

THE PROHIBITION OF ONLINE-CASINOS IN AUSTRALIA: IS IT WORKING?

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The Federal Government's review of the *Interactive Gambling Act 2001 (Cth)* will be released later in 2004. It is anticipated that the prohibition model implemented by the Act should be able to be effectively evaluated given that the Act's complaints scheme commenced on 11 January 2002. This should answer the question of whether prohibition is working. This article seeks to answer that very question. Preliminary online research of consumer gaming activity was utilised to develop an assumption that prohibition is not working. A key reason for this is the futility of prohibition given the unique nature of Internet technology. This article will also critique Government motives for prohibition, as arguably, the best approach to deal with interactive gaming was not implemented. The relevant question for public policy appears to be not whether online gambling can be controlled, but the extent to which it can be controlled.

Before the introduction of the *Interactive Gaming Act 2001 (Cth)* ('IGA'), uncertainty existed within the global and Australian gambling industry. National debate not only concerned whether the Federal Government should prohibit or regulate online-casinos, but how the chosen model should be implemented and enforced. The Government was clearly concerned at the effect increased accessibility to online-gaming would have on problem gambling, and society generally. Advocates of regulation argued that prohibition would be futile given the nature of Internet technology. However, prohibition was chosen in 2001 and implemented through the IGA. The IGA's complaints and enforcement scheme came into effect on 11 January 2002. The logical question to ask now is whether prohibition is working? If not, why not?

Part I of this paper will examine the structure of the IGA and nature of the prohibition model. Part II will then examine the Government's rationale (as distinct from motive) for prohibition. Part III will argue that the prohibition model cannot work when applied to the Internet. The underlying premise to this argument is that there are a number of important factors unique to the Internet and the online-gaming industry which will frustrate any attempt to prohibit the growth of the industry. The first factor concerns the nature of Internet technology in the context of prohibition. Key issues include the effectiveness of filter technology, forced migration to overseas-based sites, and access to unregulated sites. The second factor concerns the rapid growth of net gaming. Key issues include increasing consumer demand and technology as a driver for the growth.

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Part IV will analyse the motives of the Government in deciding to implement prohibition and not regulation. The major issue is that prohibition was chosen despite significant independent research recommending regulation, and did not reconcile with the Government's rationale for prohibition. Arguably, the Government supported prohibition for purely political reasons, not because it was the most effective solution to the online-gaming problem. This indicates a lack of transparency in policy and decision-making on this issue. Part V will examine the consequences of prohibition, and Part VI will outline future issues which arise out of a failed prohibition model.

I STRUCTURE OF THE *INTERACTIVE GAMING ACT 2001* (CTH)

There are two key elements to the *IGA*. Firstly, the Act creates the offence of providing an Australian-based interactive gambling service ('IGS') to customers in Australia.¹ Secondly the Act establishes an industry-based complaints scheme which will enable Australians to make complaints about interactive gambling services on the Internet which are available to Australians.² A key issue is that the *IGA* does not impose a total prohibition on the offering of an IGS. Australians can still access overseas-based sites that do not specifically target Australians, subject to the effectiveness of the complaints scheme and subsequent investigation from the ABA. The co-regulatory scheme, which commenced operation on 11 January 2001 and is administered by the ABA, builds on the existing Internet content scheme and has two components:

- the development of an industry code by the Internet industry that deals exclusively with designated Internet gambling matters; and
- the expansion of the ABA's complaints hotline to provide a means for addressing community concerns about prohibited Internet gambling content.³

A Targeted Prohibition

The *IGA* implements a targeted prohibition. Under a targeted ban, the Internet Service Provider ('ISP') has the option of contributing to the development of a code by a representative industry body that would provide for approved content filters to be made available to Australian Internet users.⁴ The code provides for the industry to respond to community complaints against content which the ABA has deemed prohibited by notifying the manufacturers of approved filters about the offending sites.⁵ Although predominantly a complaints-scheme, the ABA can initiate investigations on its own motion, and the scheme does not require ISPs to engage in content-monitoring.⁶ It also provides for ISPs to furnish their users with information about their online content scheme.⁷ In practice, the obligations of an ISP are discharged by providing hyperlinks to information on the ABA website and the websites of approved filter providers. A key

¹ *Interactive Gaming Act 2001* (Cth) ss 6, 15

² *Interactive Gaming Act 2001* (Cth) Pt III.

³ Explanatory Memorandum, *Interactive Gaming Bill 2001* (Cth).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ National Office for the Information Economy. *Report of the Investigation Into the Feasibility and Consequences of Banning Interactive Gambling* (NOIE, 2001) 13.

