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No. 50 2000-01

Interactive Gambling (Moratorium) Bill 2000

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Interactive Gambling (Moratorium) Bill 2000

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20 October 2000

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Interactive Gambling (Moratorium) Bill 2000

Date Introduced: 17 August 2000

House: Senate

Portfolio: Communications, Information Technology and the Arts

Commencement: On the day after Royal Assent

Note: Prior to the publication of this digest this Bill was debated and defeated in the Senate by a 33-33 vote. Following the defeat of the Bill, the Prime Minister indicated that the legislation may be resubmitted to the Parliament at a later date. Senator Brown, who voted against the Bill has stated that he would consider a ban on Internet gambling if the States did not reach agreement on uniform national laws to prevent problem gambling.

Purpose

To prohibit for one year those interactive gambling services that were not being provided before 19 May 2000.

Background

Gambling policy in Australia has traditionally been the responsibility of the States rather than the Commonwealth. State and Territory governments regulate and provide gambling services and rely heavily on the ensuing revenue. However, recent developments have seen the Commonwealth take a more active role in this area. In 1998 public concern over the impact of gambling on Australian society prompted the Commonwealth to institute an inquiry by the Productivity Commission and its conclusions have fuelled further debate.

In addition, the rapid adoption of new communications technologies by gambling industries has attracted Commonwealth interest, as this is an area which falls within its constitutional responsibilities.¹

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Commonwealth Policy Statements

On the 16 December 1999 the Prime Minister, the Hon. John Howard MP, released a statement announcing Commonwealth support for a national approach to problem gambling. This would involve the establishment of a council of Commonwealth, State and Territory ministers to focus on the following:

- stopping the further expansion of gambling in Australia
- the impact of problem gambling on families and communities
- Internet gambling, and
- consumer protection.²

On the 19 April 2000 the Minister for Communications, Information Technology and the Arts, Senator the Hon. Richard Alston, and the Minister for Family and Community Services, Senator the Hon. Jocelyn Newman issued a press release expressing disappointment at the rejection of the Commonwealth proposal for a moratorium on new forms of interactive gambling by Queensland, Victoria, Tasmania, South Australia, the ACT and NT.³

On the 19 May 2000 the Government announced that the Commonwealth was examining legislation to impose a 12-month moratorium on the introduction of new interactive gambling services.⁴ A further press release on 25 May 2000 elaborated on the moratorium and noted that the Commonwealth would conduct an inquiry into the feasibility and consequences of banning Internet gambling and would ask the States and Territories to participate in this review.⁵

The Productivity Commission Inquiry

On the 26 August 1998 the Commonwealth Treasurer, the Hon. Peter Costello MP, directed the Productivity Commission to report on the performance of the gambling industries and their economic and social impacts across Australia, including their impact on the retail, tourism and entertainment industries, and on Commonwealth and State/Territory Budgets.

The inquiry was undertaken by Gary Banks, Chairman of the Productivity Commission, and Robert Fitzgerald, who was President of the Australian Council of Social Services from 1993 to 1997.

The final report was submitted on the 26 November 1999. Some of its key findings were as follows:

- 80 per cent of Australians gambled in the last year - spending about \$11 billion - with 40 per cent gambling regularly

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- gambling accounts for an estimated 1.5 per cent of GDP and employs over 100 000 people in more than 7000 businesses
- just over 290 000 people are 'problem gamblers' (with 130 000 of these having severe problems)
- problem gamblers lose around \$12 000 a year each, and their total annual expenditure is around \$3.5 billion
- the prevalence of problem gambling is related to the degree of accessibility of gambling, particularly gaming machines
- 70 per cent of people surveyed believed that gambling did more harm than good, and 92 per cent did not want to see further expansion of gaming machines, and
- that the social costs as well as the benefits of gambling were substantial. Estimates of the costs ranged from \$1.8 billion to \$5.6 billion, while estimates of the benefits (including tax revenue) ranged from \$4.4 billion to \$6.1 billion.⁶

The Productivity Commission results have been criticised by the Victorian Casino and Gaming Authority research report, *The Economic Impact of Gambling* (March 2000) for the methodology employed in its cost-benefit analysis.⁷ The report argues that few of the Productivity Commission's calculations regarding either the benefits or costs of gambling are useful for policy formulation. The report also presents evidence that most gamblers, even heavy gamblers, can afford to do so.

Senate Select Committee Report on Online Gambling

On the 31 May 1999 the Senate Select Committee on Information Technologies announced that it would inquire 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, and
- the need for federal legislation.

