Interactive Gambling Amendment (Virtual Credits) Bill 2013

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Law and Bills Digest Section

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The Bills Digest at a glance

The Interactive Gambling Amendment (Virtual Credits) Bill 2013 (the Bill) is a Private Senator’s Bill that seeks to amend the definition of ‘gambling service’ contained in section 4 of the Interactive Gambling Act 2001 (the Act). This is a key definition that underpins the operation of Act.

Concerns have been raised about the existence of online gambling games that are accessible in Australia and allow players to purchase ‘virtual currency’ using real money but prohibit redemption of ‘virtual currency’ winnings for real money. The Bill attempts to address those concerns by expanding the definition of ‘gambling service’ to include online gambling games that utilise ‘virtual’ currency, credits, coins, tokens and objects, thus bringing them under the operation of the Act.

Despite concerns raised by both industry and the Department of Broadband, Communications and the Digital Economy (DBCDE), a strict reading of the amendment made by the Bill would not extend the operation of the Act to Massively Multiplayer Online Role Playing Games (MMORPGs) and other non-gambling online multi-player games, even if they involve a mixture of chance and skill or feature gambling sub-games as a minor feature of the overall (non-gambling) gaming experience.

2. This would include non-gambling games where players can pay for perks, advanced features, functionality or more content (“freemium”): ‘Freemium’, Wikipedia, accessed 11 June 2013.
Interactive Gambling Amendment (Virtual Credits) Bill 2013

Date introduced: 16 May 2013

House: Senate

Portfolio: This is a Private Senator’s Bill which, if enacted, would affect the operation of the Interactive Gambling Act 2001. That Act is administered by the Department of Broadband, Communications and the Digital Economy.

Commencement: 28 days after the day it receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Interactive Gambling Amendment (Virtual Credits) Bill 2013 (the Bill) is to amend the Interactive Gambling Act 2001 (the Act) to ensure that online gambling sites and games that are played for ‘virtual’ currency, coins, tokens and objects, which are bought with real money, are captured by the definition of ‘gambling service’ contained in the Act, and hence subject to regulation.

Background

The Act is the principal legislation regulating online gambling in Australia. Currently, it mainly covers casino-type games (such as online poker) with exclusions for sports betting, which is largely regulated by state and territory governments.3

The primary object of the Act was to reduce harm to problem gamblers by prohibiting the provision of online gambling services to Australians through the internet.4

Evidence suggests that the Act is making a very minor contribution to the reduction of harm to problem gamblers.5 It has been suggested that the Act may actually exacerbate the risk of harm because of the high level of usage by Australians of overseas-based prohibited services which may

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not have the same protections that the Act could require Australian licensed online gambling providers to have.\(^6\)

In 1999 the Senate Select Committee on Information Technologies conducted an inquiry into online gambling in Australia, with the report published in March 2000. The report identified the risks that online gambling posed in relation to problem gambling\(^7\) and recommended the development of ‘strict regulatory controls on online gambling with a particular focus on consumer protection’.\(^8\) One recommendation was to enact legislation to require that all online winnings are paid by non-negotiable cheques posted to the registered gambling account holder.\(^9\)

Since then, there have been a number of inquiries and reports that have examined interactive and on-line gambling. Recent examples include the:

1. Productivity Commission 2010 inquiry report into gambling\(^10\)
2. New South Wales Law Reform Commission (NSWLRC) 2011 report into cheating at gambling\(^11\)
3. Parliamentary Joint Select Committee on Gambling Reform (JSCGR) 2011 report into interactive and online gambling and the Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011\(^12\)
4. JSCGR 2012 reports into the prevention and treatment of problem gambling and the National Gambling Reform Bill 2012 and other related Bills\(^13\) and
5. the DBCDE 2012 Review of the Interactive Gambling Act 2011.\(^14\)

These reports frequently highlighted concerns over the growth of prohibited online services and the existing gaps/weaknesses of the Act in preventing the growth of interactive gambling. The Productivity Commission noted that:

> While the Australian ban on online gaming will have reduced its growth, international sites are being increasingly accessed, with the Australian ban having decreasing traction over time.... the current