⁷ *Ibid.*

aspect of this model is that the installation of filtering software on end users' computers is entirely voluntary on the part of the user.⁸

The Government asserts that these measures will not completely eliminate access to overseas gambling sites – its aim is to limit and to discourage.⁹ Given that there are thousands of virtual casino and online gaming websites on the Internet, how effective has the IGA been in achieving these Government objectives?

B *The Hitwise Survey and ABA Statistics*

A 2001 Hitwise study commissioned by the Australian Casino Association¹⁰ ('ACA') monitored 304 Entertainment-Gambling websites (100 of which were based in Australia) between February and December 2001. The Chief-Executive of the ACA believes the results indicate that the IGA is not working as it forces Australians to gamble on overseas sites which may be unregulated.¹¹ The study found that:

- The number of international gaming websites visited by Australian Internet users had increased by 38 per cent;
- The number of Internet gambling sites monitored in the same period had increased from 304 sites to 419;
- The number of Australian sites remained constant at 100;
- The level of traffic to websites in the Entertainment-Gambling category was strongest on Saturdays;
- 40 per cent of all visits to the category went to the top 10 websites;
- In comparison to the share of visits to the Entertainment-Gambling category (which remained relatively consistent throughout 2001), visits to Business and Finance-Stocks and Shares fell significantly from 1.292 per cent in February 2001 to 0.907 per cent in December 2001.¹²

In terms of the ABA's role in handling online-gaming content complaints, in the period to 31 August 2002, the ABA had received 11 complaints about Internet gambling content.¹³ Nine investigations were completed, with two investigations terminated due to lack of sufficient information (in both cases the ABA was unable to locate any Internet content at the addresses provided by the complainants).¹⁴ Of the eight investigations completed, six resulted in location of prohibited Internet gambling content hosted outside Australia and the ABA notified the details of the content to the makers' filter software products, in accordance with the procedure set out in the registered code of practice.¹⁵ Three investigations resulted in location of content that

⁸ Ibid.

⁹ Environment, Communications Information Technology and the Arts Legislation Committee, Australian Senate, *Investigation Into the Interactive Gaming Bill 2001 (Cth)* (2001).

¹⁰ The ACA is Australia's peak representative body comprising the CEOs of Australian casinos.

¹¹ Australian Gambling Association, *Australians Forced to Gamble Overseas* (2002) <<http://www.auscasinos.com>> at 25 September 2002.

¹² Australian Gambling Association, *Australians Continue to Bet Online* (2002) <<http://www.auscasinos.com>> at 25 September 2002.

¹³ Email from Andrew Essa to Richard Fraser, 20 September, 2002.

¹⁴ Ibid.

¹⁵ Ibid.

was not prohibited. No matters have been referred to law enforcement agencies for investigation.¹⁶

This paper will not examine the validity of such data. Similarly, whether the receipt of 11 complaints to the ABA is indicative of a lack of prohibited content being offered to Australian online-gamers, or rather reflects a flawed complaints scheme, is uncertain without further research. Further required information may include:

- Level of activity on overseas-based gaming sites offering services to Australians 12 and 24 months *after* 11 January 2002;
- Level of expenditure on overseas-based gaming sites; or
- Number of complaints received and investigations conducted by the ABA.

It is anticipated that the Federal Government's review of the *IGA* will consider such statistics and others in order to determine whether the targeted prohibition model is working. Forty-two submissions were received for the review which closed on 23 March 2003, and as yet there has been no indication of when the review be released. Given the controversial nature of this issue, and the Federal election later in 2004, it is anticipated that politics will prove to be highly influential in affecting the outcome of the review. Accordingly, it is likely that the actual model will not change.

Nonetheless, the statistics, even in 2002, may support an assumption that the model is not working. Therefore, it is imperative to determine *why* prohibition is not working. First, the Government's rationale for prohibition will need to be ascertained.

II GOVERNMENT RATIONALE FOR PROHIBITION

According to the *IGA* Explanatory Memorandum, the potential for the interactive gaming industry to expand rapidly and exacerbate problem gambling in Australia was a major concern for the Government.¹⁷ For example, a US National Gambling Impact Study Commission found that in May 1998, there were approximately 90 online casinos, 39 lotteries, 8 bingo games and 53 sports books. A year later, there were more than 250 online casinos, 64 lotteries, 20 bingo games and 139 sports books available to anyone with Internet access.¹⁸ There was also a need to determine the specific form of prohibition that would not place undue burden on Australia's communications industry. Therefore, the Government sought a strategy to restrict the access of Australians to interactive gambling whilst balancing the interests of the information economy.¹⁹

The *IGA* Explanatory Memorandum states that prohibition (and not regulation) was chosen for the following key reasons:

- Increased accessibility to gambling services will aggravate problem gambling. The 1999 Productivity Commission report into interactive-gaming estimated that

¹⁶ Ibid.

