and online gambling

The increasing presence of online gaming and the development of new technologies have prompted interest and instigated review processes at the parliamentary level, which we explore in more detail here. We also note the iBus submission to this inquiry delves into considerable detail in examining some of these historical developments.

The 'AUS Model'

State and Territories have traditionally had preserve over the regulation of gambling industries in their respective jurisdictions. In response to the emergence of online forms of gambling, state and territory governments combined to develop a national framework for regulating interactive gambling.

This framework – the “Draft Regulatory Control Model for New Forms of Interactive Home Gambling”, otherwise known as the ‘Draft National Model’ or ‘DRM’ – was released in 1997. It formed the basis of state and territory laws governing interactive gambling and helped provide a consistency of approach to this legislative area.

Of note, the DRM was released prior to the announcement of a moratorium on online gambling websites that was announced by the Federal Government in 2000, which of course, preceded the introduction of the Interactive Gambling Act in 2001.

A new revised model known as the ‘AUS model’ was developed as a result of a revision process around the DRM. The objectives of the ‘AUS model’ were provided to:

- promote harm minimisation and responsible gaming
- ensure the probity and integrity of industry participants, and
- ensure game fairness, system integrity and the quality of services to players.⁴

The national working party responsible for its revision and development stated in 2001 that:

“The AUS Model is designed to operate within the existing Australian regulatory structure, with its international reputation for integrity, scrutiny of operations, technical expertise and accountability mechanisms.

“Importantly, it is framed within the context of Commonwealth legislation that governs issues such as controls over money laundering and the controls over privacy. All operators are required to comply with all relevant Australian laws and it is unnecessary for the AUS Model to expand on these areas.”⁵

⁴ National Working Party (2001), *Australia: Uniform Standards for the Regulation of Interactive Gambling (Exposure Draft)*, p10.

⁵ *Ibid*, p7.

And;

“The focus of the AUS Model is on player protection, operator probity and system integrity.”⁶

The AUS Model was designed to ensure regulatory measures kept pace with internet and technological developments, while ensuring appropriate harm minimisation measures and other safeguards were in place. A number of states including Queensland, Victoria and the ACT implemented legislation that was consistent with this model. Nonetheless, it was superseded by a ban on online gaming that was to be announced by the Federal Government later.

The Senate Select Committee ‘Netbets’ Report on Online Gambling

In 1999, the Select Committee on Information Technologies held an inquiry into:

- the nature, extent and impact of online gambling in Australia
- the feasibility of controlling access to online gambling, especially by minors
- the adequacy of State and Territory regulations in relation to online gambling
- the need for federal legislation.

The Committee’s findings were summarised in the report *Netbets: A review of online gambling in Australia*. The Committee reported on the 16 March 2000.

It recommended a range of measures focused on consumer protection and an improved regulatory framework, including:

- federal, state and territory jurisdictions to work together to develop uniform regulations on online gambling with appropriate consumer protection provisions
- a moratorium on further online gaming licenses being issued until such regulations and consumer protection provisions were in place
- state and territory governments to contribute a fixed percentage of their gambling revenue to problem gambling support services and education.

Notably, the report concluded that it would be too difficult to prohibit online gambling, and that regulation was preferable:

“Strict regulation of online gambling, and not prohibition, is the preferable policy option, as it is a more practical and effective solution to the risk of problem gambling. It would allow for a range of harm minimisation policies to be applied to online gambling which would negate the prospect of higher levels of problem gambling. These policies are more likely to be successfully applied as they are suited to Internet technology.”⁷

⁶ Ibid, p2.

⁷ Senate Select Committee on Information Technologies (2000), *Netbets: A review of online gambling in Australia*, p 65.

The report goes into detail about some of the policy and technical shortcomings of the prohibitionist policy model. These include:

- the difficulty, if not impossibility, of enforcing
- the cost of enforcing
- lost taxation revenue
- loss of e-commerce technology
- the risk of unregulated clandestine gambling operations springing up
- the diminished enjoyment of gambling activities for those consumers that responsibly utilise online gambling services.

The Labor Opposition of the day issued their own dissenting report that echoed many of these sentiments. Amongst the position statements made in their report was:

“The ALP does not support an outright ban of gambling on the Internet because we do not consider it to be technically feasible or necessary.”⁸

It is our view that the Commission should consider these factors in their analysis of the impact of new technologies on the gambling industry. They remain pertinent to the scope of the Productivity Commission’s current inquiry.

The National Office for the Information Economy Inquiry

Despite the findings of the Senate Select Committee on Information Technologies, the then Minister for Communications, Information Technology and the Arts, Richard Alston, announced in July 2000 that the Government would conduct a study into the feasibility and consequences of banning interactive gambling.

The National Office for the Information Economy (“NOIE”) conducted this inquiry and a report was released in March 2001. Its findings included:

- a range of technologies could be used to attempt to block online gambling websites, but none would be fully effective
- the Commonwealth has clear constitutional and enforcement powers to ban interactive gambling within Australia
- implementing a ban on domestic interactive gambling service providers would require legislative change only
- banning online gambling through financial controls is not feasible.