\(^{6}\) Ibid.
\(^{8}\) Ibid., p. x.
\(^{9}\) Ibid.
\(^{10}\) Productivity Commission (PC), *Gambling*, Inquiry report, 50(1) and 50(2), PC, Canberra, 23 June 2010, accessed 13 June 2013.
\(^{12}\) JSCGR, *Second report: interactive and online gambling and gambling advertising: Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011*, op. cit.
prohibition of online gaming means that Australian online gamblers can only use offshore sites, some of which have poor harm minimisation features and unscrupulous business practises.\textsuperscript{15}

**What online games are covered by the Act?**

The current definition of ‘gambling service’ in the Act incorporates the word ‘game’.\textsuperscript{16} The types of gambling games that are covered by the Act are those that are of ‘chance’ or of ‘mixed chance and skill’.\textsuperscript{17} The Productivity Commission expressed the view that:

Online gaming comprises of casino games (Blackjack, Baccarat, Roulette), all forms of poker and virtual gaming machines.\textsuperscript{18}

This is a view shared by KPMG who consider ‘online gaming’ as a market composed of a number of different types of gambling games, each with its own business models and technology, including:

- sports betting
- online poker
- casino games
- online bingo and
- online lotteries.\textsuperscript{19}

The Productivity Commission noted that the Act prohibits both online gambling and advertising of online gambling,\textsuperscript{20} but had (from the point of view of consumers):

... completely deregulated the online gaming industry. In essence, the legislation attempts to dissuade people from gambling online by making it more dangerous.\textsuperscript{21}

However, the view that all online gambling games are prohibited by the Act is not universal. The NSWLRC noted that:

Concerns have recently been raised in relation to online gambling applications that are now available on social networking websites, such as Facebook, whereby players can purchase ‘virtual currency’ in order to engage in online gaming... it appears that players cannot redeem the points they win for cash, but can only use them for further play... While such games may be legal, a concern does exist that they may encourage young people to engage those forms of online gaming that do amount to unlawful gambling.\textsuperscript{22}

\textsuperscript{15} PC, *Gambling*, Inquiry report, 50(2), op. cit., p. 15.1.
\textsuperscript{16} The definition of ‘gambling service’ in turn forms part of the operational definitions of ‘interactive’ and ‘prohibited’ gambling services: *Interactive Gambling Act 2001* (Cth), sections 5, 6.
\textsuperscript{17} *Interactive Gambling Act 2001* (Cth), subparagraph (e)(ii) of the definition of ‘gambling service’ at section 4.
\textsuperscript{18} PC, *Gambling*, Inquiry report, 50(2), op. cit., p. 15.3.
\textsuperscript{21} Ibid., p. 15.19.
\textsuperscript{22} NSWLRC, *Cheating at gambling*, op. cit., 3.52.
The NSWLRC’s view that interactive and online gambling games that do not allow gamblers to redeem ‘virtual currency’ (purchased with real money) are not prohibited as they fall outside the definition of a ‘gambling service’ contained in the Act (and hence regulation) is shared by DBCDE, which states that:

Paid gambling-type activities on social media sites and other interactive platforms fall into two categories:

- games played with virtual currency that require real money to be paid for participation
- games played with real money and cash winnings.\(^{23}\)

The DBCDE then went on to state that in their view the difference between games played with virtual currency and gambling was:... that there is no cash prize on the outcome and no cash at risk during the game. Therefore, these services are not prohibited gambling services under the IGA.\(^ {24}\)

It concluded that:

While consumers can choose to purchase virtual chips, it is entirely possible to play many of these games without making such purchases. The terms and conditions make clear to consumers that virtual currency cannot be redeemed for real money, goods, or other items of monetary value.

These games are not prohibited under the IGA as they do not satisfy the definition of a gambling service, due to the virtual currency not being redeemable for real money or anything else of value. It has been suggested by some stakeholders that the IGA should be amended to capture these services, closing the loophole for purchasing virtual chips to play gambling simulations.\(^ {25}\)

DBCDE considered online gambling games that do not allow gamblers to redeem ‘virtual’ currency (purchased with real money) as being ‘gambling simulations’.\(^ {26}\) It noted that the main characteristics of ‘gambling simulations’ are:

- the games look very much like many real casino games – some may use a simulated rate of return that gives players an unrealistic impression of the rates of return for actual online casinos
- there is an incentive to use virtual chips to unlock elements of the game (e.g. new levels, items); the fastest way to do so is to purchase additional virtual chips with real money
- if a player loses all their virtual chips, they are able to purchase more chips to continue playing the game.\(^ {27}\)

DBCDE was also of the view that should a ban on ‘gambling simulations’ be introduced, it would require those characteristics to be identified and defined in the applicable legislation.\(^ {28}\)

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24. Ibid.
25. Ibid.
26. Ibid., p. 141.
27. Ibid.
28. Ibid.
Are non-gambling online games currently covered by the Act?