¹⁷ Above n 3.

¹⁸ National Gambling Impact Study Commission, *Internet Gambling* (1999) <<http://www.ngisc.gov/reports/fullrpt.html>> at 29 September 2002.

¹⁹ Above n 3.

2.1 per cent of the population are problem gamblers, with 130,000 people experiencing severe problems;²⁰

- The high social costs of gambling addiction, including the effect on families and welfare;²¹
- Australia already has one of the highest per-capita gambling industries in the world;²²
- Australia is one of the top four countries in the world in terms of per-capita Internet connections. In 1999, six million Australians had access to the Internet, and of these more than 75 per cent accessed it more than once a week. This means Australians are becoming increasingly computer and Internet literate, and are increasingly comfortable conducting electronic transactions online including the use of electronic payment mechanisms. Minors also are early adopters of technology;²³
- Other new interactive broadcasting services could soon provide new platforms for gambling.²⁴ This will increase accessibility leading to increased problem gambling and associated social costs. Specifically, broadband would facilitate the convergence of the Internet and television providing interactive and real-time gambling services in the home. Third-generation networks would enable access to gaming services on mobile phones and other wireless applications. Electronic tracking technology could create a manipulative virtual gambling environment as player information is collected and used to interact with the player.²⁵ Integrating virtual reality with gaming-software would provide another experience altogether.

Although it was clear that increased accessibility to gambling services are linked to increased social costs, uncertainty existed as to the extent of the increase. The only real guidance was the Productivity Commission report which concluded that the effect would be a ‘quantum leap without effective harm minimisation measures’.²⁶ Despite significant research into the effectiveness of such measures (including the use of technology to support the implementation of these measures), the Government was firm in arguing that reducing problem gambling was its key rationale for the IGA.²⁷

The above concerns existed against the background of a failed attempt by the Australian States in 1998 to implement a uniform online-gaming regulatory model (‘AUSMODEL’). The likely cause was differing taxation regimes. For example, the Queensland Government extracted a 50 per cent tax on revenues generated from Queensland-based casinos, whereas the Northern Territory (‘NT’) Government extracted only 8 per cent.²⁸ The justification of such a high tax is an issue in itself, but the effect was a disincentive for prospective operators to seek a licence in Queensland

²⁰ Australian Productivity Commission, *Australia's Gambling Industries: Public Inquiry Report* (2000) <<http://www.pc.gov.au/inquiry/gambling>> at 29 September 2002.

²¹ Above n 3.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Above n 20.

²⁷ Commonwealth, Parliamentary Debates, Senate, 24 August 2001, Second Reading Speech, Interactive Gaming Bill 2001 (Richard Alston, Minister for Communications, Information Technology and the Arts).

²⁸ Ibid.

due to severe cost disadvantages compared to NT operators. The required balance to be found in taxing a regulated Internet gambling environment that encourages industry growth, satisfies government fiscal requirements, and is socially acceptable, was clearly lacking.²⁹ It may be that governmental greed undermined the failed implementation of the AUSMODEL, as taxing gambling activities is traditionally a significant revenue raiser, with total gambling taxes for the year 1997-98 raising \$3.8 billion.³⁰ The structure of the innovative Queensland licensing scheme also generated public and media furor when a high-ranking governmental figure was revealed to hold a direct interest in the company to which the first licence was issued. These events preceded the Federal Government's passing of the *Interactive Gambling (Moratorium) Act 2000* (Cth) ('*Moratorium Act*') which prohibited the granting of any new interactive gaming licenses until further research was conducted into the industry.³¹

The Act was introduced despite extensive support for, and research recommending, regulation which initially led to the AUSMODEL approach. The key arguments against prohibition are examined below.

III PROHIBITION WILL NOT WORK WHEN APPLIED TO THE INTERNET

This section will argue that prohibition is not an effective solution given certain factors unique to the Internet which may frustrate its effective operation.

