



December 2022

Committee Secretary
Senate Economics Legislation Committee
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Executive summary

- The ISGA supports the introduction of a Digital Games Tax Offset (DGTO) in Australia because of the benefits it would deliver in lifting the level of skills, employment and investment in the development of digital games in Australia.
- The ISGA supports the policy intention of the DGTO that there should be criteria relating to eligibility and, equally, ineligibility.
- Notwithstanding the above, the ISGA is concerned that the legislation as it currently stands introduces novel and unprecedented terms into primary legislation. This creates legal uncertainty and regulatory risk for games companies, discouraging the very investment this offset is intended to attract.
- In particular, the exclusion for “gambling-like” may capture any game which is substantially comprised of “chance”. In practice, this may encompass all games that are not predominantly “skill-based”.
- Many digital versions of household-brand board games with dice and card decks would inevitably be caught by the exclusion for “gambling-like”. Chance-based mechanics have a central role in a host of other outwardly “non-skill” genres, such as racing games, and even sports simulation.
- Therefore, current wording will exclude or create uncertainty for vast swathes of the digital games industry that this bill is supposedly seeking to attract to Australia.
- Further, the current legislation links video games exclusions to illegal gambling services within the meaning of the Interactive Gambling Act 2001. This is an erroneous comparison that sends an extremely negative message to the industry it is attempting to attract.
- Australia already has well established precedents for the eligibility of film and television tax offsets with a cultural test, supported by government guidelines.
- For the DGTO to be effective, all references to “gambling” or “gambling-like” in the legislation and Explanatory Memorandum should be deleted and replaced with wording to enable eligibility for the DGTO to be determined by a broad-based cultural test.
- Attempts to clarify scope through even more quasi-legal definitions in the bill and Explanatory Memorandum will result in even more games being ineligible and risks creating more legal uncertainty.
- If positively drafted, in a way that is consistent with other legislation governing the sector, the DGTO has the opportunity to be transformative for the creative and technological digital games industry, providing developers and investors with legal certainty.



Introduction

The International Social Games Association (ISGA) welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee inquiry into the Treasury Laws Amendment (2022 Measures No. 4) Bill 2022 [Provisions]. The specific area of this legislation that this submission addresses is the introduction of a DGTO.

About the ISGA

The ISGA (www.i-sga.org) is a global non-profit industry association established in 2013 to develop and communicate global best practices in social games. The ISGA represents a cross-section of social games businesses, including Playtika, Zynga, Playstudios, Greentube, SciPlay, Pixel United, IGT and Huuuge Games. The ISGA promotes player education through the Smart Mobile Gamers website (www.smartmobilegamers.org), developed with leading digital safety organisations, clinical psychologists and games researchers.

We have a regularly updated set of Best Practice Principles based on the core values of consumer protection, accountability and transparency. Our latest iteration extends the principles in areas such as in-app purchases, advertising practices, privacy compliance and player safeguards (<https://www.i-sga.org/best-practice-principles/>). The ISGA is committed to working with policy-makers in researching the online games sector and has invested in and published independent research based on real player data (www.i-sga.org/research/).

Key facts

- More than 17 million Australians play video games (including on mobile devices).
- Australia's game development industry employs 1327 full-time workers.
- Australians spend an average of \$1.22 per person, per day on in-game purchases.
- Between 95-99 per cent of players of freemium games never pay any money, i.e. they never make in-game purchases.
- The global percentage of people aged under 18 who play social games is 0.22 per cent of players and 0.008 per cent of all players who make in-game purchases while playing social games and are aged under 18.

The ISGA is supportive of the DGTO

The ISGA is supportive of the introduction of the DGTO because of the significant jobs and investment benefits that it would deliver in Australia, among other things.

In addition, the ISGA is not seeking to challenge the policy intent that only certain games should qualify for the DGTO.

Risks to the effectiveness of the DGTO

If the legislation and Explanatory Memorandum pass Parliament in their current form, though, their wording which relates to the eligibility/non-eligibility of digital games for the DGTO could:

- Create legal uncertainty both in respect of the DGTO and other areas of the law – including classification, consumer protection and beyond – pertaining to video games,



- e.g. a game that is legal, but chance-based, such as match-three or bubble-burster games; and
- Unintentionally cause public policy embarrassment by giving eligibility to games that are legal but controversial, e.g. games that glorify violence, gore and harmful behaviours.