Of note, the report specifically noted that:

“Banning interactive gambling may have deleterious effects on Australia’s reputation as a leader in the global information economy, and may also adversely affect IT investment and parts of the IT industry associated with the interactive gambling industry.”⁹

⁸ Senate Select Committee on Information Technologies (2000) *Gambling Online in Australia: Minority report by ALP Senators*, p 113.

Again, these arguments remain relevant to the nature of the Productivity Commission's current inquiry, particularly given the growing importance of the IT sector to Australia's economic fortunes.

The Interactive Gambling Act

In April 2001, the Federal Government introduced the *Interactive Gambling Bill 2001* which sought to make major reforms to the legislative framework governing online gambling. The Bill was assented to in July 2001. The *Interactive Gambling Act 2001* ("IGA") made it an offence to provide, or advertise, certain interactive gambling services to Australian citizens. Prohibited services typically include online casino-style games of chance or mixed chance and skill. The IGA provided certain exemptions in the form of horse and sports wagering, and lotteries.

The Bill was opposed by the then ALP Opposition on the grounds a ban would be unworkable and that consistent regulations were needed in order to protect consumers. A statement issued by ALP Senator Kate Lundy at the time said:

*"Instead of an unworkable ban, the Coalition should be addressing harm minimisation and consumer protection as well as criminal issues that may arise from online gambling."*¹⁰

And;

*"We believe that effective regulation of online gambling is the most practical way of substantially restricting the harm caused by gambling and to maximise the benefits that will flow-on to consumers, the gambling and IT industries and the general public."*¹¹

Senator Mark Bishop of the ALP was recorded in Hansard offering a comprehensive deconstruction of the proposed legislation:

"There are a number of reasons why the opposition considers the position taken in this bill to be inappropriate ... Firstly, Australians will still be able to access Internet gambling services. The bill does not achieve, prevent or discourage access, which surely is a critical step in achieving a ban. In fact, the bill does not even prohibit Australians from accessing domestic or foreign Internet gambling sites.

Secondly, the easiest sites for Australians to access will be overseas sites— some of dubious probity. It is nearly impossible to distinguish reputable sites from those of dubious probity. So Australians will easily access some of the most dangerous gambling sites on the Internet.

⁹ National Office for the Information Economy (2001), *Report of the investigation into the feasibility and consequences of banning interactive gambling*, p 63.

¹⁰ <http://www.katelundy.com.au/2000/10/06/labor-moves-second-reading-amendment-to-interactive-gambling-bill/>

¹¹ Ibid.

Thirdly, problem gamblers are likely to be the ones who will be desperate enough to circumvent restrictions on accessing Australian and foreign sites and will most likely fall prey to unscrupulous operators who will not limit expenditure.

This bill, if passed in its current form, could result in worse gambling problems than if Australians were able to access strictly regulated Australian sites.

Fourthly, Australia is looking backwards while the rest of the world is trying to come up with constructive solutions. A number of countries are looking to adopt Australia's regulatory model for Internet gambling.

Meanwhile, the Australian government is looking to copy a 1961 US Act which has clearly failed to prevent Americans from gambling on the Internet. Australia is seeking to adopt an approach that has proven futile in preventing interactive gambling access in the United States, as evidenced by the Minister's comments that a million persons a day in the United States access and use interactive gambling services in that country.

Fifthly, we repeat our criticism that it is hypocritical to allow Australian Internet gambling service providers to receive revenue from services they offer to overseas countries when those countries will be left with the attendant social problems and no funds to deal with them. That criticism stands, notwithstanding the agreement that has been reached between the government and Senator Brown with respect to overseas countries.

Sixthly, the bill will have a negative impact on the Australian Internet gambling service providers. Their claims of being 'well regulated' will not be credible if their own government will not allow its citizens to access their services.

Seventhly, the bill still permits Australians access to Internet wagering—and, clearly, wagering is hardly immune from gambling problems. On the contrary, wagering contributes considerably to the gambling problems of Australians. The Productivity Commission made this point clearly in its report on Australian gambling industries.

In addition, the minority report by Labor senators to the Senate committee inquiry said that this bill identified a number of specific concerns about the drafting of certain provisions in the bill which would render the bill's impact uncertain and unjust."¹²

The Bill narrowly passed the Senate after an amendment was made that permitted online wagering under proscribed conditions.

In 2004, the Department of Communications, Information Technology and the Arts released a report, in accordance with its statutory obligations, that followed a review of the operation and effectiveness of the IGA.

The report found the IGA had broadly achieved its objectives and made no major recommendations for reform.

¹² Parliamentary Hansard (21 June 2001), <http://www.aph.gov.au/hansard/senate/dailys/ds280601.pdf>

The report did allude to the growth of online forms of wagering and betting on sporting events – the very things permitted under the IGA (within proscribed conditions):

“Relative to the global market, the Australian interactive gambling industry remains small and is dominated by a small number of larger providers with a strong export focus. Domestically, there has been some growth in the consumption of interactive gambling—predominantly for wagering on racing and sporting events. By contrast, there is no evidence to suggest an equivalent level of growth in the use of Internet gaming services that are prohibited under the IGA.”¹³

¹³ Dept of Communications, Information Technology and the Arts (2004), *Review of the operation of the Interactive Gambling Act 2001*, p v.

