

# Chapter 2

## Legal definitions of gambling

2.1 Much of the public debate regarding loot boxes has centred on whether such micro-transactions constitute gambling, and should therefore be regulated accordingly. This debate has focussed on the legal definition of gambling under federal and state and territory legislation; and the definition of gambling according to psychology.

2.2 This chapter will outline the legal definitions of gambling at the federal, state and territory level and the views of regulators tasked with determining the application of such legislation to loot boxes. The evidence received from witnesses, both for and against the application of gambling regulation to loot boxes is canvassed. This chapter also outlines the responses from international regulators.

2.3 The evidence regarding the psychological definition of gambling will be explored in Chapter 3.

### Commonwealth regulation of gambling

2.4 The regulation of gambling in Australia has traditionally been the responsibility of the states and territories rather than the Commonwealth. State and territory governments regulate and provide gambling services, and collect the ensuing revenue. However, given the nature of services provided via the internet, the Commonwealth has been given responsibility for the regulation of interactive gambling services in Australia through the *Interactive Gambling Act 2001* (the IGA). As such, the IGA defines a gambling service as:

- (e) a service for the conduct of a game, where:
  - (i) the game is played for money or anything else of value; and
  - (ii) the game is a game of chance or of mixed chance and skill; and
  - (iii) a customer of the service gives or agrees to give consideration to play or enter the game.<sup>1</sup>

2.5 Ms Jonquil Ritter, Executive Manager, Content Safeguards Branch, Australian Communications and Media Authority (ACMA), told the committee that the IGA prohibits the provision of certain services to customers in Australia. Ms Ritter stated:

The IGA prohibits certain services from being provided or advertised to customers in Australia. These include: online gambling services for games of chance, or games of mixed skill and chance such as casino-style games like blackjack and roulette and online slots. Since the IGA was amended in

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1 Section 4 of the *Interactive Gambling Act 2001*. See also Australian Communications and Media Authority (ACMA), *Submission 26*, p. 1.

September 2017, the ACMA has had responsibility for enforcing the prohibitions on providing or advertising illegal interactive gambling services. We also have a role in raising awareness of Australian gambling laws to help minimise the supply and use of illegal interactive gambling services.<sup>2</sup>

2.6 Examples of prohibited interactive gambling services include online casino-style games, online slot machines and online wagering services that accept in-play bets on sports events. Regulated interactive gambling services are those services excluded from the definition of a prohibited interactive gambling service, and this includes online wagering services (other than those offering in-play betting). These services can only be provided to customers in Australia with a licence granted by an Australian state or territory licensing authority.<sup>3</sup>

2.7 The ACMA explained that online games, including those which contain loot boxes, have not, to date, been regarded as gambling services under the IGA 'because they are not 'played for money or anything else of value', as set out in paragraph (e)(i) of the definition of 'gambling service'.<sup>4</sup> The ACMA stated:

...a video game is typically played for recreational purposes, rather than with the object of winning money or other valuable items. Loot boxes in turn are generally not used for the object of winning money or other valuable items, but for other reasons, such as to aid progression through a game or enhance aesthetic characteristics of the gameplay.<sup>5</sup>

2.8 The ACMA submitted that many of the items that are redeemed from loot boxes do not have any monetary or other value, and stated that in those circumstances, a loot box clearly cannot meet the definition of a gambling service.<sup>6</sup> Ms Jeanette Knowler, Manager, Interactive Gambling Taskforce, ACMA, also told the committee that the Explanatory Memorandum for the IGA when it was introduced in 2001 states that a game must be played for a prize of monetary value for it to meet the definition of gambling under the IGA.<sup>7</sup>

2.9 The ACMA however, noted that 'there may be cases where the position may not be so clear, particularly where there is a secondary market for items'. As a regulator, the ACMA is required to consider the particular features of a game or

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2 Ms Jonquil Ritter, ACMA, *Proof Committee Hansard*, 17 August 2018, p. 43.

3 Australian Communications and Media Authority, <https://www.acma.gov.au/Industry/Internet/Internet-content/Interactive-gambling/interactive-gambling-act-reforms>, (accessed 20 August 2018).

