

Where to Now? The On-line Gambling Moratorium

Lisa Vanderwal and Rebekah Cheney examine this controversial issue in light of the recent Senate debate.

In 1996 State and Territory Gaming Ministers agreed to develop a model Code for interactive gambling that called for a strict licensing regime. In the following few years, the Northern Territory, Queensland and the ACT passed legislation¹ that addressed, to a certain extent, such a regime. However, in January this year the Prime Minister indicated that he would prefer the banning of on-line gaming altogether, rather than regulating it as was the preference of the States and Territories and peak industry bodies such as the Internet Industry Association ("IIA").

True to his word, on 17 August 2000 the Government introduced the *Interactive Gambling (Moratorium) Bill 2000* ("Bill"), which immediately became the subject of much controversy. The Bill proposed imposing a 12 month moratorium on the development of the interactive gambling industry in Australia, beginning retrospectively on 19 May 2000 and ceasing at midnight on 18 May 2001. The Bill was to create a criminal offence of providing an Interactive Gambling Service ("IGS") during that period, unless the service was already being provided when the moratorium began.

The Government was, in effect, using the Bill as an interim measure to halt the further expansion of the interactive gambling industry in Australia while it made decisions as to the feasibility and consequences of a ban on on-line gaming services in Australia. The Bill was also to assist in the development of a uniform approach to harm-minimisation measures, as State and Territory Governments had significantly different approaches to this issue.

However, whether the Government would have achieved these objectives through the Bill is now almost academic, as on 9 October 2000 the Bill was defeated in the Senate when the Government failed to obtain a majority by a tied vote of 33:33. The main reasons the Bill was defeated appear to be that the Government failed to address the issue of problem gambling itself, or recognise that a ban on on-line gambling may not technically be possible?.

This article examines some of the key elements of the defeated Bill. It also outlines some of the issues that were debated in the Senate, with a view to determining whether the Government will, as promised, reintroduce moratorium legislation at a later date. It also considers whether the Government will take a more extreme measure and attempt to completely ban on-line gambling indefinitely, or, as the States and other bodies have suggested, adopt a regulatory approach.

WHAT THE BILL HAD PROPOSED

The definition of IGS in the defeated Bill had four essential elements. An IGS must be:

- (a) a gambling service;
- (b) provided in the course of carrying on a business;
- (c) provided to customers using any of the following communication services;
 - (i) an Internet carriage service (a listed carriage service that enables end users to access the Internet);
 - (ii) any other listed carriage service (as defined in the *Telecommunications Act 1997*);
 - (iii) a broadcasting service (as defined by the *Broadcasting Services Act 1992*);
 - (iv) any other content service (defined by the *Telecommunications Act 1997*, and provided using a listed carriage service or a service specified by the Minister); or
 - (v) a datacasting service (delivery of content in any form to persons having equipment appropriate for receiving that content or delivery of the services using the broadcasting service bands and the services provided in Australia under a datacasting license); and
- (d) linked in a specified way to Australia.

Some of the issues raised by this definition are examined below.

Exclusions to an Interactive Gambling Service

There were a number of exclusions to the definition of an IGS:

- Telephone betting, being a gambling service provided to customers wholly by way of voice calls made using a standard telephone service. Customers who have a disability, such as a hearing impairment, were permitted to access communications that were equivalent to a voice call.
- Services relating to options contracts, futures contracts, relevant agreements and Chapter 8 agreements as specified in the Corporations Law.
- Online share trading as it involved the acquisition of contractual rights.
- Exempted services determined by the Minister.

Relevant Communication Services

An Internet service provider ("ISP") would generally fall outside the ambit of the definition unless it intentionally provided the content of an IGS. Where the ISP was merely carrying the gambling service, it would not be guilty of an offence. Similarly, entities providing ancillary services such as bill payment and credit provision would not be guilty of an offence under the Bill, unless the provider of such services was the content provider.

Service linked in a Specified way to Australia

The service had to be linked in a specified way to Australia. There were three links specified in the Bill.

- Services provided in the course of carrying on a business in Australia.
- Services provided where the central management and control of the service was in Australia. The

Explanatory Memorandum² provided the example of a company that provided an on-line gambling service, such as a casino, that had its website maintained in an off-shore jurisdiction but the principal company executives were based in Australia.

- Services provided through an agent in Australia. The Bill provided a special rule for the service of summons or process on body corporates incorporated outside of Australia that did not have a registered office in Australia, but did have an agent in Australia.

Residency or citizenship issues were not relevant to determining whether a link to Australia had been established.

Extra-Territorial Application

The Bill had extra-territorial application. Any Australian Interactive Gaming Service Provider ("IGSP") who provided a service overseas would have committed an offence. The intention, according to the Explanatory Memorandum, was to "pause the development of the Australian-based interactive gambling industry, which includes the provision of services to persons outside of Australia".³

THE DEBATE

When the Bill was initiated in the Senate, it was immediately referred to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee ("Committee") who handed down a report on 4 September 2000. The Committee Report ("Report") consisted of a majority report endorsing the Bill, accompanied by two dissenting reports by the Australian Labor Party and the Australian Democrats. Some of the issues raised in the Report and debated in the Senate prior to the defeating vote are discussed below.