There are differing views as to which types of online games are captured by the Act and concern that non-gambling games that utilise virtual currency, purchased with real money, which don’t contain gambling elements (as well as those that do) may either already fall within the operation of the Act, or would do so if the Act were amended in an attempt to prohibit gambling-like applications and games.

The NSWLRC was of the view that some forms of gaming within MMORPGs may possibly already come within the terms of the Act. They concluded that:

MMORPGs could potentially constitute virtual casinos offering a variety of virtual gambling opportunities. A question, arises as to whether any of the forms of gaming that may be made available in virtual worlds (including, potentially, wagering on player versus player contests), but which can have real-world economic consequences, should be regulated by any of the existing laws at either the State or Commonwealth level, including for example laws prohibiting participation by minors. Some of these activities could potentially come within the reach of the Interactive Gambling Act 2001 in so far as they could be seen to involve a game “played for money or anything else of value”, on an internet carriage service.

Concern was expressed by DBCDE and News Limited that any attempt to prohibit gambling-like applications or games that allow the purchase of virtual currency with real money may result in MMORPGs and other non-gambling online multiplayer games which:

- involve paying an entry-type fee
- do not provide for cash winnings and
- which may use virtual currency or objects (which can be purchased using real money).

being inadvertently captured by the definition.

However, the DBCDE is of the view that MMORPGs and other online multiplayer games (even those that incorporate some gambling elements that are incidental to the game as a whole) are not currently covered by the Act and hence not prohibited.

Despite these differing views, as discussed below it appears unlikely that MMORPGs and other non-gambling based online multiplayer games are currently covered by the Act or would be if the definition of a ‘gambling service’ is amended as proposed by the Bill.

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32. Ibid., 3.50–3.51.

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Committee consideration

Parliamentary Joint Select Committee on Gambling Reform

The Bill has been referred to the JSCGR for inquiry (the Inquiry). Submissions closed on 31 May 2013. A date for the release of the report has not been set. Details of the inquiry are at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=gamblingref orm_ctte/virtual_credits/index.htm.35

Policy position of other parties/independents

The Government, Coalition, Greens and other independents have not yet indicated their respective policy positions on Senator Xenophon’s Bill or the specific issue of online gambling games.

Position of major interest groups

As at the time of writing this Digest, six submissions had been received by the Inquiry. Four were from industry associations, one each from DBCDE and the Australian Psychological Society (APS).

Industry submissions

The International Social Games Coalition (ISGC), Game Developers Association of Australia (GDAA), Interactive Games and Entertainment Association (IGEA), Australian Interactive Media Industry Association (AIMIA)/ Zynga and Clubs Australia all oppose the amendment proposed by the Bill.36

Submission by ISGC

The ISGC was set up by a ‘group of leading social games companies’ in May 2013, including Zynga and RocketPlay.37 Zynga made a separate (joint) submission to the Inquiry and has previously partnered with RocketPlay to bring a social sports-betting title to Facebook and Zynga.com.38 Zynga

was also explicitly referred to in a number of reports and in the Bills second reading speech. The ISGC opposes the Bill because it is of the view that:

Under the proposed amendment, almost any social game played online, such as footy tipping to the Smurfs to Jetpack Joyride, which have a paid-for element would fall under the scope of the Interactive Gambling Act (IGA). By being considered gambling, they would be put at risk of an outright ban.

Further, it was of the view that:

Social games and gambling are fundamentally different. Gambling typically requires consideration, chance, and prize. Even though some social games do have the ability to allow players to pay for elements in a game, they do not have all of these elements.

Joint submission by Zynga and AIMIA

Zynga and the AIMIA also provided a joint submission to the Inquiry. The AIMIA was established in 1992 to represent its members and the digital industry to the broader business community. Zynga and AIMIA oppose the Bill because:

... collectively we develop games that are likely to be adversely impacted by this Bill and provide platforms that enable the distribution and enjoyment of games that are likely to be adversely impacted by this Bill.