A *The Nature of Internet Technology*

1 *Forced Migration to Overseas Sites*

Prohibition will still enable Australians to access any foreign-based sites which have not been subject to the complaints scheme, as the Internet offers an instant detour around domestic prohibitions. However, there is no doubt that prohibition can effectively prevent Australian-based providers from offering services within Australia.³² With the extensive proliferation of online-gaming sites — many of which have been in operation since the mid-1990s — it is questionable whether the scheme will deter Australians from accessing almost all of the internet gaming sites that are available now. Even if certain portals or sites are filtered, the ability of a firm to alter its URL and relocate immediately is relatively easy. Of course, the consumer can also play elsewhere with abundant choice. Evidence from Lasseters Online indicates that 70 per cent of online players register with four or more gaming operators.³³ As discussed earlier, the Government's response is that prohibition will limit or deter users from accessing prohibited content. However, given the preliminary statistics used to support the assumption that prohibition is not working, it is clear the unique nature of the Internet will allow users to escape domestic prohibitions.

²⁹ L Dewer, 'Regulating Internet Gambling: The Net Tightens on Online Casinos and Bookmakers', (2001) 53 *Aslib Proceedings* 353-374.

³⁰ *Ibid.*

³¹ Above n 20.

³² Above n 27, [29].

³³ Above n 9.

2 *Access to Unregulated Sites*

The implication from the above Lasseters Online information is that the Australians currently accessing Australian gaming sites may already be playing on a number of overseas sites. With tremendous industry growth, consumers will gamble on the overseas sites knowing that they will not be prosecuted, despite the risks of playing on unregulated sites.³⁴ In effect, the *IGA* may actually be counter-productive as it 'prevents access to well regulated Australian sites that incorporate best practice harm minimisation'.³⁵ The NT Government elaborates on this point:

As Australian gambling operators will have access to a world market, excluding Australia, they will be providing the other citizens of the world leading player protection and harm minimisation measures whilst Australian residents, who will have access only to non-Australian operators, will not have anywhere near the same standard of player protection and harm minimisation measures. As a result of this there is a real likelihood that the scope for problem gambling in this country will be expanded, not limited.³⁶

This will also mean the loss of a revenue stream that could have been used to fund harm minimisation measures. The NT Government also argue that if the estimate that 2.1 per cent of gamblers are problem gamblers is accepted, the scheme creates an important anomaly whereby:

The *IGA* will deny the 98 per cent of recreational gamblers the benefits of using Australian sites but will not prevent the 2 per cent of problem gamblers from accessing almost all of the gambling sites on the internet. As offshore sites do not have the harm minimisation features required by Australian regulations, this will exacerbate problem gambling.³⁷

Therefore, given the innovative technological framework within which the Internet exists, and in light of preliminary evidence leading to the assumption that prohibition is not working, it is clear that the source of the problem is the prohibition model itself.

3 *Filter Technology*

Internet communications utilize packet switching.³⁸ This means that each message is broken into discrete packets traveling over various and unpredictable routes until received and reassembled at the message's destination. Even though the targeted prohibition doesn't solely rely on content filtering devices, once illegal content is determined, the ABA notifies the details of the content to the makers' filter software products, in accordance with the procedure set out in the registered code of practice.³⁹

The 2001 National Office of the Information Economy ('NOIE') report⁴⁰ examined four methods of filtering Internet content and concluded that none would be 100 per cent

³⁴ Testimony to US National Gambling Impact Study Commission, 21 May 1998 (Tom Bell).

³⁵ Above n 9, Northern Territory Government Submission.

³⁶ Ibid .

³⁷ Ibid.

³⁸ This is in contrast with telephone communications which utilize circuit switched networks.

³⁹ Above n 3.

⁴⁰ Above n 6.

effective in blocking Australians' access to online gambling sites.⁴¹ This is because relatively simple methods such as dialing an overseas service provider from Australia, encryption, using anonymous proxy servers,⁴² or accessing those sites not restricted, could circumvent most blocking mechanisms. They are also almost impossible to prevent without significantly more invasive powers of detection for enforcement agencies.⁴³

The NT Government commented in 2001 that the filtering provisions are no advance on current practice.⁴⁴ Such software is already available commercially for Australians who wish to limit access on their computers, and since 1999 the NT has required by law that an Internet gaming operator provide access to the same filtering software.⁴⁵ The MegaSports submission to the Senate ECITA Report in May 2001 similarly added that:

The optional content filtering provisions in the Bill will strongly appeal to those in the community who oppose gambling. It is right that they have the freedom of choice to install such filtering technology to prevent themselves or their children from accessing online gambling products and services. However, those individuals who wish to gamble online (including the number who may have a tendency to gamble beyond their means) will be extremely unlikely to choose to install such filtering technology.⁴⁶