On-line gambling pushed off shore

The ALP and the Democrats argued that a moratorium would not address problem gambling and would encourage Australians to use international IGSPs, which often operate in a less regulated environment with few harm-minimisation measures. In a submission by Lasseters Online, statistics were introduced stating that the number of international IGSPs is growing by around 20 per week in line with increased consumer demand, providing Australians

with more options for on-line gambling every day.

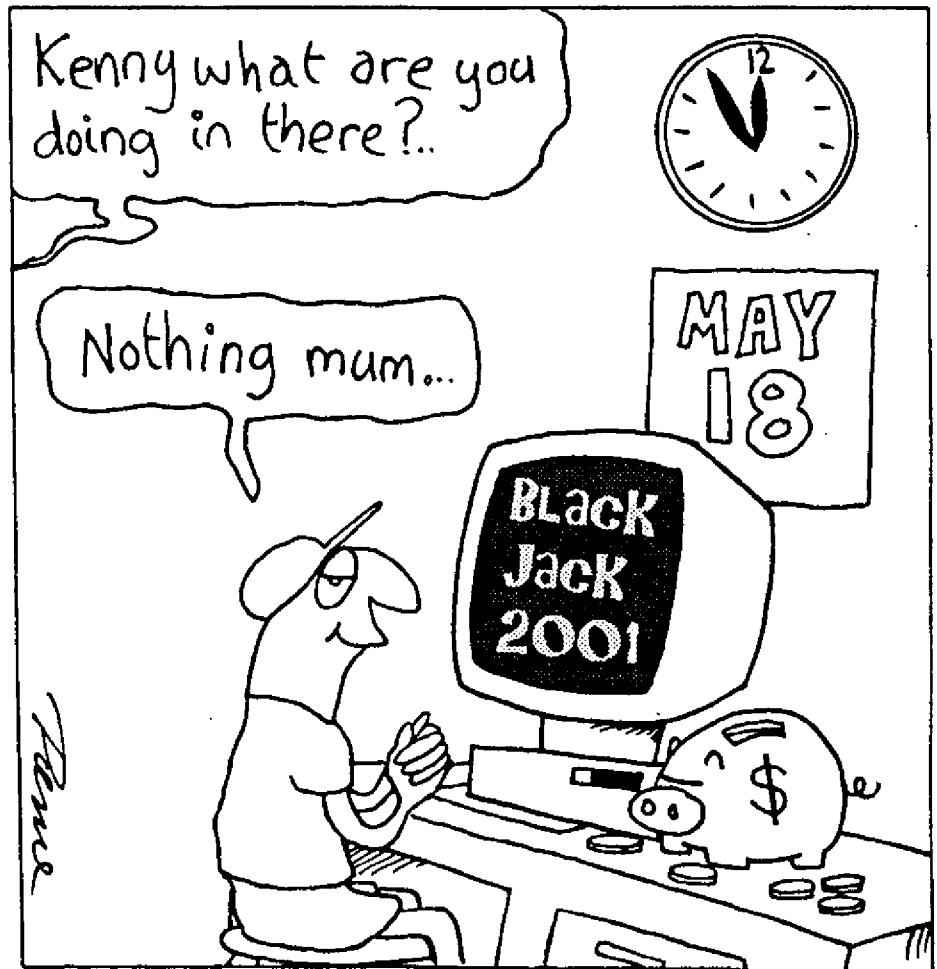
The majority report of the Senate Committee conceded that the moratorium would not restrict Australian gamblers' current ability to access offshore sites, but argued that "widely-held privacy and security concerns" about the Internet would hinder Australians from betting on "dubious overseas casino sites".⁴ However, the majority report argued that interactive gambling in reputable jurisdictions (such as the US and the UK) would probably be limited over the next 12 months resulting in a reduced expansion of the offshore industry in reputable jurisdictions. As a result, the majority report concluded the absence of reputable IGSPs would also discourage most Australians from gambling on-line with overseas-based IGSPs hence "interim controls on the expansion of Australian-based IGSPs... will limit the most likely source for increased gambling activity and therefore problem gambling".⁵

The dissenting Democrat report stated that maintaining a multifaceted harm minimisation regulatory strategy is the most effective strategy against problem

gambling in Australia and claimed the introduction of an interim moratorium on interactive gambling would not adequately address this highly complex social phenomenon. The Democrats instead proposed a three month non-retrospective moratorium that would be immediately followed by the implementation of a national regulatory scheme.⁶ This proposal was rejected by the Senate and was not fully supported by the Democrats – senators Lyn Allison and John Woodley crossed the floor to vote with Government in favour of the Bill.