In addition, Zynga and the AIMIA are of the view that:

... this Bill will cause Australia to become the only country in the world to ban some of the most common and popular games and software applications (or apps) on the internet today.

Zynga and AIMIA stated that they were of the view that if passed, the Bill would ban a wide variety of online games and applications including:

Angry Birds, Farmville, Monopoly, Tetris, UNO, Pac-Man, Candy Crush Saga, Lord of the Rings, Words with Friends, The Simpsons, Temple Run, The Sims, FIFA Ultimate Team and Smurfs Village. These are some of the biggest games to have ever been developed – combined they have been downloaded hundreds of millions of times by Australians.

40. Ibid., p. 5.
41. Ibid., p. 2.
42. Zynga and AIMIA, Submission to the Joint Select Committee on Gambling Reform, Inquiry into the Interactive Gambling Amendment (Virtual Credits) Bill 2013, op. cit., p. 7.
43. Ibid., p. 5.
44. Zynga and AIMIA, Submission to the Joint Select Committee on Gambling Reform, Inquiry into the Interactive Gambling Amendment (Virtual Credits) Bill 2013, 31 May 2013, accessed 6 June 2013.
46. Ibid., p. 2.
Joint submission by GDAA and IGEA

In their joint submission, the GDAA and IGEA oppose the Bill on the grounds that the revised definition of a ‘gambling service’ would go ‘well beyond the intended purpose of the Bill and is likely to have serious and unintended consequences for non-gambling style games’.  

The GDAA and IGEA then provided their own analysis of how the amended section would impact on their members’ business. For example, in relation to amended subparagraph (e)(i) of the definition of gambling service in section 4 of the Act, they were of the view that:

Video games often encourage users to collect virtual items. Games often allow users to collect and exchange virtual items for other game items and features. For some time now games have allowed users to purchase virtual items using [in-app purchases] … The Bill’s extension to the ‘anything else of value’ concept would impact on a massive range of games, particularly those that use the Freemium or Free-to-Play business models.

In relation to subparagraph (e)(ii) of the definition of gambling service in the Act, which provides that a gambling service game is ‘a game of chance or of mixed chance and skill’ they were of the view that:

The element of chance plays a significant role in many popular video games currently enjoyed around the world, the majority of which are non-gambling style games. For example, as Monopoly uses a roll of the dice to import chance into its game, chance is also used to determine the next shape a user will receive in Tetris. The element of chance is heavily used throughout the more sophisticated online role playing games such as World of Warcraft where, for example, chance partly determines a user’s success in an online battle and how much gold the user will find when unlocking a virtual chest. While not all games use chance mechanics, a large category of games use this technique to enhance and diversify the individual user experience and simply make games more fun.

As a result, they were of the view that with ‘the expanded scope of section (e)(i) the Bill would likely prohibit a large range of games, including non-gambling style games, particularly those games that use the free-to-play or freemium business models’.

However, GDAA and IGEA acknowledged that one purpose of the Bill is to ensure:

... that consumers will know whether they are participating in gambling activities or not...

Submission by Clubs Australia

Clubs Australia indicated that it had established a Social Gaming Working Group to examine the issues associated with gambling simulations and social gaming, and whether it should be considered

47. GDAA and IGEA, Submission to the Joint Select Committee on Gambling Reform, Inquiry into the Interactive Gambling Amendment (Virtual Credits) Bill 2013, 30 May 2013, p. 2, accessed 13 June 2013.
48. Ibid., p. 4.
49. Ibid., p. 5.
50. Ibid., p. 6.
51. Ibid., p. 7.

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a responsible and appropriate option for clubs. The working group has yet to form a definitive view on gambling simulations and social gaming. 52

However, Clubs Australia stated that it does not support the Bill as in its view it would impose a ‘blanket prohibition’ on gambling simulations and social gaming. 53

Summary of industry concerns

The concerns of industry about the Bill expressed in the submissions discussed above can be summarised as follows:

• that non-gambling games that involve a mixture of chance and skill would fall under the operation of the Act and
• that the change of the definition of a gambling service would be interpreted as applying to a wide range of non-gambling games including MMPORGS.