4 ACMA, *Submission 26*, p. 2.

5 ACMA, *Submission 26*, p. 2.

6 ACMA, *Submission 26*, p. 2.

7 Ms Jeanette Knowler, ACMA, *Proof Committee Hansard*, 17 August 2018, p. 45.

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service and that it is 'therefore difficult to make statements about "loot boxes" or video games generally'.<sup>8</sup>

2.10 The ACMA further noted that even where a service or game may meet the definition of gambling, it does not necessarily mean that it is prohibited under the IGA. The ACMA stated that the 'definition of "gambling service" is only one of the matters the ACMA must consider in deciding if a service is prohibited under the IGA'.<sup>9</sup>

### **State and territory regulation of gambling**

2.11 Gambling is also regulated by the states and territories and as such, the committee received submissions from the Victorian Government, and the New South Wales Government. These submissions outlined whether loot boxes meet the legal definitions of gambling under the legislative frameworks in these states. For example, the New South Wales Government submitted that:

Liquor & Gaming NSW does not consider that purchased loot boxes and other chance-based items (which can include a key to unlock a loot box) by themselves constitutes gambling under NSW gambling laws. However, Liquor & Gaming NSW is aware of particular instances where virtual items (being quite often the contents of a loot box) can be monetised outside the game they are featured in. Such instances are likely to offend NSW gambling laws, depending upon the circumstances.<sup>10</sup>

2.12 The New South Wales Government explained that under the *Unlawful Gambling Act 1998* (NSW) (UGA), the definition of what constitutes an 'unlawful game' includes a requirement that 'money is staked or risked on an event or contingency'. The New South Wales Government explained that money being staked or risked covers the 'prize element' in a general way and that anything that has monetary value would meet this requirement. As such, loot boxes which cannot be cashed-out or monetised outside the game would not meet the definition under the UGA. The New South Wales Government explained:

Where a game allows a player to purchase loot boxes and other chance-based items found in video games, which then provides a virtual item which can be used by the player as a form of currency *outside* of the game (thereby having monetary value), Liquor and Gaming NSW would regard this as satisfying the third limb above and this is likely to contravene the UGA.<sup>11</sup>

2.13 The New South Wales Government also stated that the NSW Responsible Gambling Fund is currently considering the risk of gambling related harms associated

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8 ACMA, *Submission 26*, p. 2.

9 ACMA, *Submission 26*, p. 2.

10 New South Wales Government, *Submission 33*, p. 1.

11 New South Wales Government, *Submission 33*, p. 1.

with in-game micro-transactions and chance-based items, including loot boxes. This work will inform the NSW Government's approach to whether additional safeguards are required to address the concerns around normalising gambling to minors through loot boxes.<sup>12</sup>

2.14 The Victorian Government however submitted that the definition of gambling under the *Gambling Regulation Act 2003* (Vic) means that loot boxes must be considered on a case by case basis to determine whether they meet definitional requirements.<sup>13</sup>

2.15 Submissions from state governments also raised concern that despite states and territories being responsible for the regulation of gambling in their jurisdictions, the nature of online gaming makes it necessary for regulation at a national level. The Victorian Government stated that 'state and territory governments are limited in their capacity to regulate products that are available exclusively online, are offered from outside their jurisdiction and do not constitute gambling'.<sup>14</sup> The Queensland Attorney-General and Minister for Justice, also highlighted that:

...many game developers, including the developers of games at the centre of recent loot box controversies, are based overseas and have global markets...games may be purchased, patched and played via digital distribution platforms located on servers outside the jurisdiction in which the player resides. Additionally, from an Australian perspective, multiplayer games, including those games involved in recent loot box controversies, are generally played on oceanic servers that combine players from multiple Australian jurisdictions (and the wider oceanic region) in a single game.<sup>15</sup>

2.16 The Queensland Attorney-General and Minister for Justice, while not commenting on whether loot boxes meet the legal definition of gambling under Queensland law, nevertheless concluded that any regulation of games containing loot boxes through amendment to the IGA 'would appropriately reflect the Commonwealth's responsibility for online gambling and ensure consistent implementation of any relevant intervention across all Australian jurisdictions'.<sup>16</sup>

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12 New South Wales Government, *Submission 33*, p. 3.