Gambling in Australia: A Snapshot

Generally

Australia has a long history and association with gambling. It's for this reason that Australia has previously received international recognition for the strength of regulations and responsible gambling measures within the various jurisdictions.

As noted in the Productivity Commission's Issues Paper, Australian Bureau of Statistics data on the gambling industry is for the period 2004-05 and a few years old now. It was calculated that \$16.5 billion in revenue was generated by gambling businesses in 2004-05.

Consistent nation-wide statistics on participation by gambling type are difficult to obtain given that various jurisdictions maintain different definitions and methods of measuring data. It is also important to note the distinction between electronic gaming machines (pokies) and online poker as they can sometimes be confused. By 'electronic gaming machines' we refer to coin/note operated gaming machines in licensed premises. By 'online poker' we refer to games of poker played over the internet.

Queensland Treasury compile national statistics by different gambling types but do not record participation in online gaming activities prohibited under the IGA. Nonetheless, they are useful for demonstrating the overall size and prevalence of established forms of gambling in Australia. The most recent *Australian Gambling Statistics* report included statistics from 2006-07.¹⁴ It calculated total expenditure on gambling to be approximately \$18.2 billion.¹⁵ By far, the gambling activity that attracted the most expenditure was gambling on electronic gaming machines with a figure of \$10.6 billion.¹⁶

The Productivity Commission conducted a national survey of gambling participation as part of its 1999 inquiry. It found the primary forms of gambling were lotteries, instant scratch games and electronic gaming machines. A table from the report is reproduced below:¹⁷

Table 1 Participation and frequency of gambling by adult Australians

Form of gambling	Total Participation (per cent)	of which:			
		Less than once a month	1-3 times a month	1-3 times a week	>3 times a week
Lotto or other lottery games	60	25	24	45	6
Instant scratch tickets	46	52	33	14	1
Poker or gaming machines	39	62	25	11	2
Racing	24	71	14	13	2
Keno	16	72	20	7	1
Casino table games	10	82	15	2	0
Sports betting	6	52	25	23	0
Bingo	5	40	23	27	2
Private gambling	5	68	23	7	2
Played an internet casino game	0.4	60	15	21	4
Any gambling activity	82	26	24	37	13

Source: PC National Gambling Survey.

¹⁴ Office of Economic and Statistical Research (2009), *Australian Gambling Statistics*.

¹⁵ Ibid, Table D.

¹⁶ Ibid, Table D.

¹⁷ Productivity Commission (1999), *Australia's Gambling Industries: Inquiry Report*, Vol 1, p 10.

Growth in the popularity of poker

It is noted that when the Productivity Commission examined gambling in 1998, the growth in popularity of poker was earmarked as a future area of interest vis-à-vis gambling regulations. Reference is made to a submission to the inquiry from Mr John Beagle, in which he articulated the expected growth in the popularity of poker as a form of entertainment and popular gambling activity.¹⁸

The first Australasian Poker Championship was held at Crown Casino in 1997 and attracted 74 players with a prize pool of \$74,000. The event has grown since then and is billed as the “Aussie Millions”. This year’s winner walked away with over A\$2 million.¹⁹

The growing popularity of poker was certainly heightened after Australian Joe Hachem won the World Series of Poker in 2005.²⁰ He walked away with \$10 million and an instant profile outside of poker circles in Australia. He went on to feature at other prominent poker tournaments like the Magic Millions and attracts widespread media coverage. He also writes a periodic column in the Sydney Morning Herald.

Other Australian poker players continue to receive coverage in the media while helping to grow the popularity of poker. 26-year-old Australian, Charlie Elias, walked away with A\$174,000 from a World Series of Poker tournament in July 2009.²¹

The iBus Media submission to this inquiry provides estimated figures for Australia’s two biggest poker organisations as having 800,000 members collectively²², and casinos experience continued popularity. A sizable section of the Australian community enjoys poker as a pastime activity and this group will continue to grow in size.

Online gambling (and the rise of online poker)

It is difficult to know with certainty the size and prevalence of online gambling in Australia. Available figures indicate that online gambling services, both legal and prohibited, are utilised by a significant number of Australians. As cited earlier in this submission, a Global Betting and Gaming Consultants (GBGC) study calculated Australia’s total online gross gambling yield to be more than US\$1 billion in 2008.²³ Online sports betting was calculated to represent a gross gambling yield of US\$391 million.²⁴

Online poker is a seemingly widespread activity with the GBGC report finding that in 2008 there were 363,120 active online poker accounts in Australia, and that this is estimated to increase to 492,260 by

¹⁸ Beagle, John (1998) *Submission to the Productivity Commission Inquiry Into Australia’s Gambling Industries*, http://www.pc.gov.au/__data/assets/pdf_file/0010/50212/sub095.pdf

¹⁹ See, <http://www.crownpoker.com.au/AussieMillions.aspx>

²⁰ See for example, <http://www.smh.com.au/news/national/joes-lucky-streak-continues/2005/12/21/1135032075876.html>

²¹ <http://www.smh.com.au/world/sydney-tilers-10m-poker-dream-over-20090715-dkij.html>

²² iBus Media Ltd (2009), *Submission to the Productivity Commission*,

²³ GBGC Report. This figure includes online casino games, bingo, poker and sports betting.