The consensus amongst these views is that it is inappropriate for the government to argue that technological solutions are available to support prohibition. Although, as noted above, the Government's response is that it does not contend that the complaints scheme will completely eliminate access to overseas gambling sites, but that it will limit and discourage access.⁴⁷

B Growth of Net Gaming and Consumer Demand

There has been tremendous growth in the uptake of information technology and e-commerce services by Australians in the 1990s.⁴⁸ As Australians traditionally love to gamble,⁴⁹ these two factors, in addition to the nature of the Internet, make a targeted prohibition even harder to implement and enforce. Such growth has resulted from a trend of liberalization driven by governments' revenue needs, a constrained tax base, and new developments in technology producing a proliferation of new gambling products and increased supplier competition.⁵⁰ Overall, gambling revenues have more than doubled in the last decade, driven mainly by the growth in the gaming machine sector.⁵¹ US investment firm Bear Stern in March 2001 reported that the number of Internet gambling web sites doubled from the 600 to 700 operating in 2000, to 1,200 to 1,400 in March 2001.⁵² This represents two new sites coming online every day. The

⁴¹ Ibid .

⁴² Above n 9, Fujitsu Submission.

⁴³ Above n 6.

⁴⁴ Above n 9.

⁴⁵ Above n 6.

⁴⁶ Above n 9.

⁴⁷ Above n 6.

⁴⁸ Above n 20.

⁴⁹ Above n 29.

⁵⁰ Above n 20.

⁵¹ Ibid.

⁵² Ibid.

firm also estimates that online gambling revenue could grow from \$US1.5 billion to \$US5 billion over the next two to three years.⁵³ These statistics indicate that online-gaming is a growth industry world-wide and presents even greater problems for those attempting to prohibit certain content from being accessed. As the Internet offers a simple way to escape domestic prohibitions, the Government is assuming that the complaints scheme will be able to effectively regulate Australian consumers' Internet activities, notwithstanding rapid industry growth. This assumption lacks sufficient justification and contradicts extensive independent evidence to the contrary.⁵⁴ Given that the Federal Government must now deal with the consequences of a failed prohibition, it would be interesting to analyse the Government's underlying motives for implementing such an approach.

IV PROHIBITION: GOVERNMENT MOTIVES

Prohibition generally occurs when something is against the religious mores of a culture.⁵⁵ On this view, one may wonder why the Howard Government chose prohibition considering the historical and cultural acceptance of gambling in its traditional forms in Australia. Alternatively, the pragmatic viewpoint would argue that regulation be adopted; that is, it cannot be stamped out, and should therefore be controlled⁵⁶ (for example, to prevent problem or underage gambling, and to prevent criminal elements from becoming involved). However, the Government still chose prohibition despite extensive and independent research recommending regulation. This section will first identify the views supporting regulation, and second, posit that prohibition may have been a purely political move, and not an appropriate solution to the online-gaming problem. This will be linked to the key issue that prohibition is not currently working as the model was never supported by a majority of affected stakeholders.

A Support for Regulation

In the mid-to-late 1990s when the States allowed online-gaming via licensing, David Ford, Executive Director of the Queensland Office of Gaming Regulation, stated that 'Australian officials concluded that Internet gambling could not be effectively banned, and the decision to regulate came easily as the country had a long tradition of acceptance of gambling'.⁵⁷ Another Australian official indicated that banning Internet gambling was impractical because 'it was already in place' and that prohibition would 'cause a loss of consumer benefits, inefficient allocation of resources (including enforcement), and crime and corruption'.⁵⁸ Shortly after the Howard Government's second straight election win in 1996, the government stated that 'regulation is the best way to ensure fairness, credibility and accountability through licensing, regulation and

⁵³ Above n 27.

⁵⁴ Australian Senate Select Committee on Information Technologies, *Netbets: A Review of Online Gambling in Australia* (2000) <<http://www.aph.gov.au/senate/committee/it.ctte/gambling/>> at 24 September 2002.

⁵⁵ C Janower, *Gambling on the Internet* (1999) <<http://www.bcg.com>> at 3 October 2002.

⁵⁶ Above n 29.

⁵⁷ F Faust, 'Internet Gambling Australia-Style: Serious Regulation' (1999) *Inside the Rolling Good Times* <<http://www.rstonline.com>> at 22 September 2002.