13 Victorian Government, *Submission 35*, p. 1.

14 Victorian Government, *Submission 35*, p. 2.

15 Attorney-General and Minister for Justice (Qld), *Submission 1*, p. 3.

16 Attorney-General and Minister for Justice (Qld), *Submission 1*, p. 3.

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## Issues raised in evidence

2.17 The following sections outline the evidence received both for and against the argument that loot boxes constitute gambling, as they relate to the legal definitions of gambling.

### *Legal definition*

2.18 Submitters that argued loot boxes do not constitute gambling under Australian legislation reiterated the position outlined by the ACMA, namely that games that involve loot box features, have not been regarded as gambling services under the IGA, because they are not played for money or anything else of value (i.e. the requirement established by the IGA). For example, the Interactive Games and Entertainment Association (IGEA) submitted that:

Because items for loot boxes cannot be lawfully cashed out or exchanged for real world money, they do not involve an offer of prizes of money or "other consideration of value" and so do not constitute gambling.<sup>17</sup>

2.19 Mr Ron Curry, Chief Executive Officer, IGEA, told the committee that 'the items obtained are not money or considered as items of value, as they are only useable within the games and cannot be cashed out within those ecosystems'.<sup>18</sup>

2.20 However, others argued that the legal definition of gambling is 'outdated' and has not evolved to keep pace with technological developments. Mr Jeremy Ray, for example stated that the 'legal vocabulary to deal with the myriad iterations of loot boxes out there' does not exist. Further, there is not a 'stringent enough qualification, in a legal sense, to define gambling'. Mr Ray suggested that a 'practical definition of gambling is simply putting up value for a random amount of value' and that in the case of loot boxes, 'it's no secret that people are willing to buy virtual goods, proving their value. Thus loot boxes meet that definition every time, whether cosmetic or gameplay-affecting'.<sup>19</sup>

2.21 The concept of a commonly-accepted definition of gambling was reiterated by individual submitters who described the concept of loot boxes where players purchase the chance to win an item, and where that item is unknown and likely to be of low value as 'blatant gambling'.<sup>20</sup>

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17 Interactive Games and Entertainment Association (IGEA), *Submission 3*, p. 8.

18 Mr Ron Curry, IGEA, *Proof Committee Hansard*, 17 August 2018, p. 31. The issue of monetization of items through third-party sites is explored below.

19 Mr Jeremy Ray, *Submission 32*, p. 2.

20 Ms Stephanie Gray, *Submission 30*, p. 1.

### *Always a prize*

2.22 It was also argued that loot boxes do not constitute gambling because players are always guaranteed to receive in-game content when they make a purchase i.e. there is no loss incurred by a player. For example, IGEA submitted that 'players will not encounter a scenario where the purchase of a loot box does not result in the player obtaining an in-game item'. IGEA argued that this distinguishes loot boxes 'from gambling services such as poker machines, where users are not guaranteed to receive anything in return for their consideration'.<sup>21</sup>

2.23 Dr James Sauer and Dr Aaron Drummond (Sauer and Drummond) noted that international jurisdictions have cited this argument when explaining why loot boxes do not constitute gambling. Sauer and Drummond submitted:

...everyone who purchases a loot box gets *something* so there are no losers. An obtained reward might be high or low in value (or desirability) but, unlike in more conventional forms of gambling, no one loses their money entirely. Both the ERSB (the game rating agency for US and Canada) and PEGI (Pan European Game Information; the game rating organisation for Europe) have cited this argument when explaining their view that loot boxes are not a form gambling (Griffiths, 2018).<sup>22</sup>

2.24 However, while Sauer and Drummond described this premise as 'accurate' they noted that with loot boxes, 'some players still lose'. Sauer and Drummond explained that players may lose in one of two ways. First, the functional utility of reward items varies markedly with some items offering substantial competitive in-game advantages, while others provide no advantage. Players who receive these competitive advantages 'win' whilst those who do not, 'lose'. Second, where items can be sold on third-party websites, the market value for some items is less than the cost of purchasing the loot box. Therefore, the item is worth less than the amount of money the player expended in obtaining it, and the player incurred a financial loss as a result of the loot box transaction.<sup>23</sup>

2.25 Other submitters described the defence that there is 'always a prize' as 'highly disingenuous' and agreed with Sauer and Drummond's assessment that prizes are often of little or no value. Mr Jeremy Ray explained:

Often what you get back is of minuscule or zero value, and often it's a duplicate of something you've won before. The odds of winning anything of high value are carefully calculated not only so the house always wins, but so the player feels like they've always almost won.<sup>24</sup>

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21 IGEA, *Submission 3*, p. 8.