Problem Gambling

Australia experiences a particularly good reputation for consumer protection legislation and therefore engenders trust with online gamblers both in Australia and internationally. However, the ALP criticised the Bill for not providing regulation of interactive gambling and therefore not addressing the issue of problem gambling. While the Government stated it was not the aim of the Bill to regulate, merely to reduce expansion, the Bill did not impose a



requirement to explore the feasibility of the regulation of IGS (as distinct to exploring the feasibility of a ban) or to implement a framework at the end of the moratorium. The absence of this regulation "damages Australia's international reputation for effective consumer protection laws and strong, workable gambling regulations."⁷

Overseas IGSPs banned from Australia

The definition of a specified link to Australia in the Bill (as discussed above) in conjunction with its extra-territorial application meant that the Bill applied to interactive gambling operations not wholly based in Australia, and to Australian companies providing services in other jurisdictions. The majority report argued that this was to ensure organisations would not be in a position to shift their Internet service to an offshore server whilst continuing to offer services in Australia, as has been the case in some instances with the Government's scheme for Internet content regulation.⁸ The Committee also argued that for the sake of "consistency", Australian companies should not be allowed to provide to persons in other jurisdictions services that are classified as illegal in Australia. In contrast Publishing and Broadcasting Limited Gaming Management Pty Ltd argued in its submission that "it is for foreign governments, rather than Australia's, to determine foreigners' access to the Internet".⁹

Impact of the Bill on e-commerce

Regulation is in line with Australia's strategy for developing and encouraging e-commerce in Australia. The Senate Committee report notes that Australia's reputation provides Australian IGSPs with a significant market advantage over their international competitors. However, the IIA advised that imposing a ban, would result in a number of Australian-based organisations moving overseas.

In spite of the impact on society of problem gambling, the export income from gamblers overseas that do use Australian on-line gambling sites will benefit Australia. While the Government has argued any "potential negative economic impact" would be "offset by the need to ensure Australians are not subject to the potentially adverse effect of increased gambling opportunities."¹⁰ it would appear that a moratorium would

not have stopped an increase in gambling opportunities but would certainly have adversely affected e-commerce, thereby resulting in a double loss for Australia.

CONCLUSION

The defeat of the Bill raises a number of questions. It is apparent that following the defeat, there may be a spate of new on-line gambling sites. Does this reiterate the argument that the proposed moratorium was not assisting problem gamblers, only adversely affecting e-commerce? Will the Government realise its threat of reintroducing moratorium legislation, or will it move more directly towards legislating for an absolute ban? If so, how will the States and Territories respond? Despite the governmental split, given that national attention has now been focussed on the short falls of any banning legislation, the Government has probably missed its only opportunity, unless it significantly refocuses the impact of any future bills.

On-line gambling can not easily be banned, despite Minister Alston's statement "I have seen at least three experts who explained to me in very cogent detail precisely how [banning on-line gambling] could be done, and it sounds very simple to me". Minister Alston was in fact referring to enacting legislation to require ISPs to block all access to every on-line gambling site. Senator Lundy of the ALP argued that not only would a complete ban not address Australia's gambling addiction, but because of constant developments in technology, it is not technically feasible in the long term.

In the meantime, the industry is arguing that the e-commerce opportunity cost is significant as investment is slow during this time of uncertainty, and community groups are reiterating the urgent need for harm minimisation measures for problem gamblers.

Currently, the online gambling industry is subject to a degree of regulation that varies between State and Territory governments. However, it is clear that the industry favours strict regulation coupled with "a federal legislative framework worked out cooperatively with the States including codes of practice for sporting organisations to ensure that match fixing, point sharing and insider information are addressed".¹¹ Indeed, at the time of writing State and Territory

regulators have come full circle from 1996 and met in Darwin on 27 October 2000 to discuss the implementation, yet again, of player protection standards by adopting a uniform national code. In principle, such a code is supported by the IIA and the Australian Casino Association, but whether the bickering States and Territories can unite to create a workable system before the Government makes its next move to ban on-line gambling is questionable.

1 Northern Territory – The Gaming Control Amendment Act 1998; Queensland – The Interactive Gambling (Player Protection) Act 1998; Australian Capital Territory – The Interactive Gambling Act 1998; Victoria – The Interactive Gambling (Player Protection) Bill 1999.

2 Explanatory Memorandum, Interactive Gambling (Moratorium) Bill 2000, p17.

3 Explanatory Memorandum, Interactive Gambling (Moratorium) Bill 2000, p19.

4 Senator Alston, Senate Debate. Monday 9 October 2000, p17994.

5 Senate Committee Report, p6.

6 Interactive Gambling (Moratorium) Bill 2000, Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Australian Democrats, Dissenting Report, Senator Stott Despoja.

7 Senator Lundy, 12.57pm Thursday 5 October 2000, p17864.

8 Broadcasting Services Amendment (On-line Services) Act 1999.

9 Publishing and Broadcasting Limited Gaming Management Pty Limited Submission 9, p2.

10 Senate Report, p10.

11 Senator Sherry, 12.31pm, 9 October 2000, p17935.

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