⁵⁸ S Olfield, 'Banning Leads to Corruption' (1999) *Australian Financial Review* <<http://www.afr.com.au>> at 22 September 2002.

enforcement'.⁵⁹ The Productivity Commission report into the online-gaming industry in 2000 produced similar views and concluded that 'it is likely that (without harm minimisation measures and appropriate regulation) online gambling will pose significant new risks for problem gambling'.⁶⁰ Importantly, the report did not advocate prohibition. The March 2000 Senate report '*Netbets*' also followed the Productivity Commission report and concluded that regulation be recommended – not prohibition.⁶¹

Since *Netbets*, a clear Federal Government policy shift supporting prohibition has occurred:

- In April 2000, the Ministerial Council on Gambling met for the first time. The Commonwealth Government proposed a voluntary 12 month moratorium on interactive gambling services which was ultimately rejected by a majority of states and territories;
- On 17 August 2000, the government introduced and passed the Interactive Gambling (Moratorium) Bill 2000, which imposed a 12 month moratorium on the development of the interactive gambling industry in Australia;
- On 3 November 2000, the Council of Australian Governments ('COAG') agreed to the development of a strategic framework to deal with problem gambling: there were four central themes including prevention, early intervention and continuing support, the building of effective partnerships and research; and
- In March 2001, the NOIE completed its report into the feasibility and consequences of banning interactive gambling, commissioned by Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts.⁶²

When clear and substantial evidence to support regulation existed, how could the Government justify its decision to choose prohibition?

B *Prohibition: A Political Move?*

This section will answer two questions: First, how credible are the NOIE recommendations, and second, how influential was the report in affecting the Government's policy to support prohibition? In other words, how transparent was the Government's decision making?

1 *Credibility of NOIE Report*

As discussed earlier, the Government's rationale for the *Moratorium Act* was that the increased accessibility to gambling services would have an effect on problem gambling. To further investigate, the NOIE in March 2001 was commissioned, and its report was the only publicly available report completed since the Government's policy shift and the *Moratorium Act*. It determined that 'although prohibition would technically be feasible,

⁵⁹ Gaming Tech Industry News, *Online Gambling Revenues Will Break the \$10 Billion Barrier By 2002* *Gaming Tech Industry News* <<http://www.gamingtech.com/news/gam-rev.htm>> at 24 September 2002.

⁶⁰ Above n 20.

⁶¹ Above n 54.

⁶² Above n 6.

further research and impact analyses would be required to determine the specific form of prohibition'.⁶³ This was the report's key finding to justify prohibition.

The very nature of the report's research method may explain the report's conclusion. Unlike previous studies, this report was conducted from the presumption that prohibition will be implemented. This is obvious from the title of the report.⁶⁴ The report offers no new information and simply summarises the arguments for and against prohibition. Interestingly, 70 per cent of the 59 public submissions received by the NOIE after the *Moratorium Act* recommended regulation, yet the report did not. If the report was going to contradict evidence supporting regulation, then it is reasonable to assume that new information or argument would be presented. Arguably, when reading between the lines of the report, it seems the source of the report's justifications is that it would be against Government policy to now also recommend regulation. For example, the key points the NOIE identifies for supporting prohibition in terms of social costs are:

- There is currently very little use of the Internet for interactive gambling, a Department of Family and Community Services survey found that few people expressed interest in interactive gambling. And
- 68 per cent of respondents to the Department of Family and Community Services survey supported a ban on interactive gambling, and most would avoid a banned gambling site if they came across it.⁶⁵

No statistics were quoted to support the first claim. Already this paper has presented many statistics indicating that the global online-gaming industry is rapidly growing. Similarly, a May 2001 report of the Senate Environment, Communications Information Technology and the Arts Legislation Committee investigation into the Interactive Gaming Bill 2001 (Cth) ('Senate ECITA Report') dismissed arguments advocating regulation. However, this dismissal occurred in one paragraph after the report devoted considerable discussion to argument supporting regulation.⁶⁶

2 *Transparency of Decision Making*

These reports and associated Government decisions arguably lack transparency as it is never clear why the reports and associated policy contradict the recommendations of the prior research discussed above. It is possible that a Cabinet or high level decision advocating prohibition was executed before or soon after the Ministerial Council on Gambling in April 2000. If this occurred, and the source of the decision is founded in policy devised purely to advance the pre-election cause, then this raises questions concerning responsible government. For the purposes of this paper, it raises the issue that the most appropriate or effective solution to deal with online-gaming — regulation — was not implemented.