22 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 4.

23 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 5. See also Dr Sauer, *Proof Committee Hansard*, 17 August 2018, pp. 6–7.

24 Mr Jeremy Ray, *Submission 32*, p. 2.

2.26 The Australian Institute of Family Studies (AIFS) similarly submitted that players take a risk when purchasing loot boxes and loot boxes are much more likely to contain a common item of low or no in-game value, which may represent a monetary loss to players. It stated:

Gambling requires an individual or group to risk losing something of value (in the case of 'loot boxes', money is risked) on an event with an uncertain outcome (a 'loot box' containing a random item is received) with the aim of winning something of greater value (although, in reality the 'loot box' is much more likely to contain a common item of low or no in-game value, which may represent a monetary loss; a valuable or highly sought-after item is rarely received).<sup>25</sup>

2.27 The Institute concluded that on that basis 'micro-transactions for chance-based items therefore fall within the definition of gambling provided in the *Interactive Gambling Act 2001* or, indeed, in any commonly-accepted definition of gambling'.<sup>26</sup>

2.28 Sauer and Drummond also expressed caution that the position that 'there are no losses because everyone receives something' could lead to unintended legal consequences. Sauer and Drummond submitted:

Accepting the argument that nobody loses in these games because 'everyone receives a prize' may set a legal precedent for illegal gambling operations more broadly (e.g., unlicensed casinos) to skirt gambling regulations by providing every player with some prize following a losing game (e.g., by giving losing players 5 cents of their money back on a losing blackjack hand).<sup>27</sup>

2.29 Dr Drummond concluded, 'we do see a significant legal hazard with this idea that everybody wins when in some cases there are clearly real-world financial losses occurring from those loot boxes'.<sup>28</sup>

### ***Surprise and delight***

2.30 It was argued that loot boxes do not constitute gambling because they are simply 'surprise and delight' mechanisms similar to trading card games and Kinder Surprise Eggs, in that purchasers understand that they are buying an item but remain unsure of the item's details until they open the packaging. IGEA stated that:

Retail and toy stores also stock a significant number of products that allow consumers to purchase sealed, non-transparent boxes or crates that provide unknown items on a variable basis...the use of surprise and delight

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25 Australian Institute of Family Studies (AIFS), *Submission 10*, p. 2.

26 AIFS, *Submission 10*, p. 2.

27 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 5.

28 Dr Aaron Drummond, *Proof Committee Hansard*, 17 August 2018, p. 7.

mechanics in consumer products is pervasive and thus is not something unique to loot boxes.<sup>29</sup>

2.31 Mr Curry, IGEA told the committee that loot boxes are 'a mechanism that's been used for many years across many different forms of product'. Mr Curry explained:

...look at things like trading cards, you don't know the value of what you're going to get out of them. You could get cards very similar to those you already have or you could get the gold, silver, bronze or whatever it is. The mechanic that we were explaining is not new and is not unique to video games.<sup>30</sup>

2.32 However, this argument was rejected by a number of witnesses for a range of reasons including the effect of the context in which a player engages with the mechanism, and the knowledge of the item contained within. For example, Professor Elizabeth Handsley, President of the Australian Council on Children and the Media (ACCM) told the committee that:

The one really significant difference between loot boxes and the two types of systems that you've just referred to [Kinder Surprises and sports trading cards] is that loot boxes operate in a context where a player is already highly committed to a game...and is therefore likely to experience much greater pressure to purchase the loot box and wants something that's in the loot box in order to progress in the game where that person is already highly committed.<sup>31</sup>

2.33 Professor Handsley went on to explain that the psychological process of deciding to engage with a Kinder Surprise is different to the psychological process made when a player 'is in the middle of playing a game and...needs a particular tool or feels that a particular tool or weapon would be particularly useful at that point in the game and therefore tries to get access to that tool or weapon'.<sup>32</sup>

2.34 Submitters also argued that before purchasing a Kinder Surprise egg or trading cards, consumers are broadly aware of the value of the item and that this is different to the process of engaging with a loot box.<sup>33</sup>

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29 IGEA, *Submission 2*, p. 11.