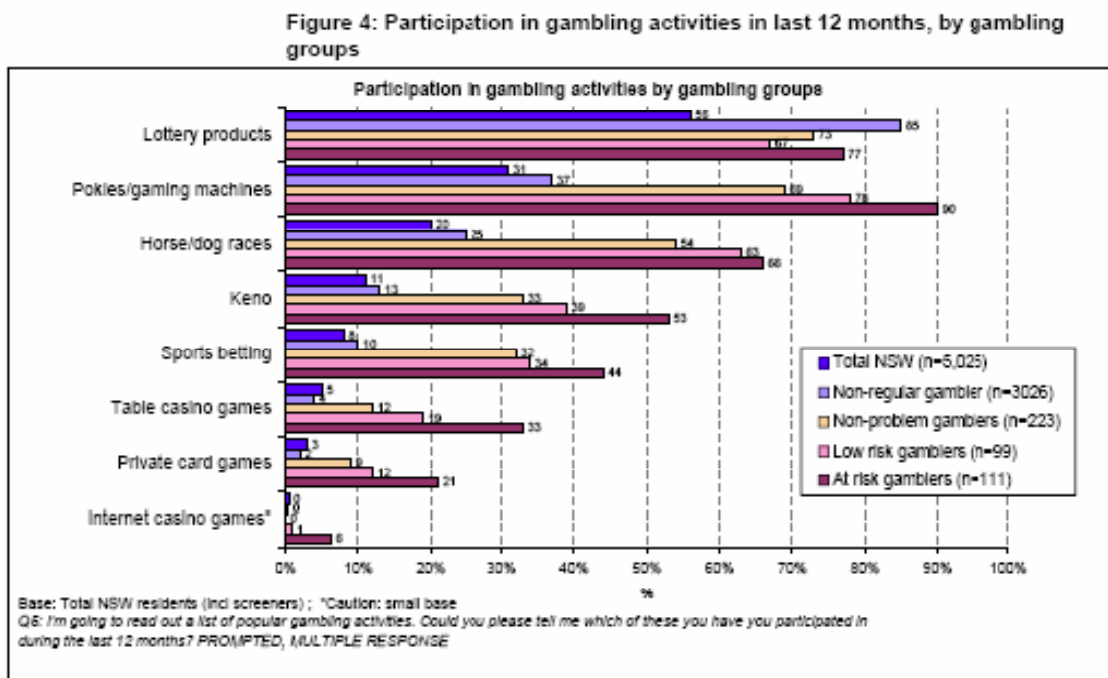
²⁴ Ibid

2012.²⁵ In 2008, gross gambling yield from online poker in Australia was US\$212 million and is estimated to increase to US\$280 million by 2012.²⁶

However, a recent FaHCSIA report into interactive gambling found that it was difficult to come by definitive statistics owing to the nature of the activity and the prohibition proscribed under the IGA.²⁷

Despite this, any review of the existing regulatory regime should take account of the considerable section of the Australian constituency engaging in online poker as a consumer activity.

It is still important to remember that online gaming is smaller than other more established forms of gambling in Australia. A 2006 NSW Government-commissioned study looked at the prevalence of gambling and problem gambling.²⁸ It found that the main gambling activities participated in were lotteries and electronic gaming machines and that 'at risk' gamblers were most likely to engage in these forms of gambling – a table from the report is reproduced here²⁹:



The table helps illustrate why other forms of gambling have rightly been at the centre of regulatory efforts. Indeed, the ABS statistics covering 2004-05 found the largest source of net takings was from EGMs in hotels and clubs with \$8.7 billion or 56 per cent of total net takings.³⁰

²⁵ Ibid

²⁶ Ibid

²⁷ Department of Families, Housing, Community Services and Indigenous Affairs (2009), *Review of Current and Future Trends in Interactive Gambling Activity and Regulation: Literature Review*, p9.

²⁸ AC Nielsen (2006) *Prevalence of Gambling and Problem Gambling in NSW – A Community Survey 2006*, Available at: http://www.olgr.nsw.gov.au/pdfs/rr_prevalence_gambling.pdf

²⁹ Ibid, p 26.

³⁰ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8684.0>

International Responses to Online Gambling

Several overseas jurisdictions have responded to the existence of online gambling by proposing appropriate regulatory frameworks.

Italy

After initially banning online gambling and attempting to block online gaming websites, Italian authorities reversed their decision and moved towards a regulated system in 2008. This came on the back of failed attempts to prohibit online gambling which did little to stem participation in the activity.