The Committee reported on the 16 March 2000. The report, *Netbets: A review of online gambling in Australia*,⁸ recommended that:

- Federal, State and Territory governments work together to develop uniform and strict regulatory controls on online gambling with a particular focus on consumer protection

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- pending the implementation of these consumer protection policies no further online gambling licences be granted, and
- State and Territory governments contribute a fixed percentage of their gambling revenue to a national education campaign on gambling and to agencies that assist and rehabilitate problem gamblers.

The report also recommended many specific measures to protect consumers and assist problem gamblers.

The Senate Committee Report on the Legislation

The Senate Environment, Communications, Information Technology and the Arts Legislation Committee (the ECITA Committee) reported on this legislation in September 2000.⁹ The Committee was divided with Government senators endorsing the Bill without amendment while Opposition and Democrat senators rejected the Bill.

The minority report argued that a moratorium on interactive gambling would not prevent access to online gambling in Australia or prevent gamblers from accessing unregulated offshore sites. ALP senators argued that any attempt to do so would harm the Australian e-commerce industry. The Opposition argued that online gambling is well regulated by State and Territory governments and advocated the development of an industry code of practice.

The dissenting report of the Australian Democrats argued that the moratorium could threaten an industry that fosters research and development in areas including artificial intelligence, security and financial transaction processing for little result in terms of reducing the incidence of problem gambling. The Democrats recommended a three month non-retrospective moratorium on the issuing of Australian Interactive Gambling licences so as to allow the States and Territories to establish a national regulatory system.

Extent of Online Gambling

According to the gambling industry analyst, Christian Capital Advisors, there were more than 250 companies or authorities operating around 850 Internet gambling sites in 1999, with revenues of \$US 1.67 billion. This was estimated to be an 80 per cent increase over 1998 revenues. Projected revenues for 2002 are around \$US 3 billion.

At least 70 gambling sites are headquartered in Antigua and Barbuda, which offers special tax advantages. Other major locations are Costa Rica, Dominica and St. Kitts. Around twenty-five countries are believed to license operators at this time.

The Productivity Commission's National Gambling Survey indicated that 90 000 Australians gambled on the Internet in 1998-99, with around 58 000 playing casino games and the remainder split between sports and race betting.

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Australian Online Gambling Operators

According to the Explanatory Memorandum, at early June 2000 there were approximately 15 licensed online gambling operators in Australia, with a total of 25 interactive gambling licences having been issued by the States and Territories. Newspaper reports indicate that at least seven licences were issued in the month before the proposed commencement of the moratorium (19 May).¹⁰ All States and Territories except South Australia and Victoria appear to have issued licences.

However, it should be noted that the Bill makes no reference to State/Territory licensed operations: only interactive gambling services that were being provided (not just licensed) before the 19 May 2000 will escape the moratorium, and these will not be permitted to offer new services.

The major Australian operators are:

- Lasseters Online (NT) which commenced in April 1999 and claims 62 000 players generating \$78 million in turnover
- Centrebet (NT) with 50 000 clients and \$100 million turnover
- Canbet (ACT) with a 1999 turnover of \$46 million, and
- NetTAB (NSW) has 10 000 account holders and sales in 1998-99 of around \$20 million.

Recent Overseas Developments

A survey of international developments can be found in Chapter Five of the *Netbets Report*.¹¹ More recent reported developments include the following:

- In August the first Internet-based Casino licensed by the Philippines Government commenced operation. However, an anti-Internet gambling Bill has been filed in the Philippines Senate
- Professor Peter Collins of the University of Cape Town has estimated that Internet gambling could be a one billion rand export industry for South Africa within two years and has urged the establishment of a federal regulatory structure and taxation incentives to encourage the industry
- In the US in July, the Goodlatte Bill to prohibit Internet gambling failed to attract the necessary number of votes in the House. The Bill was criticised because it contained exemptions for special interests such as horse and dog racing, while restricting State lotteries. The Senate had approved similar legislation (the Kyl Bill) in November 1999. Under both bills, convicted online gambling operators could be fined or sent to prison for up to four years. The House bill also contains provisions that absolve

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Internet Service Providers (ISPs) from prosecution if it is discovered that illegal gambling operations are running on their servers, provided the ISP takes steps to remove the offending site from its system. Congressmen from both parties have petitioned the House leadership to hold another vote on the issue, and

- In the UK, a Gambling Review Body has been established to consider the current state of the gambling industry and likely developments over the next ten years, and to make recommendations on the nature and extent of regulation for gambling activities (including the Internet). The Review should report by the end of this year.