On the issue of legal uncertainty, as almost all digital games played on mobile devices contain an element of chance, then almost all such digital games would not be eligible for the DGTO because they would meet the definition of being “gambling-like” games, which are ineligible for the DGTO under the current legislation and Explanatory Memorandum. An example of a seemingly innocuous online video game is the online version of “Monopoly”, which has a “Community Chest” feature. If a game developed in Australia had such a feature, then the game would be ineligible for the DGTO under the current legislation.

On the issue of unintentional public policy embarrassment, just because a game does not include so-called “gambling-like practices” or loot boxes does not mean that it cannot be perceived by some to be controversial. There are many examples of games which include violence or other adult content, which are legitimate entertainment and come with appropriate labelling and age ratings. Taking this into consideration, it is undesirable for a highly violent or explicit game to be given a tax offset when, for example, a simple card-game simulator played by middle-aged adults would not.

Maximising the effectiveness and certainty of the DGTO

Australia already has a well established tax incentive scheme for the producers of Australian feature films. In relation to the most effective structure for informing eligibility/ineligibility for the DGTO, the ISGA respectfully submits that this should be a template for the DGTO. This is an incentive which is available for producers of Australian feature films, television and other projects. While it is underpinned by tax legislation, the specific terms relating to eligibility for this incentive are contained in government guidelines. The ISGA is supportive of the same approach being taken for the DGTO, meaning all references to “gambling-like” in the legislation and Explanatory Memorandum should be deleted and replaced with wording to enable eligibility for the DGTO to be determined by a wide cultural test, without narrow and anomalous exclusions.

Globally, video games tax relief legislation is largely based on a points-based mechanism often referred to as the “cultural test”, which originates in the film industry. While aspects of this can be found in the DGTO (e.g., that development and hiring take place within Australia), there is an important omission in respect of the more broad-based approach taken to decide whether or not a game is eligible on subjective grounds. Indeed, at no point do any of these tax breaks seek to target a video game genre or mechanic for exclusion in isolation.

For example, Regulation 8 of the UK Video Games Tax Relief provides that “up to four points will be awarded in respect of the contribution of the video game to the promotion, development and enhancement of British culture”. Similarly, the French *Crédit d’Impôt Jeu Vidéo* requires that a game contributes to French and European creativity. In Belgium, as of March 2022, political agreement was reached on a tax break for the video games sector, also based on a cultural test. It reflects Belgium’s film tax incentive, whereby each development project should prove that it has a “positive cultural dimension”.



The *Crédit d'Impôt Jeu Vidéo* initially excluded games 18-plus according to the PEGI (Pan European Game Information) content rating system. However, it was amended to allow any game rated 18-plus to qualify in certain circumstances, highlight the shortcomings of an overly prescriptive or inflexible approach in a fast-changing and creative digital industry. Further, the original – and partially abandoned exclusion – was directly linked to existing (classification) guidance. It did not introduce a novel legal conceptualisation or test for video games since it would have created an inconsistent, disjointed and unattractive legal framework, thereby undermining the original purpose of the incentive.

This risk of a confused and fragmented legislative environment is acute in Australia. The DGTO has introduced a novel definition in an area which is the subject of forthcoming content classification reform. Without cross-regulatory consistency, video games legislation in Australia risks there being an inconsistent and legally confusing list of regulatory requirements, which acts as a significant disincentive to international investment.

The ISGA was not involved in government consultation which took place – mostly likely in late 2021 and early 2022 – on the use of the phrase “gambling-like” in the legislation and Explanatory Memorandum. The ISGA only became aware of this phrase when exposure draft legislation was publicly released in March 2022. Since then, additional legal definitions and examples added to the legislative documents will result in even more uncertainty among overseas game developers about eligibility for the DGTO. Regulation of the internet and the broad reach that the phrase “gambling-like” will have across the mobile games sector dictates that a cultural test would maximise the effectiveness of the DGTO.

Clarification – online gambling games

The ISGA does not support retaining the wording in the legislation and Explanatory Memorandum that states games which are an online gambling service within the meaning of the Interactive Gambling Act 2001 are not eligible for the DGTO. Such games are currently illegal in Australia anyway, so there is no chance – under any circumstances – of them being considered as being eligible for the DGTO. Further, retaining this wording and therefore linking the DGTO to illegal online gambling games in legislation sends a message to game developers that there are regulatory and legislative risks from developing digital games in Australia, deterring game developers from investing in Australia.