Licensing conditions are generally regarded as giving local operators an advantage but reforms may help level the playing field for operators based outside of Italy. Recent figures point to €188 million being spent on online poker during April 2009 and that this represented about four per cent of the total spend across all gambling sectors.³¹ Of note, online poker is regarded as a game of skill in this jurisdiction.

The United Kingdom

In the United Kingdom, online gambling activities are governed by the *Gambling Act 2005*. The Act treats both online and offline forms of gambling in a consistent manner, and allows for the granting of operating licenses for approved providers through the UK Gambling Commission. Under section 6 of the Act, gaming is defined as ‘playing a game of chance for a prize’.³² The Act is inclusive of games of ‘chance’ and ‘semi-chance’.

A large scale British Gambling Prevalence study was undertaken in 2007. It found that the numbers of citizens engaging in online gambling was comparatively low when compared to more traditional forms of gambling, with only three per cent of respondents having gambled online (poker or other casino-type games).³³ The report also noted a lower problem gambling prevalence rate in Britain than in Australia.³⁴

France

French legislators have indicated that they will introduce a regulatory framework that facilitates a licensing regime for online gambling operators in 2010. It is also understood existing protections for local gambling operators will be removed.

A Bill has already been introduced into the French Parliament and is making progress. The French Budget Minister, Eric Woerth, has reportedly stated “... [it was] no use denying the reality of online gambling and the expectations of French people”.³⁵

³¹ Murray, Brendon (2009), “Online Poker Continues to Grow” in *Europe Card Player*, at: <http://www.cardplayer.com/poker-news/6736-online-poker-in-italy-continues-to-grow>

³² Gambling Act 2005 (UK), at: http://www.opsi.gov.uk/acts/acts2005/ukpga_20050019_en_2#pt1-pb2-l1g6

³³ National Centre for Social Research (2007), *British Gambling Prevalence Survey 2007*, p 9.

³⁴ *Ibid*, p 10.

³⁵ Blitz, Roger (2009), “France to Open Up Internet Gambling” in *The Financial Times*, 6 March 2009, at: <http://www.ft.com/cms/s/0/7f88de4a-09ae-11de-add8-0000779fd2ac.html>

The United States

The U.S. *Wire Act* prohibits the operation of certain types of online betting businesses in the United States. However there are contrary views as to what this Act specifically prohibits. The US Department of Justice has stated the position numerous times that the Act prohibits all forms of online gambling.

However, a ruling by the US Fifth Circuit Court of Appeals in 2002 found that the Act only prohibits certain types of sports betting.

In *Thompson v MasterCard International*, the Court upheld a lower court ruling that online sports betting was illegal but online casino-style games were not:

“... a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the role and the exception to the role expressly qualify the nature of the gambling activity as that related to a "sporting event or contest.”³⁶

The *Wire Act* was enacted in 1961 to cover telephone betting and so the language of the Act is largely unsuited to adequately covering the reach and nature of new forms of technology and their impact on online gambling.

In 2004 the World Trade Organization (WTO) made a ruling that U.S. government efforts to stem internet gambling were in breach of commercial services accords. The initial complaint was made by Antigua and Barbuda. The European Union Commission has since made a complaint on similar grounds that has been upheld and is proceeding through established protocols.

With continuing uncertainty regarding the provisions of the *Wire Act* and whether it constituted an effective ban, U.S. legislators attempted to introduce new laws that would remove any uncertainty. However this proved difficult owing to divergent views on how to best regulate the online gambling industry and what the best means of enforcement were, as well as the many jurisdictions and stakeholders that opposed a blanket prohibition.

It is worth noting that some states in the United States have sought to have online poker included as part of a regulated regime. For example, in 2001 the State of Nevada took attempted to implement regulations governing the provision and licensing of online gambling, once further research had been conducted into appropriate safeguards for ensuring minors were not able to gain access to services. It was subsequently advised by the Federal Department of Justice in 2002 that any proposed legislation seeking to provide for a regulated regime would not be in compliance with federal laws.

It is also important to note that in some U.S. state jurisdictions, poker is regarded as a game of skill and beyond the regulatory reach of the State. This is because they apply a ‘predominance test’ that rules a

³⁶ <http://pub.bna.com/eclr/1321a.htm>

game to be a game of skill – if skills predominate over chance. Court rulings in Colorado and Pennsylvania have found poker to predominately be a game of skill.³⁷

In 2006, the *Unlawful Internet Gambling Enforcement Act* (UIGEA) was enacted in an attempt to provide greater certainty in relation to online gambling and its prohibition. The UIGEA prohibited financial institutions from facilitating payment transactions between overseas gambling providers and U.S. citizens. However, like Australia, the law did not make it offence for citizens to gamble online.

The Act had the effect of some of the larger publicly-listed online gambling providers ceasing to provide services to US customers. However it has not effectively prohibited online gambling with some smaller, less-visible providers continuing to operate beyond the reach of authorities.