Arguments For and Against the Bill

Although the Bill proposes a moratorium on new Australian Internet gambling services, rather than a permanent prohibition of such services, the arguments for and against the legislation may tend to focus on the latter issue. This is because:

- the moratorium is an interim measure while the Government considers the feasibility of an outright ban, and
- the arguments against the moratorium are essentially the same as those against prohibition.

Supporters of the moratorium would argue that it was necessary because of the large number of new Internet gambling services being licensed by the States. These services would be operating by the time the review of the feasibility of prohibition is completed and would thus compromise any further action. If the existing services were to be exempt from the prohibition, then it would be rendered ineffective by the large number of continuing providers. If the prohibition were to include the existing services, then it would significantly increase any compensation payments that may be required. Opponents of the moratorium could argue that the Commonwealth has closed down pornographic Internet sites without compensation, so such considerations should not be relevant to a prohibition on gambling sites.

Opponents of the moratorium (and of prohibition) could argue that such action is pointless if it is intended to address the issue of problem gambling because:

- online gambling is insignificant when compared to other forms of gambling
- online gamblers will still be able to use offshore sites, and
- Australian sites will simply transfer their operations offshore, and Australian governments will lose any taxation revenue they may have obtained from such sites.

They could also argue that an Australian Internet gambling industry would result in significant export earnings, because overseas gamblers would be attracted by Australia's regulated environment.

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Proponents of prohibition could argue that:

- the scale of problem gambling exposed by the Productivity Commission was such that action needs to be taken at the outset to discourage household access to gambling services (ie. through the Internet)
- the Productivity Commission inquiry also demonstrated that the prevalence of problem gambling is related to the degree of accessibility of gambling, so that household access will ultimately result in a substantial increase in gambling problems, and
- although offshore sites will still be available, many gamblers will not use these because of concerns about their reliability whereas regulated Australian sites would be perceived as trustworthy.

Claims for Compensation?

A number of licensed interactive gambling service providers made submissions to the Senate Committee indicating that would be seeking compensation in the event that the moratorium proceeded.¹² The providers pointed to the large sums of money expended in developing appropriate technology and meeting the licensing requirements of State and/or Territory authorities.

The basis of the legal action was not specified and the providers did not indicate whether they would be seeking redress from the Commonwealth or the State and Territory governments.

It is possible that interactive gambling providers may bring an action asserting that the Bill is unconstitutional as it does not provide just terms. Section 51(xxxi) of the Constitution empowers the Commonwealth Parliament to make a law with respect to the acquisition of property provided that the law provides just terms.

There are, however, two principal obstacles to such a claim. Firstly it must be established that by imposing the moratorium the Commonwealth has 'acquired' property. The High Court has historically given the word 'acquisition' a narrow interpretation; detriment however great is never sufficient to bring forth the requirement of just terms. In this case while the moratorium substantially impairs the profitability of existing licensees this is not likely to be held to amount to an acquisition of property. An acquisition only occurs when the deprivation of one person resulted in another person acquiring a property right.¹³

Furthermore it is doubtful that the High Court would characterise the Bill as a law with respect to the acquisition of property. The Court has held that there are cases where the requirement for just terms compensation is anomalous. This includes laws requiring the forfeiture of prohibited imports¹⁴ and imposing criminal penalties.¹⁵ The ECITA Committee was told that the fact the Bill has creates a criminal offence means that it an action based on section 51(xxxi) is unlikely to be successful.¹⁶

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The Commonwealth's view as expressed in the Explanatory Memorandum is that recent licensees, frustrated from operating by the moratorium, may claim restitution from the States and Territories for the costs of obtaining a license:

Principles of restitution will apply to any contracts frustrated by the Commonwealth's action to prevent one party to a contract gaining a windfall at the expense of the other party.¹⁷

Main Provisions

Definitions

A 'gambling service' is broadly defined in **clause 4** of the Bill to include wagering. A number of witnesses before the ECITA Committee investigating the Bill sought to distinguish online wagering from online gaming and argued that the former should not come within the scope of the moratorium.

The *Netbets Report* defined online gaming as where the 'gambling event is based on a computer program and the outcome is determined by a random number generator. These activities contain no element of skill and include games such as black-jack, poker, lotteries and electronic gaming machines.'¹⁸ In contrast, in a wager the gambling event takes place on a race track or sports field, the Internet is just a mechanism for placing the wager.