However, for reasons discussed below in the Key issues and provisions section of this Digest, as a matter of statutory interpretation it appears unlikely that a court would construe the amended definition of gambling service in section 4 of the Act as extending to non-gambling games as suggested by Zynga, the ISGC, AIMIA, GDAA and IGEA. Further, the Explanatory Memorandum to the Interactive Gambling Bill 2001 clearly stated that in relation to the definition of a ‘gambling service’ it was not intended to apply to online or network games, even where it could be argued that there is an element of chance in relation to game play 54 (a view reinforced by judicial consideration of the phrases ‘game of chance’ and ‘mixed skill and chance’, discussed below).

Contrast to submissions to previous inquiries

In contrast to the above industry submissions, none of the major interest groups that provided submissions to the 2011 JSCGR inquiry into interactive and online gambling and gambling advertising directly addressed expanding coverage of the Act to include online and interactive gambling games that utilise ‘virtual’ currency, credits, coins and objects (that is, where players can lose but not win money in an online gambling game).

However, in its submission to the 2011 JSCGR inquiry into interactive and online gambling and gambling advertising Responsible Gaming Networks (an Australian manufacturer of responsible gaming hardware and software systems) stated that:

52. Clubs Australia, Submission to the Joint Select Committee on Gambling Reform, Inquiry into the Interactive Gambling Amendment (Virtual Credits) Bill 2013, 30 May 2013, p. 1, accessed 21 June 2013
53. Ibid.
The current IGA legislation means that Australians can very easily gamble with offshore sites that have been proven to... Not deliver regulated and reasonable returns to players... Australians have literally nowhere to go in order to seek redress from current fraudulent offshore providers. 

Responsible Gaming Networks indicated that it supported regulated access to licensed providers located and operating out of Australia, subject to a strong regime of consumer protection. 

Non-industry submissions

Submission by the APS

The APS indicated in its submission that it supported the Bill. The APS indicated that ‘virtual’ currencies or ‘tokens’ are a well-understood psychological concept that has been the subject of considerable study in a number of different settings. The APS noted that:

Token economies have been used extensively in psychology, most commonly as part of behaviour modification techniques, using the principle of reinforcement (Skinner, 1953). In these circumstances, tokens have symbolic value, and demonstrate the widespread use of alternative forms of currency, that function in similar ways to that of cash currency. In this way, it is the symbolic value of the currency, together with the rewards for which it can be exchanged, whether in cash, privileges or other benefits, that has meaning, and not the actual unit currency. This evidence warrants caution regarding the accessibility of online gaming opportunities using virtual currencies, as these can simulate (and stimulate) broader gambling activities and reinforce gambling behaviour.

The APS then stated that in its view:

Amending the Interactive Gambling Act 2001 to provide that virtual credits, coins, tokens and objects that are purchased are recognised as items of value in relation to a gambling service would appear entirely consistent with psychological research that demonstrates, and has utilised in therapeutic settings, the operation of token economies as systems of behaviour modification and reinforcement in which the token indeed has real currency.

Submission by the Department of Broadband, Communication and the Digital Economy

The DBCDE indicated that in its view:

- there is emerging research that suggests there is a public policy issue regarding simulated online gambling services that requires further consideration

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55. P Ryan (CEO & Managing Director, Responsible Gaming Networks), Submission to the Joint Select Committee on Gambling Reform, Inquiry into interactive and online gambling and gambling advertising, 14 November 2011, p. 2, accessed 13 June 2013.
56. Ibid.
57. Australian Psychological Society (APS), Submission to the Joint Select Committee on Gambling Reform, Inquiry into the Interactive Gambling Amendment (Virtual Credits) Bill 2013, 31 May 2013, pp. 1–2, accessed 13 June 2013.
58. Ibid., p. 5.
59. Ibid.
60. Ibid.
• there are significant challenges in defining the types of simulated online gambling services that could be banned without major unintended consequences

• enforcement of any such ban would be extremely difficult and highly unlikely to attract the needed support from overseas law enforcement bodies and

• there are better ways of addressing this issue than changing the definition of gambling in the IGA - this includes encouraging greater vigilance by parents and by relevant social media platforms, etc. being more responsive to the findings of emerging research in this area.61

Whilst reaching these conclusions however, DBCDE noted that there are a number of reasons why Parliament should take action in relation to online games that allow gambling with virtual items including:

• such games may give a false impression that money put into these online games (to purchase virtual items) can be cashed-out and

• in some instances, such online games can be advertisements for ‘real money' interactive gambling services and therefore may act to increase the use of associated interactive gambling services that are unlawful.62