Against this backdrop, there exists legislative activity in Congress to provide greater legislative clarity to this area and provide for an enhanced regulatory model that permits online gambling. Earlier this year, Congressman Barney Frank introduced a Bill that seeks to permit online gambling while overturning the restrictions on financial transactions contained within the UIGEA. The Bill continues to gather support. A Bill along similar terms has been proposed by Senator Robert Menendez for the Senate.³⁸

Other countries

Other countries that have moved to regulated models include Malta, Gibraltar, the Isle of Man and Alderney, and other countries like Spain and Sweden have indicated their intention to move in this direction.

³⁷See Jenkins, Tom (2009), "Pennsylvania Poker Ruling Appealed to State Superior Court" in Poker News Daily, At: <http://www.pokernewsdaily.com/pennsylvania-poker-ruling-appealed-to-state-superior-court-1016/>

³⁸ Johnson, Fawn (2009), "Poker Players Lobby Lawmakers To License Online Games" in The Wall Street Journal, 20 July 2009, at: <http://online.wsj.com/article/BT-CO-20090720-713104.html>

Issues for consideration

This submission raises a number of issues for further consideration by the Commission in its inquiry.

Prohibitionist regulatory models

Research has been conducted previously into the effectiveness of prohibitionist regulatory models of online gaming legislation, and the significant shortcomings associated with this policy approach.³⁹ There is scope for further research into this area from an Australian perspective. The shortcomings commonly identified in existing research reports are based on economic, technical and harm minimisation grounds.

Prohibitionist regulatory responses lead to:

- the spread of unregulated and clandestine gaming operations
- lost taxation revenue
- less funding for gambling support services and responsible gambling measures, and
- new ways of bypassing prohibition provisions and mechanisms.

These arguments have been made extensively through Parliamentary forums and processes that have been referred to in this report.

By prohibiting online poker, governments are foregoing a significant taxation and revenue stream. For example, a 2009 study by PricewaterhouseCoopers found that the US Government could potentially raise as much as \$52 billion in revenue over the next ten years by regulating and taxing online gambling.⁴⁰

Pursuing a prohibitionist model is in contrast to other jurisdictions around the world that have moved towards a regulated model in order to ensure taxation benefits are realised amongst other objectives. Countries in this grouping include United Kingdom, Italy, France, Spain, Malta, the Isle of Man, and Gibraltar, and Alderney. An appropriate and commercially viable taxation regime that complemented a regulated environment would deliver tangible benefits to Australians.

³⁹ For example, see Vuaran, D (2002), "The Banning of Internet Gambling in Australia: The Interactive Gambling Act 2001", in *Gaming Law Review*, June 2002, Vol. 6, No. 3: 207-212; Essa, A (2004), "The Prohibition of Online Casinos in Australia: Is It Working?" in *The Queensland University of Technology Law and Justice Journal*, Vol 4 No 1, p 88; Lessani (1998), "How Much Do You Want to Bet That the Internet Gambling Prohibition Act of 1997 is Not the Most Effective Way to Tackle The Problems of Online Gambling?" from The UCLA Online Institute for Cyberspace Law and Policy, <http://www.gseis.ucla.edu/iclp>

⁴⁰ Palmer, Doug (2009), "US could reap billions taxing Web gambling – study" from *Reuters*, 25 February 2009, at: <http://www.reuters.com/article/rbssConsumerGoodsAndRetailNews/idUSN2550450720090225>. Report summary at: <http://www.safeandsecureig.org/media/pwctaxanalysis.pdf>

Technological enforcement of a prohibitionist regulatory model

As previously noted, it is illegal to provide online gaming services to Australian citizens under the provisions of the IGA (with noted exceptions). Under section 24 of the IGA, the Australian Communications and Media Authority is required to add prohibited online gambling content to the Authority's list of prohibited content, otherwise known as a 'blacklist'.

One governmental response to the existence of online gaming services through the internet (and in line with the objectives of the IGA) has been to propose internet blocking utilising existing filtering technologies, either on a voluntary or mandatory basis. As this inquiry is examining the impact of new technologies on the gambling sector, it is appropriate to address this matter as it relates to the terms of reference.

The feasibility and objectives of mandatory filtering proposals have been examined through a number of inquiry processes and research reports. Some of these have been referred to earlier in this submission such as the NOIE inquiry and the Senate Select Committee on Information Technologies.

In addition to the parliamentary forums noted above, and their findings referred to earlier in this report, additional forums have examined the feasibility of online filtering technologies and made some pertinent observations.

A report commissioned by the former Federal Government and compiled by the Internet Industry Association (IIA) was completed in February 2008 and handed to the Department of Broadband, Communications and the Digital Economy.⁴¹

The report examined operational, legal, technical and financial aspects of ISP filtering, and made the following observations:

- filters could be easily bypassed
- filters could slow the internet considerably
- filters only addressed one method of transmission
- there were business and legal impacts that needed to be more fully considered
- those maintaining the list of prohibited content would not be able to keep pace with new web content being created.

Insofar as these observations relate to online gaming, this submission argues that mandatory filtering does not represent the ideal position in relation to the responsible regulation of gambling from both a policy and public interest standpoint. A mandatory filter applied to online gaming sites would likely be ineffective because:

- individuals would easily find ways to bypass it
- new, 'underground' sites would emerge that do not offer the same levels of consumer protection

⁴¹ Internet Industry Association (IIA) (2008), *Feasibility Study: ISP Level Content Filtering*, http://www.dbcde.gov.au/___data/assets/pdf_file/0006/95307/Main_Report_-_Final.pdf

- Australians may seek to participate in gaming activities through other, less regulated mediums not blocked by the filter.

