

CHAPTER 4

OPERATION OF THE BILL

Introduction

4.1 This chapter examines the operation of proposed legislation. During the inquiry, three key issues have emerged in relation to how the bill would achieve its stated objectives:

- the appropriateness of banning a technology rather than an activity;
- whether the bill would achieve its objective of limiting problem gambling in Australia; and
- and the definition of ‘reasonable diligence’ in determining whether companies will be prosecuted under the bill.

4.2 The chapter also whether Australian companies should be permitted to deliver internet gambling services to people outside Australia, then concludes with a consideration of several other administrative issues raised by submissions.

Technological inconsistencies

4.3 A criticism made by many submissions is that the bill focuses on the means of transmission rather than the legality of the act itself. It is argued that this has illogical results:

An artificial distinction is drawn between accessing gambling services over the telephone and accessing the same service using other delivery methods, particularly when a ‘voice call’ includes a call that involves a recorded or synthetic voice. It is illogical to suggest that making a voice call to make a bet is legal, while at the same time prohibiting a person from sending a fax to make the same bet.

If a gambling service can be provided using a telephone, it should be able to be provided using any Delivery Method.¹

4.4 It is also argued that this approach runs contrary to the Government’s wider policy of encouraging e-commerce:

[T]he Government’s own *Electronic Transactions Act 1999* was enacted to give standing and effect to transactions that occur online. The simplified object of the Act is defined as ‘for the purposes of a law of the Commonwealth, a transaction is not invalid because it took place by means of one or more electronic communications’. In other words the mode of transaction should not determine its legal status and an online transaction has the same legal standing as an offline transaction.²

1 Jupiters, Submission 31, p 4. See also Mr Hines, *Proof Committee Hansard*, Canberra 4 May 2001, p 2; NT government, Submission 22, p 9; IAS, Submission 23, p 5; ARBAC, Submission 1, p 3.

2 MegaSports, Submission 14, p 4.

4.5 Jupiters explain that this involves the two principles of functional equivalence and technology neutrality:

‘functional equivalence means that transactions conducted using paper documents and transactions conducted using electronic communications should be treated equally by the law and not given an advantage or disadvantage against each other’; and

‘technology neutrality means that the law should not discriminate between different forms of technology - for example, by specifying technical requirements for the use of electronic communications that are based upon an understanding of the operation of a particular form of electronic communication technology’.³

Conclusions and recommendations

4.6 The Committee has two findings in relation to this matter. First, the Committee endorses the concept of technological neutrality, and the Government’s overall policy of encouraging the adoption of e-commerce by Australian business and society. However, this principle would be complied with if the findings and recommendations of Chapter 3 – covering the exclusion of wagering and lotteries, and the narrowing of the definition to remove the unintended consequences – were adopted. The effect of the law would be to allow the use of the internet as a tool for conducting business transactions.

4.7 This leaves the issue of gaming on the internet, which would still come within the scope of the bill. For all the reasons detailed in Chapter 2, the Committee considers that it is appropriate to take measures to limit the use of the internet for gaming activities, and that the principle of technological neutrality does imply a blanket acceptance of every new internet product. There are circumstances in which the Government can and should take action to limit the emergence of new products that are judged to cause harm. Similarly, the fact that gaming is acceptable in one context, such as physical casinos, does not preclude limits to that same activity in other contexts. Racing motor vehicles provides an analogy: what is legal on the race track is not legal on public roads.

4.8 The Committee therefore concludes that the provisions of the bill do not contradict existing Government policies that seek the acceptance of e-commerce through the principles of technology neutrality.