Proponents of the view that wagering should be exempt from the moratorium argue that the nature of the activity, involving analysis and skill, was less likely to cause problems than gaming. In addition they argued that on the grounds of technological neutrality, Internet wagering should not be treated differently from telephone betting. In contrast proponents of a uniform approach stated that while gaming machines were primarily responsible for creating problem gamblers, wagering on racing was also significant.

The majority ECITA report endorsed the uniform approach of the Bill arguing that the Internet may increase the accessibility and appeal of wagering activity and that the moratorium would allow the government time to consider its impact. The dissenting report of the Australian Democrats also favoured a uniform approach.

Clause 5 defines an interactive gambling service as a service provided in the course of carrying on a business¹⁹ that is provided to *customers* using either an Internet or other carriage service, a broadcasting or other content service, or a datacasting service. In addition, the service must have a connection with Australia. That is it must either: be provided in the course of carrying on a business in Australia, have its central management and control in Australia or be provided through an agent in Australia.

Therefore, an interactive gambling service hosted by an Internet service provider in a foreign country will be subject to the moratorium provided that there is a sufficient

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connection with Australia. Further the Bill aims to limit the ability of Australian based interactive gambling providers from expanding into overseas markets. An interactive gambling provider (with a connection to Australia) will also be subject to the moratorium on offering new services even if the service is available solely to people outside Australia.

The extra-territorial application of the Bill is facilitated by **clause 9**. The Explanatory Memorandum notes that **clause 9** overrides the general rule in the *Acts Interpretation Act 1901* that, unless contrary intention appears, references to localities, jurisdictions and other matters shall be construed as references to matters in the Commonwealth.²⁰ As a consequence of **clause 9**, the reference to customers in **clause 5** will not be construed as referring to customers only in Australia.

Subclause 5(3) provides that telephone betting services and trading in options/future contracts are excluded from the definition. The Minister may also determine that a specified class of services is exempt. Such determinations are disallowable instruments.

The Prohibition

Clause 10 states that a person providing an interactive gambling service shall be guilty of an offence, with a penalty of \$220 000 (2000 penalty units) for each day of contravention. **Subclause 10(3)** provides that the section will cease to have effect at the end of 18 May 2001.

Clause 11 establishes a defence in a prosecution under **clause 10** for those defendants who can prove that:

- they were providing an interactive gambling service before 19 May 2000 under the same name²¹
- the pre-19 May 2000 service had at least one arm's length customer (ie it is not enough for a provider to be licensed by the relevant State or Territory authority, the provider must have commenced business), and
- the current service is the same or substantially the same as the pre-19 May 2000 service.

The Explanatory Memorandum makes clear that the intent of requiring that the service is essentially the same is to prevent existing providers of interactive gambling services from expanding their range of products.²² For example, a provider would not be able to offer betting on a sport or event that was not offered prior to the commencement of the moratorium.

The Bill has been criticised for its retrospective application in that it purports to impose the moratorium from 19 May 2000. However care must be taken in attaching this label to the Bill. As the Senate Committee for the Scrutiny of Bills points out, **clause 2** states that the Bill commences on the day after it is assented to:

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Therefore, the penalty to be imposed under clause 10 applies only to persons providing an interactive gambling service on or after the day after assent. This means that a person who established an online gambling service on 20 May 2000 and operated it until the date on which the bill was assented to would have committed no offence under this legislation, provided the service was closed on that date.²³

Concluding Comments

While all participants in the debate have expressed concern about problem gambling, there is widespread disagreement about whether this Bill is an effective mechanism for dealing with the issue. The Bill will not stop online gambling or even substantially limit the access of problem gamblers to gambling services. There are already numerous Australian based operators offering a large number of products not to mention the proliferation of services based in other countries. However it is not the stated objective of this legislation to prohibit online gambling. The Bill has the more limited goal of slowing the expansion of the industry while the government considers a long-term regulatory response. The merit of the Bill may turn on an assessment whether the Bill's potential to limit the number of problem gamblers outweighs possible damage to the development of the Internet industry in Australia.