We are aware that ISP-filtering technologies are currently undergoing trials through the Department of Broadband, Communications and the Digital Economy and that this will further inform discussion of this area.

According to available statistics, a reasonably significant constituency appears to play online poker despite the provisions of the IGA. They would no doubt have a keen interest in this policy matter and desire to have consultative input into any decision made following the trials that sought to enforce a blanket ban on online poker through a mandatory filter or similar mechanism.

Inconsistencies with the Interactive Gambling Act

The IGA contains several inherent inconsistencies in relation to permitted forms of online gambling – namely, how the IGA treats online wagering as opposed to online gaming.

‘Online wagering’ refers to gambling on racing or sports events through the internet, while ‘online gaming’ refers to other forms of gaming based on chance or mixed chance including casino-style games and tournament games such as online poker, over the internet.

It is our view that online poker requires greater levels of skill than betting on a random outcome of a sporting event or other contingency. As such, the IGA imposes an unfair and unexplainable distinction between the two forms of online gambling, and as a consequence, provides markedly different legislative rules.

Indeed, the 2000 ALP minority report as part of the Senate Select Committee on Information Technologies inquiry process stated:

“The ALP believes that Internet gambling should be subject to the same set of regulatory principles as other forms of gambling.”⁴²

Research studies have examined the role of player strategy in poker and found it to be much more than a game of chance. Some of the submissions received by this inquiry have explored this notion (such as the iBus Media and John Beagle submission). A US study of more than 100 million hands of Texas Hold’Em online poker found:

“... compelling statistics about the way that outcomes of games are largely determined by players’ decisions rather than chance.”⁴³

⁴² Senate Select Committee on Information Technologies (2000) *Gambling Online in Australia: Minority report by ALP Senators*, p 129.

⁴³ Cigital Inc(2009), *Statistical Analysis of Texas Hold’Em*, p 5, at:
<http://www.cigital.com/resources/gaming/poker/100M-Hand-AnalysisReport.pdf>

In some jurisdictions in the US, a 'pre-dominance' test is applied that rules a game to be a game of skill, if skills predominate over chance. In some jurisdictions such as Colorado and Pennsylvania, courts have ruled that poker is predominantly a game of skill.

Poker is also differentiated from other forms of gambling in that it is played peer-to-peer with the dealer taking a cut, as opposed to playing against the house.

Online gambling can be more regulated than terrestrial forms of gambling

A common misconception is that online gambling is less regulated and less capable of regulation than offline forms of gambling. The vast majority of online poker service providers operate within strict regulatory regimes imposed by their host countries. A number of regulatory mechanisms already exist and apply to online gaming operators depending on their host jurisdictions, including measures for:

- ensuring only adults are able to gain access to websites
- ensuring the transparency and fairness of general game play
- monitoring consumers playing habits and usage, and imposing certain limits based on that information
- allowing consumers to place certain controls, including self-exclusions, on their playing methods
- identifying and providing advice and support to problem gamblers
- identifying and acting on fraudulent or problematic financial activities associated with online poker sites
- ensuring revenue is contributed toward problem gambling initiatives.

This is clear from the regulatory regime imposed under the laws of Tasmania and the Northern Territory in respect of their licensed online operators.

The 2009 FaHCSIA report into interactive gambling found that most large gambling service providers promote responsible gambling strategies to their consumers as part of their operations.⁴⁴

A number of online poker providers, including some which are associated with IGC, are regulated by the Alderney Gambling Control Commission (AGCC) and the extensive controls which that Commission has in place to deal with these issues provides a useful case study. Providers are required to comply with all relevant regulations under Alderney law. The Alderney laws and regulations are extensive.⁴⁵

Pursuant to those regulations, the provider is obliged to operate in accordance with an Internal Control System which has been approved by the AGCC and only with gambling equipment which itself has been approved by the Commission. The regulations contain detailed provisions including provisions for the registration of customers, as to the deposit of customer funds, as to compliance with the relevant anti-money laundering codes, as to the identification of players at risk and the limitation on players' gambling activities.

⁴⁴ FaHCSIA report, p vii.

⁴⁵ Available at: <http://www.gamblingcontrol.org>

The regulations also require providers to make contributions to an appropriate body involved in conducting research into, or providing education about, the risks of gambling or the treatment of problem gamblers.

The nature of internet technology means there is significant potential for implementing desired safeguards for consumers in Australia of regulated online poker. However, the prohibition of online gaming in Australia means that overseas-based providers are forced to rely on responsible gambling practises as they apply to the jurisdictions in which they are based. This means that Australian consumers who access different online poker websites are subject to sometimes differing responsible gaming features.

The myth that online gambling equals problem gambling

It has been asserted at various times, most notably in the lead up to the introduction of the *Interactive Gambling Bill*⁴⁶, that there is an explicit link between the growth of online gambling and problem gambling. There appears to be no evidence base to support these assertions.