Effectiveness of the proposed regime

4.9 A criticism made of the bill is that, notwithstanding the merits of banning internet gambling, the measures provided for will not in fact achieve the stated objective of the bill. This view is summarised by Mr Clark of the Northern Territory government:

the bill aims to achieve two things: firstly, it attempts to draw a symbolic line in the sand, as it were, to start changing the Australian gambling culture; and, secondly, it would seek to combat problem gambling. The Northern Territory fully supports both of these objectives. We want to change a gambling culture that encourages excessive and detrimental gambling. We are also committed to fighting problem gambling. However, this bill fails to achieve both of those objectives. Indeed, in respect of fighting problem gambling – to the extent that this bill would preclude

3 Jupiters, Submission 31, p 4. See also Centrebet, Submission 33, p 6.

operators using the Internet technological platform – this bill could actually be described as worse than useless.⁴

4.10 There are three main elements to this argument.

Migration to overseas sites

4.11 First, it is argued that the bills will in fact have little effect since Australian gamblers will still be free to access any of the large number of overseas sites. According to Mr Clark:

There is nothing potential about the access; the access is achieved now.⁵

... having access to the Internet means you have access to internet gambling. That is a fact of life. In terms of the notion of access, access is here – access has been overtaken by the fact of the internet. We now turn to the other question of exacerbating problem gaming, the so-called virtual poker machine in every lounge room. It is significant to note that the bill will not prevent Australians accessing offshore sites – 99.9 per cent of the sites are offshore sites. So the bill will do nothing to prevent Australians accessing almost all of the internet gaming sites that are available now.⁶

4.12 The Federal Group make a similar point:

The industry has already taken off; the horse has bolted. Many comments have already been made today about the size of the industry. In fact, in Senator Alston's own second reading speech the industry was noted as having increased by some 100 per cent in the last 12 months, to some 1,400 sites worldwide.⁷

4.13 In this context, it is also relevant to note the evidence by Lasseters Online, which states that 70 percent of online players register with four or more gaming operators.⁸ The implication is therefore that all the Australians currently accessing Australian gaming sites are probably already playing on a number of overseas sites.

Filtering systems will not be effective

4.14 The second and related aspect to this argument is that the filtering systems envisaged by the bill will have little real effect. As Fujitsu note in their submission:

It is readily evident that a simple ban in internet gambling will be circumvented by existing technology; specifically the anonymous proxy servers commonly used by hackers.⁹

4 Mr Clark, *Proof Committee Hansard*, Canberra 4 May 2001, p 47. See also NT Government, Submission 22, p 1; MegaSports, Submission 14, p 1.

5 Mr Clark, *Proof Committee Hansard*, Canberra 4 May 2001, p 47.

6 Mr Clark, *Proof Committee Hansard*, Canberra 4 May 2001, p 47.

7 Mr Farrell, *Proof Committee Hansard*, Canberra 4 May 2001, p 37.

8 Mrs Pafumi, *Proof Committee Hansard*, Canberra 4 May 2001, p 45.

9 Fujitsu, Submission 27, p 1.

4.15 The Northern Territory government add that the filtering provisions are no advance on current practice. Such software is already available commercially for those who wish to limit access on their machines, and since 1999 the Northern Territory has required by law that an internet gaming operator provides access to the same filtering software.¹⁰ MegaSports picked up this theme:

The optional content filtering provisions in the bill will strongly appeal to those in the community who oppose gambling. It is right that they have the freedom of choice to install such filtering technology to prevent themselves or their children from accessing online gambling products and services. However, those individuals who wish to gamble online (including the number who may have a tendency to gamble beyond their means) will be extremely unlikely to choose to install such filtering technology.¹¹

4.16 Electronic Frontiers Australia also point to the technical difficulties associated with the use of the filtering software:

such techniques are highly inaccurate, their reliability being estimated at around 70 per cent in the case of France. Quite simply, the addressing methods used to direct internet data packets are not structured on a geographical basis, and no improvements in technology are going to alter this fact. Furthermore, just as attempts at censorship are easily circumvented, there are anonymising and relay techniques that can readily defeat attempts to determine location.