30 Mr Ron Curry, IGEA, *Proof Committee Hansard*, 17 August 2018, p. 32.

31 Professor Elizabeth Handsley, Australian Council on Children and the Media (ACCM), *Proof Committee Hansard*, 17 August 2018, p. 22.

32 Professor Elizabeth Handsley, ACCM, *Proof Committee Hansard*, 17 August 2018, p. 22.

33 Mr Stephen Dupon, Institute of Games, *Proof Committee Hansard*, 17 August 2018, p. 27. See also Mr Lindsay Shaw, VRGF, *Proof Committee Hansard*, 17 August 2018, p. 20.

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### *Monetisation of virtual items*

2.35 A number of submitters argued that the position taken by regulators that 'in-game rewards have no real-world value, therefore loot boxes are not gambling' ignores the evidence that a number of games allow players to buy and sell virtual items for real-world currency.<sup>34</sup> For example, Sauer and Drummond submitted that during an examination of 22 games released in 2016 and 2017, they found that more than one-in-five allowed players to cash out winnings.<sup>35</sup> Dr Drummond told the committee that:

Often this occurred on third-party websites, but in at least one case in the games we analysed, and in at least four other cases we can cite, it actually occurs through a primary marketplace that is connected to the distribution platform of the game. There are actually quite substantial rewards associated with that. We're talking about the possibility of receiving rewards from these loot boxes that can be cashed out on those primary marketplaces for...Real-world currency. Upwards of US\$1,800 is what one of the items was listed for last week.<sup>36</sup>

2.36 The rarity of some in-game items, and the emergence of online sites acting as exchange markets (e.g. OpSkins and CSGOLounge) have led to players paying high prices to purchase virtual items. The AIFS described in-game items as acting as 'de-facto virtual currencies'.<sup>37</sup>

2.37 The monetization of virtual items, that is, the embedding of loot boxes in the real-world economy can occur in a variety of ways, as outlined below.

- **Platform supported sale** – some game creators and storefronts allow virtual items to be traded between accounts through digital marketplaces that involve either real-world currency, or digital currencies that can be used to purchase things that have real-money value. For example, games publisher Valve allows virtual items to be traded through its Steam storefront for store credit which can be spent on games by other publishers. Currency can also be indirectly traded between users.<sup>38</sup>
- **Platform supported trade** – some games allow virtual items to be traded between accounts within the game, often using in-game marketplaces. Theoretically, no-real world currency is utilised in the transaction, however users may communicate and real-world currency is then exchanged outside the game in exchange for the transfer of the item for a symbolic in-game price.<sup>39</sup>

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34 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 4.

35 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 4.

36 Dr Aaron Drummond, *Proof Committee Hansard*, 17 August 2018, p. 2.

37 Australian Institute of Family Studies, *Submission 10*, p. 2.

38 Mr Greg Tannahill, *Submission 20*, p. 5.

39 Mr Greg Tannahill, *Submission 20*, p. 5.

- **Account exchange** – some games lock virtual items to a user's account which prevents the trade of items between users. However players who obtain a particularly rare or valuable item through a loot box can offer to sell their account to another player (using real-world currency exchanged outside of the game) to allow the other player to play the game using the rare item.<sup>40</sup>
- **Third-party sales** – third-party companies commonly referred to as 'gold farmers' rapidly obtain virtual items with in-game value and sell them to other players for real-world currency. The products offered may include items where the cost of obtaining the item is lower than the average selling price for the item. Gold farmers do not participate in 'normal' or 'for fun play' and are therefore able to obtain game resources more rapidly than recreational players.<sup>41</sup>
- **'Skin gambling'** – players use virtual items and loot boxes as pseudo-currency on third-party gambling sites. These sites are not approved or authorised by games developers or publishers.<sup>42</sup>