Endnotes

(All hyperlinks are current as at the date of publication)

- 1 Under section 51(v) the Commonwealth has power to make laws with respect postal, telegraphic, telephonic and other like services. The argument that the Commonwealth power does not extend to post 1900 forms of mass communication such as radio (*R v Brislan; Ex parte Williams* (1935) 54 CLR 262) and television (*Jones v Commonwealth* (1965) 112 CLR 206) has been rejected by the High Court.
- 2 Hon. John Howard MP, 'National Approach to Problem Gambling', *Media Release*, 16 December 1999. http://www.pm.gov.au/news/media_releases/1999/gambling1612.htm
- 3 Senator, the Hon. Richard Alston, Minister for Communications, Information Technology and the Arts and Senator, the Hon. Jocelyn Newman, Minister for Family and Community Services, 'States Refuse to Act on Gambling Explosion', *Joint Media Release*, 19 April 2000. <http://www.facs.gov.au/internet/newman.nsf/3642f4f6006b0c7fca25670f0009cd22/deb26f69c8c0ef89ca2568d20017bf0d?OpenDocument>
- 4 Senator, the Hon. Richard Alston, Minister for Communications, Information Technology and the Arts and Senator, the Hon. Jocelyn Newman, Minister for Family and Community

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Services, 'Commonwealth to impose Online Gambling Moratorium', *Joint Media Release*, May 19 2000.

<http://www.facs.gov.au/internet/newman.nsf/3642f4f6006b0c7fca25670f0009cd22/e32e894f6460770dca2568e700011619?OpenDocument>

- 5 Hon. Peter McGauran, Acting Minister for Communications, Information Technology and the Arts and Senator, the Hon Jocelyn Newman, Minister for Family and Community Services, 'Proposed moratorium on interactive gambling services', *Joint Media Release*, 25 May 2000. <http://www.dca.gov.au/cgi-bin/graphics.pl?path=5023>
- 6 Productivity Commission, *Australia's Gambling Industries*, December 1999. <http://www.pc.gov.au/inquiry/gambling/finalreport/keyfindings.pdf>
- 7 A copy of the report can be found at: http://www.gambling.vcga.vic.gov.au/domino/web_notes/vcga/vcgareports.nsf/e84db0e6102a3bc9ca2566c20006c551/5fbf3e33b44e132aca25691d002ebee1?OpenDocument
- 8 A copy of the report can be found at A copy of the report can be found at: http://www.aph.gov.au/senate/committee/erca_ctte/gambling/gambling.pdf
- 9 A copy of the report can be found at: http://www.aph.gov.au/senate/committee/erca_ctte/gambling/gambling.pdf
- 10 'Gambling licences slip past Alston', *Sydney Morning Herald*, 23 May 2000.
- 11 Senate Select Committee on Information Technologies, *Netbets: A Review of online gambling in Australia*, March 2000, pp. 95-108.
- 12 See Australian Casino Association, Submission to ECITA, p. 2, Canbet Ltd, *Evidence*, 25 August 2000, p. 8, Gocorp, *Evidence*, 25 August 2000, p. 47.
- 13 For an overview of the High Court's approach to section 51(xxxi) cases see Australian Government Solicitor, Acquisition of Property, *Legal Practice Briefing*, No.13 1994. <http://www.ag.gov.au/publications/briefings/index.html>
- 14 *Burton v Honan* (1952) 86 CLR 169.
- 15 *Re DPP; Ex Parte Lawler* (1994) 179 CLR 470.
- 16 Mr Clark, Acting Director of the Legal Services Unit in the Northern Territory Department of Industries and Business told the ECITA Committee that 'it may be somewhat unfair to adopt a criminal approach to stopping this activity and thereby avoiding paying compensation to operators who in good faith have invested millions of dollars to fulfil what has been a lawful activity. *Evidence*, 25 August 2000, p. 50.
- 17 Explanatory Memorandum, p. 9.
- 18 Senate Select Committee on Information Technologies, *Netbets: A Review of online gambling in Australia*, March 2000, p. 2.
- 19 This limb of the definition ensures that office tipping competitions for example are excluded from the scope of the moratorium.

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- 20 Explanatory Memorandum p. 24.
- 21 It might be argued that the effect of Clause 11 will be to prevent the sale or transfer of any gambling services that are currently operating, as this would remove their defence from prosecution. Alternatively, it may be that as long as the same corporate entity provides the interactive gambling service it will be regarded as being provided by the same person .regardless of the ultimate ownership.
- 22 Explanatory Memorandum pp. 26–28.
- 23 Senate Scrutiny of Bills Committee, *Alert Digest*, No.11 2000, p. 5.
<http://www.aph.gov.au/senate/committee/scrutiny/bills00/eleven%20report.pdf>

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