Further evidence to support this can be drawn from second reading speeches to the Interactive Gaming Bill 2001 (Cth). The Bill was drafted in the context of much public

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Above n 9.

and media debate on whether to prohibit online-gaming, and was a hot pre-election issue. In his second reading speech, Federal Communications Minister Senator Richard Alston's focus was not on justifying the model, but on consistently attacking the alleged poor leadership of the Opposition Leader.⁶⁷ On two occasions the Minister expressly linked these verbal challenges to the upcoming election.⁶⁸ Further, in Senator Stott-Despoja's second reading speech, she noted that 'most of the media coverage about the interactive gambling legislation has concentrated not so much on the merits of the legislation, but on whether or not this government has the numbers to pass it'.⁶⁹

In response, Senator Alston indicated the Government's approach to the major criticism that the *IGA* will force Australians to use offshore Internet gambling services:⁷⁰

- A proposed amendment to ban the advertising of interactive gambling services, which will limit the access of offshore providers to the Australian market; and
- A proposed amendment to extend the offence in the Bill to offshore operators to deter them from signing up Australian customers.

Senator Alston also reasoned that:

Australian customers will be cautious about using offshore services, in any case, because these services are often unregulated and there is no guarantee of payouts being honoured. If the local industry is not allowed to develop, it is unlikely there will be a significant uptake of interactive gambling by Australians in any case. Also, a regulatory approach only serves as a stimulus to online-gaming. Further, a survey on attitudes to a ban commissioned by the Department of Family and Community Services found that only one per cent of people would play a gambling site on the Internet if they knew a ban was in place.⁷¹

In terms of the proposed amendments, although limiting interactive-gaming advertising will in theory limit market access, it will not prevent the rapid growth of consumer demand within a growing global online-gaming industry. As long as overseas-based sites exist, any Australian with Internet access can gamble. This is especially pertinent as Australians are considered to be early adopters of Internet technology,⁷² and are savvy as to ways to use the Internet to discover new information, products, and services. The second proposed amendment was eventually withdrawn by the Government after a strong Productivity Commission recommendation.⁷³ The remainder of Senator Alston's comments do not adequately respond to the key criticism of the *IGA*: that prohibition will not work given the nature of the Internet. These comments were analysed and rebutted with evidence in Part III.

It is also possible that the Government's legislative rationale for prohibition does not reconcile with the actual model chosen. The Government's key rationale in advocating

⁶⁷ Above n 27.

⁶⁸ Ibid.

⁶⁹ Commonwealth, *Parliamentary Debates*, Senate, 21 June 2001, Second Reading Speech (Natasha Stott-Despoja).

⁷⁰ Above n 27.

⁷¹ Ibid.

⁷² Above n 20.

⁷³ Ibid.

prohibition was the effect increased accessibility would have on problem gambling.⁷⁴ However, in the Democrats' second reading speech, Senator Stott-Despoja noted that if problem gambling was *really* at issue, then the Government should introduce amendments aimed at reducing the number of poker-machines in existence in Australia, combined with reforming the licence-granting process.⁷⁵ This comment was based on the Democrats' position that prohibition is 'futile' and 'will not work on the Internet'.⁷⁶

The argument does have merit, as one view is that prohibition when applied to the Internet will not reduce or limit problem gambling⁷⁷ – which is the Government's key rationale for the *IGA* – but reducing the number of pokies in existence will. For example, the Productivity Commission found that 92 per cent of Australians do not want to see further expansion of poker machines, with one in five machines world-wide located in Australia and more than half of gambling expenditure (\$11 billion per annum) being spent on the 'pokies'.⁷⁸ Rapid market penetration of pokies clearly has driven this statistic, as well as the high number of problem gamblers in Australia.⁷⁹ Western Australia is the only State to have developed a sustainable and equitable revenue base which has translated into fewer pokies and less problem gamblers. Other States have inadequate gaming regulations which are complex, fragmented, and lack transparency.⁸⁰ According to the Democrats, State and Territory over-reliance on taxation revenues was arguably a clear impediment to reform.⁸¹ Support for this argument could be found in 50 per cent of the submissions received by the NOIE's 2001 report.⁸²

Therefore, it is arguable that the Howard Government used the interactive-gaming issue to win election votes by advocating not the appropriate solution, but the model that would appease the majority of the electorate. If the Government was truly concerned about problem gambling, then an approach to deal with the proliferation of pokies — the major cause of the 290,000 problem gamblers — would have been the key focus of reform. Instead, prohibiting online-gaming meant that the Government was seen to be doing something. Without disputing the significance of increased accessibility, it is likely that politically this was always going to justify prohibition, even if a regulatory approach — as advocated by the Senate's *Netbets* Report and the Productivity Commission Report — would have been more effective in dealing with the uncertainty of interactive gaming. Of course, the real answer to whether the Government's prohibition model is a real solution or a political move is contained in Cabinet or Ministerial minutes and documents.