It is therefore totally inappropriate to imply that technological solutions are available to support this legislation.¹²

Forcing Australian gamblers offshore with no protection

4.17 The third issue, as alluded to by Mr Clark quoted above, is that the bill may actually be counter-productive. By prohibiting access to well regulated Australian sites that incorporate best practice harm minimisation, Australian gamblers will end up on overseas sites with no protection at all. To quote Mr Clark further:

the bill will not stop Australians accessing almost every internet gaming site in the world. So it makes no change in access. All it does is stop Australians accessing the best regulated internet gaming sites in the world – our own. It is likely to exacerbate problem gambling rather than reduce it because you are blocking players from accessing the kinds of harm minimisation features of which I have just spoken.¹³

4.18 The Federal Group makes a similar point, reflected by many submissions:¹⁴

10 NT Govt, Submission 22, p 5.

11 MegaSports, Submission 14, p 3.

12 EFA, Submission 16, p 3. See also Centrebet, Submission 33, p 4.

13 Mr Clark, *Proof Committee Hansard*, Canberra 4 May 2001, p 49. See also Mr Coroneas, *Proof Committee Hansard*, Canberra 4 May 2001, p 57.

14 Canbet, Submission 10, p 1; Sky City, Submission 9, p 4; Australian Casino Association, Submission 12, p 3; Centreracing, Submission 19, p 3; Megasports, Submission 14, p 2; ACT Government, Submission 20, p 2.

As Australian gambling operators will have access to a world market, excluding Australia, they will be providing the other citizens of the world leading player protection and harm minimisation measures whilst Australian residents, who will have access only to non-Australian operators, will not have anywhere near the same standard of player protection and harm minimisation measures. As a result of this there is a real likelihood that the scope for problem gambling in this country will be expanded, not limited ...¹⁵

4.19 At the same time Australia loses the opportunity to create a properly regulated local industry with appropriate harm minimisation measures, as well as losing a revenue stream that can be used to fund harm minimisation measures.¹⁶

Conclusions and recommendations

4.20 The Committee recognises that there are real limitations on the capacity of the Australian Commonwealth Government to prevent Australians accessing gaming sites on the internet. However, it is important to remember that the bill does not pretend to stop Australians from such gaming. As NOIE points out:

the Government is not asserting that these measures will completely eliminate access to overseas gambling sites. What the Government is endeavouring to do is to limit and to discourage.¹⁷

4.21 Addressing the effectiveness of the complaints mechanism, NOIE went on to explain:

In the case of a complaint about an overseas gambling site that is making gambling services available to Australians the intention is to provide for either an industry code of practice or ABA determined standards, which would essentially have the same effect as the online content regime, and that is to provide for the referral of complained about gambling sites to filtering software manufacturers and to have filtering software made available by internet service providers, and others if necessary, to their customers but on a voluntary basis.¹⁸

4.22 The Committee also notes that:

A FaCS [Department of Family and Community Services] survey has found that very few people currently gamble online and if it were banned, almost all would respect that ban. The survey also identified strong public support for a ban on gambling.¹⁹

4.23 The bill is therefore about setting a standard, and sending a message to Australians about the dangers of problem gambling and the internet.

15 Federal Group, Submission 3, p 2. See also Mr Farrell, *Proof Committee Hansard*, Canberra 4 May 2001, p 37

16 Noted at Submission 22, NT Govt, p 5.

17 Mr Besgrove, *Proof Committee Hansard*, Canberra 4 May 2001, p 63.

18 Mr Dale, *Proof Committee Hansard*, Canberra 4 May 2001, p 63.

19 NOIE Report, p 63.

4.24 Overall therefore, the Committee does not consider that the limitations of the bill mean that it is not worth proceeding with. As Mrs Phillips, representing the Festival of Light in South Australian commented:

I believe anything that is attempting to address the problem is a step forward. I would not reject the legislation simply because it did not go far enough. ...

I still think the bill is better than nothing. By having no legislation at all, the impression given to the public is that there is nothing wrong with this kind of gambling.²⁰

4.25 For these reasons, the Committee considers that the bill will provide a disincentive to Australians seeking to gamble on the internet, and as such, should be proceeded with. However, the Committee suggests the Government consider the adoption of two additional measures to strengthen the effectiveness of the proposed legislation. First, the creation of an advertising prohibition in Australia of overseas based internet gambling services; and second, the introduction of legislation similar to the US Wire Act,²¹ providing for the prosecution of foreign based operators of internet gambling services being accessed from Australia, should those operators come to Australia.