2.38 In examining loot boxes, international researchers Rune Nielsen and Pawel Grabarczyk, developed a typology for distinguishing loot boxes according to whether they are isolated or embedded in real world economies. This analysis examined whether the resource required to obtain the loot box involved real-world currency (embedded) or in-game resources (isolated); and whether the reward/virtual item can be monetized in the real world economy (embedded) or if it can only be redeemed within the game (isolated).<sup>43</sup>

**Table 1 – Types of loot boxes**

Type	Resources (Required for achieving the eligibility condition)	Reward	Examples
1	Isolated	Isolated	Diablo 1 & 2
2	Isolated	Embedded (virtual sellable object)	Diablo 3 (with auction house)
3	Embedded (real money purchase)	Isolated (virtual unsellable object)	Overwatch, Star Wars Battlefront II, FIFA 17 Ultimate Team
4	Embedded (real money purchase)	Embedded (virtual sellable object)	PUBG, Team Fortress 2, CS:GO

Source: Dr Marcus Carter, *Submission 11*, p. 2

2.39 Dr Marcus Carter highlighted that Nielsen and Grabarczyk argue that the fourth (fully embedded) type of loot box is 'functionally similar to gambling', noting

40 Mr Greg Tannahill, *Submission 20*, p. 6.

41 Mr Greg Tannahill, *Submission 20*, p. 6.

42 Australian Institute of Family Studies, *Submission 10*, p. 2.

43 Dr Marcus Carter, *Submission 11*, p. 2.

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the exceptional amounts of money involved (i.e. loot boxes which cost very little to purchase, deliver items which can be sold for thousands of dollars). Dr Carter stated that 'this is also useful for distinguishing between collectible cards and loot boxes'.<sup>44</sup>

2.40 The committee heard that the Steam marketplace, offered by the game developer, publisher, and digital distribution company Valve, allows digital items to be traded between players for real world currency, with the original creator of the digital item collecting a fee every time the item is traded between players. Mr Blake Mizzi, Board Member, Game Developers' Association of Australia (GDAA), told the committee that Steam 'seems to be quite a healthy marketplace' where 'we see a lot of healthy transactions happening'.<sup>45</sup>

2.41 Dr Drummond highlighted that the retail value of virtual items obtained through the purchase of loot boxes on Steam can vary hugely with items sold for a few cents while others are sold for thousands of dollars. This means that players are able to make a profit, or suffer a financial loss through the monetization of virtual items. Dr Drummond told the committee:

The overall message I'm trying to convey...is that...the highest cost items are being sold for US\$1,800, for example, one of the items on the *Counter-Strike: Global Offensive* market. The lowest cost items are often been sold for about 3c, and the cost of a loot box is typically around \$2.50, so we're looking at real world gains of \$1,800 and real-world losses of up to \$2.47 per entry into this loot box.<sup>46</sup>

2.42 Drummond and Sauer submitted that for loot box systems where players can 'cash out' in-game rewards for real-world currency, they should be considered to meet the 'common legal criterion to be considered gambling' [i.e that prizes have a monetary value].<sup>47</sup>

2.43 Ms Knowler, ACMA, agreed that as a regulator examining 'whether or not something fits within that definition [of gambling] is less problematic when you can monetise the item on a secondary market'. Ms Knowler noted that this definitional approach has been adopted by some international jurisdictions. However, Ms Knowler also reiterated the evidence provided in the ACMA's submission, that loot boxes must be examined on a 'case-by-case basis and there are quite different facts and ways of playing each of these games'.<sup>48</sup>

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44 Dr Marcus Carter, *Submission 11*, p. 2.

45 Mr Blake Mizzi, Game Developers Association (GDAA), *Proof Committee Hansard*, 17 August 2018, p. 11.

46 Dr Aaron Drummond, *Proof Committee Hansard*, 17 August 2018, p. 3.

47 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 2.