V CONSEQUENCES OF PROHIBITION

In addition to the consequences mentioned above, the following are select consequences that may confront affected stakeholders:

⁷⁴ Above n 3.

⁷⁵ Above n 69.

⁷⁶ *Ibid.*

⁷⁷ This issue is discussed in Part IV of this paper.

⁷⁸ Above n 20.

⁷⁹ Above n 27.

⁸⁰ Above n 20. Note also the irony that Brisbane's casino is housed in the former Treasury building.

⁸¹ Above n 69.

⁸² Above n 6.

- Significant amounts of consumer dollars will be lost to both regulated and unregulated foreign operators, with Australian gamblers playing offshore with no protection;⁸³
- Lost export revenues, as well as revenue displaced from lower taxed non-gambling domestic goods and services will most likely generate overall revenue losses.⁸⁴ Lost-revenues are estimated at more than \$1 billion per year, which in turn deprives governments of funds to direct at problem gambling;⁸⁵
- Lost individual choice, penalising the freedom to address the small number of Australians who have problems with their gambling habits;⁸⁶
- Commercial costs including a negative effect on the up-take of technology by both Australian businesses and individuals, less incentive for private sector to develop network capacity and commerce, loss of jobs, and closure of some businesses;⁸⁷
- Gambling activities will be driven underground, creating a criminal class of people who are caught up in illicit consumption, creating large potential profits for illegal suppliers and a web of corruption; also, poor information on problem gambling may result, frustrating the development of appropriate care services;⁸⁸
- Lost opportunity to capitalise on the characteristics of the Internet which many argue enable harm minimisation measures to be more effective than is possible for physical gambling venues;⁸⁹ and
- According to the Government, reduced problem gamblers and decreased social welfare burden due reduced accessibility to interactive gaming services.⁹⁰ New evidence may clearly contradict this assertion due to the current ability for Australians to access foreign, unregulated sites not subject to the *IGA* complaints-scheme.

VI FUTURE ISSUES

The above consequences will present new challenges to future government policy-making. The relevant question for public policy appears to be not *whether* online gambling can be controlled, but the *extent* to which it can be controlled. As this paper has shown, full control is not an obtainable objective given the nature of the Internet and tremendous global growth of the online-gaming industry. If the Government concedes that a targeted prohibition is not the effective solution, then clearly other alternatives must be identified. Such alternatives may involve a total prohibition, or various forms of regulation. If regulation is chosen, the specific level at which it exists will need to be identified: state, national, international, or global.⁹¹ With 30 countries globally having adopted a regulatory model by 2002,⁹² the benefit of hindsight shows that when an industry that has been subject to regulation migrates to the Internet, similar regulation is required in its new environment.⁹³ Without it, despite stimulated

⁸³ Above n 9.

⁸⁴ Above n 6.

⁸⁵ Above n 9.

⁸⁶ *Ibid.*

⁸⁷ Above n 20.

⁸⁸ *Ibid.*, Tattersalls Submission.

⁸⁹ Above n 9.

⁹⁰ Above n 20.

⁹¹ S Sherry, 'Haste Makes Waste: Congress and the Common Law in Cyberspace' (2002) 55 *Vanderbilt Law Review* 307.

⁹² Above n 55.

⁹³ Above n 29, 353-374.

competition and increased investments in technologies, an uneven playing field emerges which may threaten the survival of established operators.⁹⁴ In the past, the key issue for governments and policy makers was whether the social costs are worth these developments. However, as the Australian situation has shown, there needs to be a clear link between the objectives of government policy and the effectiveness of the actual solution.

VII CONCLUSION

This paper has proposed a framework with two perspectives of why prohibition and the *IGA* is not working. First, the Government supported prohibition not because it was the most effective solution to the online-gaming problem, but arguably for political reasons. The solution also did not reconcile with the Government's rationale for prohibition. It also lacked sufficient justification and was chosen in spite of significant independent research recommending regulation. Arguably this indicates a lack of transparency in policy and decision making. The second perspective showed that the prohibition model contained within the *IGA* does not work when applied to the Internet. The Government must now contend with the consequences of failed prohibition. Whatever the source of the problem, a realistic, appropriate, and widely-supported solution dealing with online-gaming must be found. Persuasive guidance may be found overseas as similar jurisdictions like Canada, the US and UK, struggle to find and implement such a solution. The struggle generally involves attempting to find the right balance between the benefits of new technologies, and whether these benefits are worth the subsequent social costs. In that quest, politics will be paramount. However, adhering to principles of responsible government, especially transparent decision making, is crucial in achieving this goal.

⁹⁴ Above n 55.