Indeed the recently completed FaHCSIA report found that:

“... to date there are no robust studies showing a high correlation between growth in Internet gambling websites and problem gambling incidence, even in countries that allow a broader range of Internet gambling activities.”⁴⁷

Furthermore, studies have linked the growth of problem gambling with the growth of electronic gaming machines (EGMs or ‘Pokies’) in the past. For example, the 2006 ACNielsen study commissioned by the NSW Government made the observation that EGMs pose greater risk in relation to problem gambling, as problem gamblers are more likely to use EGMS than non-problem gamblers.⁴⁸

It is important to recognise that online poker is enjoyed as a consumer pastime based on its popularity *as a form of entertainment*. Much of this stems from enjoyment of poker as a non-gambling activity.

A number of countries have moved to allow online gaming under regulated conditions rather than go down the prohibitionist route. These include the United Kingdom, Italy, France, Spain, Malta, the Isle of Man, and Gibraltar, and Alderney.

Using the United Kingdom as a case study, the move to allow online gambling has had no impact on problem gambling statistics according to published data. The problem gambling prevalence rate in the United Kingdom in 2007, was the same as 1999 at 0.6 per cent.⁴⁹ Great Britain’s problem gaming statistics are still, and always have been, within the same range as Canada, New Zealand, and Sweden at

⁴⁶ For example, see http://www.richardalston.dcita.gov.au/Article/0,,0_4-2_4008-4_15182,00.html

⁴⁷ FaHCSIA Report, p vii.

⁴⁸ AC Nielsen (2006) *Prevalence of Gambling and Problem gambling in NSW – A Community Survey 2006*, p

⁴⁹ UK Gambling Commission (2007), “Problem gambling has not increased, but the level remains a challenge” [Media Release], at: http://www.gamblingcommission.gov.uk/gh-media/latest_news/2007/problem_gambling_has_not_incre.aspx

0.5-0.6 per cent.⁵⁰ While the overall popularity of online gaming increased, the percentage of problem gamblers citing online gambling as their primary mode of gambling actually decreased, from 16 per cent to 12 per cent.⁵¹

In Canada, a 2005 study by the Government of Ontario analysed the prevalence of internet gambling and problem gambling. It cited statistics from the Ontario Problem Gambling Helpline that indicated less than one per cent of gamblers identified internet gambling as the source of problem gambling.⁵²

Wider perceptions about Australia's e-economy

Australia was once seen as a world leader in the provision of an appropriate regulatory framework to govern gambling service provision, and online gaming services. With the IGA, Australia is considered an 'old world' economy. Australia now has an opportunity to be at the front of international best practise in the provision of responsible gaming services.

⁵⁰ Wardle, H., Sproston K., Orford, J., Erens, B., Griffiths, M., Constantine, R., Pigott, S., (2007), *British Gambling Prevalence Survey 2007*, p 10, 84-85.

⁵¹ GamCare (2007), *2006 Care Services Report*, at:
<http://www.gamcare.org.uk/data/files/pdfs/CareServices2006.pdf>

⁵² Sadinsky QC, S., (2005) *Review of the Problem Gambling and Responsible Gaming Strategy of the Government of Ontario*, p 204.

Recommendations

This submission makes a number of recommendations in relation to the legislative and regulatory environment underpinning gambling, and specifically, the provision of online gaming services.

We respectfully submit the following recommendations:

- 1. That the Commission notes the risks and shortcomings of prohibitionist regulatory models in response to online gambling;***
- 2. That the Commission notes the shortcomings of policy responses that seek to enforce a prohibition of online gaming through internet filtering technologies;***
- 3. That further research into the prevalence of online gambling and consumer habits is required before any legislative changes in order to ensure there is a solid 'evidence base' to any proposed legislative reforms or recommendations;***
- 4. That should the Commission wish to examine and propose an appropriate legislative model for online gaming, that a regulated model would provide the best means of protecting consumers and ensuring benefits flow through to the community, as opposed to a prohibitionist model;***
- 5. That online poker is seen as a distinct form of online gambling in terms of this inquiry process and any proposed regulatory framework; and,***
- 6. That an appropriate forum such as a Senate Committee examines the provisions of the IGA relating to the differentiation that is made between online wagering and gaming, with a view to treating both forms in a consistent policy manner.***

Conclusion

The growth of communications technologies like the internet will strengthen the need for further work to be done in relation to the regulations that govern online gambling. This will help ensure Australian citizens are able to access online gambling services in a safe and regulated environment.

This submission has argued for a fair and responsible approach to online gambling and the regulations which govern it. Australian legislators have a unique opportunity to remedy many of the issues that have been outlined in this submission and in past forums, by providing a more effective legislative basis to online gambling activities, and by allowing for the legalisation and regulation of online poker.

Harm minimisation policies rightly form the basis of Australia's regulatory regime relating to permitted forms of online gambling. There is great potential for online poker to contribute towards this framework and provide a responsible, regulated service to Australian consumers.