48 Ms Jeanette Knowler, ACMA, *Proof Committee Hansard*, 17 August 2018, p. 44.

2.44 IGEA submitted that it accepts that if game publishers or developers authorise the sale or exchange of virtual items for real-world currency, then the legal definition of gambling under the IGA would likely be met. It commented:

IGEA accepts that if game publishers or developers authorised players to cash out, transfer or gamble items acquired through loot boxes for real currency, whether directly or via external websites and services, the element of "offering prizes of money or other consideration of value" would likely be satisfied and current Australian gambling laws may be activated. This might also implicate the gambling laws of other countries and anti-money laundering legislation.<sup>49</sup>

2.45 IGEA concluded however that it is 'not aware of any video games that engage in this practice'.<sup>50</sup> Mr Ron Curry, IGEA explained that 'video game publishers and developers typically do not allow loot boxes, virtual items or game points to be traded, exchanged, sold or gambled outside of the game ecosystem or via third-party sites'. Mr Curry stated:

Where a party other than the video game publisher, developer or platform offers a mechanism to cash out, purchase or gamble, it's generally unauthorised, potentially unlawful and likely acting in violation of the terms of service and user-licence agreements, and other similar contractual terms. Video game companies do not receive any benefit or remuneration from these external websites or services, and nor do they have any relationship with the companies that operate them.<sup>51</sup>

2.46 IGEA also questioned whether the monetisation of virtual items for amounts higher than the purchase price should determine whether a loot box meets the definition of gambling. It highlighted that items obtained through other 'surprise and delight' mechanisms such as trading cards and toys can also be sold for more than the purchase price. IGEA submitted that:

...collectible items frequently sell at prices that are marked-up much higher than their initial recommended retail prices. Does this mean that these products also constitute a form of gambling or require additional regulation, simply because the initial purchase involved an element of variability and surprise?<sup>52</sup>

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49 IGEA, *Submission 3*, p. 9.

50 IGEA, *Submission 3*, p. 9.

51 Mr Ron Curry, IGEA, *Proof Committee Hansard*, 17 August 2018, p. 31. See also IGEA, *Submission 3*, p. 9.

52 IGEA, *Submission 3*, p. 11.

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*Skin gambling*

2.47 It was acknowledged that virtual items are also able to be monetized through so-called 'skin gambling' where virtual items are used to 'chip in' on online digital casinos. However, this was described as occurring in 'a dark corner of the internet', and without the permission of game developers or publishers. Mr Mizzi, GDAA, stated:

Essentially, we do know that there is a dark corner of the internet where gambling goods in video games—digital goods from video games, as in these digital casinos—is a problem. It's a billion-dollar industry. A lot of these individuals, as I mentioned before, are based in Russia and often in the US as well. There have also been indications that this has also been connected to money laundering. But they're not part of the common or mainstream games industry or community of players.<sup>53</sup>

2.48 IGEA submitted that 'black' secondary market websites utilise 'underhand tactics to be able to operate, including setting up fake accounts to facilitate external trades, hacking or exploiting vulnerabilities in a game environment, or even transferring ownership of accounts to other players by password sharing'.<sup>54</sup>

2.49 Mr Mizzi, GDAA, told the committee that Valve's Steam platform has been the principal platform utilised by third party gambling sites. Further, despite Valve's attempts to close such sites, new ones are created daily. Mr Mizzi stated that:

Valve has been on a mission to clamp down on these third party skin casinos and has managed it around their popular game Counter Strike GO. This has been made possible due to a gap or a loophole identified in the Steam platforms open ID API—it's part of their programming—and has created a billion-dollar black market gambling industry... As I understand it, Valve has managed to close roughly half of these casino related gambling sites though new ones do open daily. For the committee's benefit, Valve is a privately-owned US company that is the creator of the Steam marketplace platform and is also the creator of the CS:GO game.<sup>55</sup>

2.50 Mr Mizzi concluded that the issue of skin gambling using the Valve platform is not an issue related to game design or the inclusion of loot boxes, but rather it is 'a security problem' related to the Valve platform.<sup>56</sup>

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53 Mr Blake Mizzi, GDAA *Proof Committee Hansard*, 17 August 2018, p. 11.