ISGA recommendations

The ISGA acknowledges the challenges involved with significantly altering the legislation so far into the process. Therefore, in the absence of having a cultural test determining the eligibility of the DGTO, the ISGA recommends the following measures:

1. All references to “gambling-like” in the legislation and Explanatory Memorandum should be deleted;
2. The DGTO exclusion is aligned with Australia’s Guidelines for the Classification of Computer Game and/or approved platform rating tools, pending the conclusion of an ongoing classification reform process (the *Crédit d'Impôt Jeu Vidéo* serves as a useful reference point); and
3. All references to real-money online gambling, including references to the Interactive Gambling Act, should be deleted from the legislation and Explanatory Memorandum



to avoid regulatory risk in Australia being viewed as a major hurdle to investment in Australia by game developers.

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Appendix – Background information about social casino games and loot boxes

About social casino games

“Social casino” or “casino-style” games are a sub-genre of social games. They take inspiration from well-known chance-based games often found in real-money casinos (such as slot machines) and deliver them innovatively in terms of social mechanics, design and gameplay typical of social games. As a casual game, they are typically played for entertainment in short time bursts, on mobile, and on the move. As with all freemium games, they are free to download and rely on in-game advertising and in-game purchases to achieve revenue. Most (95-99%) social casino game players never make an in-game purchase.¹

Social casino games are not a form of gambling

There are no social games available in the Australian market that constitute gambling. According to the Interactive Gambling Act, three elements define a gambling game – consideration, chance and prize. Social games, including casino-style social games, contain the element of chance and they may have consideration, but they never have prize. Therefore, social games cannot be classified as gambling. No social casino-style games pay out any money – if they did, this would constitute real-money gambling, and real-money online casino games are not legal in Australia.

Distinguishing between loot boxes and social games

Loot boxes are a video-game feature containing randomised items in which the player does not know what they are going to receive until they have opened the loot box. Numerous consultations and government inquiries have established working definitions based on this premise.² Although concerns and commentary can overlap, it is important to avoid conflation. Social casino games are a genre, whereas loot boxes are an in-game feature found in multiple genres and types of video games.

Existing research into links between social casino games and/or loot boxes and gambling harms is inconclusive

We respectfully advise caution regarding the state of existing research into hypothesised links with gambling-related harms for either loot boxes or social casino games. Methodological flaws and limitations have been highlighted by leading academics, such as Dr Sally Gainsbury of the University of Sydney³ or the Rapid Evidence Assessment (REA),⁴ which supplements and informs the UK government’s recent landmark response to the loot box call for evidence. Criticisms include, but are not limited to, over-reliance on self-report that may not match

¹ The Freemium Monetization Model Revenue Split; Information Provided by the Casual Game Association (2012)

² A helpful working definition can be found in the UK government response to the call for evidence on loot boxes (18 July 2022). Accessible from: <https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/outcome/government-response-to-the-call-for-evidence-on-loot-boxes-in-video-games>

³ *Gaming-Gambling Convergence: Research, Regulation, And Reactions*. Accessible from: <http://doi.org/10.1089/glr2.2019.2323>. Published by Gaming Law Review in March 2019.

⁴ Loot boxes and digital gaming: a rapid evidence assessment: A study requested by the UK Department for Digital, Culture, Media and Sport (April 2021). Accessible from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091282/InG_AME_Loot_Box_REA.pdf

transactional data, non-random and unrepresentative samples, cross-sectional study that cannot infer causation, a failure to account for confounds, a narrow application of the Problem Gambling Severity Index (PGSI), a need to develop valid measures and a disconnect with comparatively stable prevalence data. It is also the case that peer-reviewed research that does not fit a convergence hypothesis rarely receives commensurate publicity.

Virtually all regulators and associated bodies that have appraised the state of research on loot boxes and/or social casino games have concluded that academic research is at a nascent stage. For example, the European Parliament has found that “there is no consensus on a causal link between loot boxes and harmful behaviour.”⁵ Similarly, the Swedish Consumer Protection Agency’s study on loot boxes highlights a lack of causal evidence.⁶

⁵ Loot boxes in online games and their effect on consumers, particularly young consumers. Accessible from: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU\(2020\)652727_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU(2020)652727_EN.pdf). They were published by the European Parliament in July 2020.

⁶ Mapping of consumer protection in the event of lottery or casino-like elements in computer games, (September 2019). Accessible from: <https://www.konsumentverket.se/contentassets/83509d8dffff48559d44de6546ecc362/kartlaggning-av-konsumentskyddet-vid-lotteri--eller-kasinoliknande-inslag-i-datorspel-fi-2019-01630-ko.pdf>.