Meaning of ‘reasonable diligence’

4.26 Industry submissions have raised concerns in relation to the obligations imposed by the offence provisions of section 15 of the bill. Under section 15, it is an offence to provide an Australian-based interactive service to customers in Australia, however section 15(3)(b) provides a defence if it can be established that the person ‘could not, with reasonable diligence, have ascertained that the service had an Australian customer link’.

4.27 Submissions consider this requirement to be too onerous and uncertain, particularly in view of the heavy penalties, and argue for greater clarity by means of guidelines or regulation, to establish what operator safeguards would amount to ‘reasonable diligence’.²² According to Jupiters:

It is unacceptable that Australian companies should be subjected to the uncertainty surrounding the drafting of the reasonable diligence defence, particularly when the Government has made it clear in the Explanatory Memorandum that its intention is to allow consideration to be given to the technical and commercial viability associated with implementing compliance systems.²³

4.28 The central problem is that companies are uncertain of what they will be required to do to meet the ‘reasonable diligence’ test under the proposed regime. They fear that they will take various precautions which, while generally effective, may still allow some Australian customers to slip through, exposing them to prosecution and the high penalties provided for

20 Mrs Phillips, *Proof Committee Hansard*, Canberra 4 May 2001, p 34.

21 For a detailed discussion of the US Wire Act 1961, see the Senate Select Committee on Information Technologies, *Netbets – A review of online gambling in Australia*, p 96-100.

22 Canbet, Submission 10, p 2. See also Skycity, Submission 14, Megasport, p 6; Submission 22, NT Govt, p 8.

23 Jupiters, Submission 31, p 5.

under the bill. The accuracy and reliability of geo-location software were described above and in this context, the Committee notes the example given by Mr Farmer of Canbet:

... we are aware of – and it is very much in our mind – the case of one Australian company called MegaSports which is owned by a company in Nevada. They gave an undertaking to the Nevada Gaming Board that they would not take bets from within the United States, and they put in blocking protocols. An agent of the Nevada Gaming Board opened an account in Canada, purported to be a Canadian, quoted a Canadian credit card number and dialled from Nevada to Canada an internet service provider so it came up at MegaSports as a Canadian having a bet. The person had identified themselves as a Canadian with a Canadian address and a Canadian credit card, but it turned out that it was an American.²⁴

4.29 It is this sort of risk that has led both Canbet and International All Sports to indicate they will leave Australia should the bill be passed.²⁵ It is therefore important to companies that they can be clear about what measures they are expected to take, to protect them against prosecution.

4.30 One solution is for the bill to provide for the creation of an industry code, along similar lines to Part 4 of the bill, that would set out what steps companies must take to comply with ‘reasonable diligence’.²⁶ Under this system, an Australian internet gaming provider that complies with the code will not be prosecuted even where an Australian gambler succeeds in placing a bet. This contrast with the application of the ‘reasonable diligence’ test on a case by case basis.

4.31 The Committee sees considerable merit in this approach. Alternatively, the due diligence requirements should be set out in the bill itself or in regulations.

Recommendation 4.1

The Committee recommends that the Government take measures to clarify the requirements of ‘due diligence’ for the purposes of section 15, either by amending the Interactive Gambling Bill 2001 or detailing these requirements in associated regulations.

Australian services to offshore gamblers

4.32 A further issue that arises in the consideration of this bill, is whether, if Australian companies are to be prevented from providing gambling services to Australians, they should be permitted to market these services to overseas gamblers.

4.33 In the Second Reading Speech, and Explanatory Memorandum, no justification is given for the approach taken in the bill. However, many submissions were critical. As Professor McMillen of the Australian Institute for Gambling Research states:

24 Mr Farmer, *Proof Committee Hansard*, Canberra 4 May 2001, p 2.

25 Canbet, Submission 10, p 2; IAS, Submission 23, p 4.

26 Mr Farmer, *Proof Committee Hansard*, Canberra 4 May 2001, p 3.

The bill is based on the principle that interactive gambling is unacceptable for Australians because of the potential for harm; yet it will permit Australian operators to provide interactive gambling to international customers. There is an inherent ethical contradiction in this bill. It is morally indefensible to imply that Australians should be protected from this form of gambling yet Australian operators can profit from the harm created in other countries.²⁷