54 IGEA, *Submission 3*, p. 9.

55 Mr Blake Mizzi, GDAA, *Proof Committee Hansard*, 17 August 2018, p. 11.

56 Mr Blake Mizzi, GDAA, *Proof Committee Hansard*, 17 August 2018, p. 11.

2.51 Mr Mizzi also stated that game developers have little control over third party gambling sites, or the security measures utilised by digital stores which sell games. In addition, few options are available to game developers when users breach terms of service or licence agreements to skin gamble. Mr Mizzi stated:

The game developers around the world, particularly Australian developers, who publish their games on digital stores such as Steam, Xbox, PlayStation, Google Play and the iTunes App Store have little to no control over the security measures or the code and infrastructure around these digital stores. We also don't have much control around the third party gambling sites. And we have only limited control around when a player breaches our users end term licence agreement or terms of service. One way the players can cash out in this regards has been identified—when they sell their online account to someone else.<sup>57</sup>

### ***Broader concept of value***

2.52 While the ACMA submitted that it is restricted by the requirement of the IGA that prizes must have a monetary value in order for loot boxes to satisfy the legal definition of gambling, other submitters argued that this 'rests on a very narrow conceptualisation of utility'.<sup>58</sup>

2.53 Sauer and Drummond argued that this position 'ignores the subjective value created for players from the combination of scarcity of, and competitive advantage provided by, in-game items in the gaming environment'. Sauer and Drummond explained:

...in-game rewards can have value for players – and influence players' behaviour (i.e., motivate them to engage with loot box mechanisms) – without being converted into real currency. For example, a scarce costume may signify prestige in the games' online community, or a particular weapon might be highly desirable because it increases the ease with which they can win future games. In both cases, the item has value for the player, and this value may motivate players to continue buying randomised rewards until they obtain the item they desire.<sup>59</sup>

2.54 Dr Drummond told the committee that 'most games have variable scarcity items that are often referred to as rare, epic or legendary items'. These items are often only ever given to players a very small percentage of the time and this creates a system where players desire these items more than other items. Dr Drummond concluded that the desirability of an item alters the way a player 'might perceive the value' of items.<sup>60</sup>

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57 Mr Blake Mizzi, GDA, *Proof Committee Hansard*, 17 August 2018, pp. 9–10.

58 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 5.

59 Dr James Sauer and Dr Aaron Drummond, *Submission 2*, p. 5.

60 Dr Aaron Drummond, *Proof Committee Hansard*, 17 August 2018, p. 3.

2.55 Professor Handsley, ACCM, similarly highlighted the psychological processes which affect the way in which players conceptualise value. Professor Handsley argued that the ability to:

...convert loot boxes into real-life money is neither here nor there because the items that are accessed via loot boxes are of value to the player. That's all that really matters from a psychological perspective. Whether that person can then get money or some real-life tangible good in return for the loot boxes is neither here nor there. The player is committed to the game. These games are very absorbing. There are a lot of people who have a lot invested in playing games and getting to higher levels, therefore the value to those can be very high. From a psychological perspective, that's what matters. Whether it's money or some tangible good is really not the point.<sup>61</sup>

2.56 The Attorney-General and Minister for Justice (Qld) also noted that virtual items obtained through loot boxes 'can change the way the player is perceived by other players within the game, therefore adding to the player's prestige and status and creating something of value to the player'.<sup>62</sup>

2.57 Similarly, Dr Carter highlighted the finding by the Belgian Gaming Commission that 'loot boxes are a form of gambling, even if players can't trade or sell the options'. The Commission found that 'what is important is that players attach value to it [loot boxes] and that this value is also emphasised by the game developers themselves'.<sup>63</sup>

2.58 It was also noted that this broader conceptualisation of value and utility may have particular effects on children. For example, Dr Carter noted that children, 'who do not place the same value on "real" money as adults' may be 'more vulnerable to the configuration of economically isolated rewards that have significant social and cultural value to players'. For example, being able to play as Cristiano Ronaldo in *FIFA* or advantages in competitive games such as *Angry Birds 2*, may have more value to children than a monetary prize.<sup>64</sup>

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61 Professor Elizabeth Handsley, ACCM, *Proof Committee Hansard*, 17 August 2018, p. 23.

62 Attorney-General and Minister for Justice (Qld), *Submission 1*, p. 2.

63 Dr Marcus Carter, *Submission 11*, p. 2. Citing Belgian Gaming Commission, 'Research Report on Loot Boxes', April 2018, p. 10, [https://www.gamingcommission.be/opencms/export/sites/default/jhksweb\\_nl/documents/onderzoekrapport-loot-boxen-Engels-publicatie.pdf](https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoekrapport-loot-boxen-Engels-publicatie.pdf).

64 Dr Marcus Carter, *Submission 11*, p. 3.