4.34 The World Lottery Association notes that the bill also runs contrary to the usual approach in relation to lotteries:

Indeed, current members in good standing, including the lottery companies in Austria, Sweden, Finland, and other European government lotteries, have restricted their sales only to residents of their respective countries unless they have an agreement with another country.²⁸

4.35 In considering this concern, the Committee notes that the central purpose of the bill is to address problem gambling in Australia. As stated by the Explanatory Memorandum:

Australia already has one of the largest per capita gambling industries in the world. The Productivity Commission found that, on average, adult Australians currently spend at least twice as much on legalised gambling as people in Northern America and Europe – making Australians among the heaviest gamblers in the world.²⁹

4.36 It is therefore neither appropriate nor necessary for the Australian Government to introduce measures relating to problem gambling overseas. This point was made by Mr Dale of NOIE:

It is the obverse of the main policy intention, which is clearly not to expand or control services provided to people outside Australia; it is to restrict services provided to people in Australia and, in doing that, as it not necessary to prevent access by residents of other countries the government has not done that. It is not necessary to achieve the main intention, which was the potential gambling problems of Australians rather than people in other countries. As the minister has said publicly, the general principle should be that initiatives to address or restrict gambling in particular countries are up to the governments of those countries. In this case we have taken action for Australian residents only and do not purport to do anything else.³⁰

4.37 The Committee therefore considers the provisions of the bill to be appropriate.

Banning the users

4.38 The bill creates a number of offence provisions for individuals who provide interactive gambling services. The Committee has received several recommendations that the bill should extend these penalty provisions to make it an offence to bet online with an

27 AIGR, Submission 34, p 1. See also ARBAC, Submission 1, p 4; ACT government, Submission 20, p 2; Centreracing, Submission 19, p 2.

28 WLA, Submission 8, p 1.

29 Explanatory Memorandum, p 3.

30 Mr Dale, *Proof Committee Hansard*, Canberra 4 May 2001, p 63.

Australian licensed provider, as well as to provide false or misleading information in order to place a bet.³¹

4.39 The Committee has not received sufficient evidence on this matter to form any final conclusions, however, both are suggestions that merit further consideration by the Government.

Enforcement mechanisms

4.40 Two church groups commented on the need to strengthen the enforcement mechanisms of the bill by legislating a more proactive monitoring role for the Australian Broadcasting Authority (ABA), rather than simply responding to complaints as envisaged by the bill as drafted. Also, it was suggested that the complaints mechanism must be as user friendly as possible: incorporating a well-advertised free ABA phone hotline and complaint forms available via the ABA website.³²

4.41 The Committee notes that the bill as drafted provides for the ABA to investigate breaches based on either complaints by members of the public or on its own initiative.³³ However, the Committee agrees with the need to ensure the accessibility of the complaints mechanism.

Education campaign

4.42 The final issue relates to community education programs that address the dangers of problem gambling, both on the internet and elsewhere. Such programs were recommended in the NOIE report:

consumer advice campaign to complement a ban on interactive gambling. Such a campaign could inform the community of the potential risks and dangers of gambling online and be targeted at potential new groups of gamblers emerging with the increased accessibility of interactive gambling services.³⁴

4.43 The Committee notes the concern raised by the Internet Industry Association that such an education campaign must not become an internet scare campaign that will harm the overall acceptance and adoption of e-commerce:

there is a risk that unless this 'advice' campaign is carefully managed, it will do no more than reinforce a message that the Net is inherently risky. This would be inconsistent with another recent NOIE report, 'the Phantom Menace', which tried to calm consumer fears about using credit cards online.³⁵

4.44 This is a legitimate concern, which the Committee considers the Government should remain mindful of when preparing the campaign.

31 Megasport, Submission 14, p 5-6; TAB NSW, Submission 7, p 9. Centreracing, Submission 19, p 2.

32 Festival of Light, Submission 13, p 8. See also Baptist Community Services, Submission 32, p 3-4.

33 Section 21

34 p. 62. The matter was also raised by the Baptist Community Services, Submission 32, p 6.

35 IIA, Submission 36, p 4.

Senator Alan Eggleston

Chair