In relation to how the amended definition of ‘gambling service' proposed by the Bill would be interpreted, DBCDE noted that the proposed amendment, if it was adopted, may also increase the range of gambling services that are unable to be advertised under the existing advertising prohibitions contained in Part 7A of the IGA.63 More specifically, the Department noted that:

It is not clear to what extent the proposed amendment is intended to cover the full range of such online games.64

DBCDE went on to express the view that:

A key difficulty in expanding the legislation to prohibit any or all of these game types is defining these in a way that captures the games that are intended to be banned (that is, those that are considered would cause gambling related harm), while not inadvertently capturing other games that may not contain any simulated gambling-type elements or contain some of those elements but are not viewed as potentially causing harm. For example, the proposed amendment could arguably cover some online games that require payment of a fee to play or enter the game, and include elements of chance for progress in the game, but would not be seen as traditional online gaming (for example, playing a game of Monopoly online as part of a tournament).

On the other hand, games with strong gambling characteristics that are free to enter and where virtual credits or similar could not be purchased would not be captured, as the payment of consideration to play or enter the game is a key component of the existing definition (see subparagraph (e)(iii) of the definition of

62. Ibid., p. 2.
63. Ibid.
64. Ibid., p. 4.
DBCDE also noted that there are already issues enforcing the existing ban on prohibited services because despite the AFP having notified relevant overseas law enforcement bodies about prohibited gambling services being offered to Australians, no known prosecutions have commenced. 66 The Department stated that:

The lack of dual criminality in relation to online interactive gambling in most foreign countries demonstrates the practical barriers obstructing the AFP from progressing investigations in relation to these referrals.... Though the ACMA and the department have been successful in procuring the agreement of specific parties to disable access for Australians, remove games from their websites or to cease advertising prohibited services, there have been no successful criminal prosecutions in Australia under the IGA. 67

DBCDE concluded that as no other countries have yet been identified as having banned online gambling simulations, there would be additional practical obstacles to securing cooperation from overseas law enforcement bodies. 68

In relation to other countries having banned online gambling simulations, Julia Hörne and Brigitte Zammit note that several US states have enacted specific legislation prohibiting internet gambling. 69 They also cited a number of US federal court cases that have held that the US Federal Wire Act applies to online casinos. 70 However, it is beyond the scope of this Digest to determine if the relevant US laws have been applied to ‘gambling simulations’ as defined by DBCDE.

In summary, whilst supporting the intention of the Bill, DBCDE had concerns about how amended subparagraph (e)(i) of the definition of gambling service at section 4 of the Act would be interpreted and how, as a matter of practicality, such a ban would be implemented.

Financial implications

The Bill does not appear to have any immediate financial implications. New regulatory requirements would likely be met within the existing resources of the Australian Communications and Media Authority (ACMA). It is also possible that the changes would increase taxation revenue by encouraging online gamblers currently based overseas to set up Australian operations, but this is not assured. 71 In summarising its view in regards to possible increased taxation revenue, the JSCGR majority stated that:

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65. Ibid., p. 5.
66. Ibid.
67. Ibid., p. 5–6.
68. Ibid., p. 6.
70. Ibid., p. 46.
Currently most interactive gambling service providers are based in ‘tax havens’ so there is little incentive for them to move. The potential for tax revenue remains uncertain. The PC acknowledged that the amount of additional tax revenue would probably be limited.\(^{72}\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), Senator Xenophon has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. Senator Xenophon considers that the Bill is compatible.\(^{73}\)

**Key issues and provisions**

**Current law**

**Item 1** of Schedule 1 of the Bill amends subparagraph (e)(i) of the definition of gambling service at section 4 of the Act, which contains the definition of a ‘gambling service’. This is a key definition which underpins operational aspects of the Act. Currently paragraph (e) of the definition provides that:

\[
	ext{gambling service means:}
\]

\[
\ldots
\]

\[
(e) \text{ a service for the conduct of a game, where:}
\]

\[
(i) \text{ the game is played for money or anything else of value; and}
\]

\[
(ii) \text{ the game is a game of chance or of mixed chance and skill; and}
\]

\[
(iii) \text{ a customer of the service gives or agrees to give consideration to play or enter the game...}
\]

Section 5 of the Act defines ‘interactive’ gambling services in a way that includes gambling games provided through the internet, broadcasting service or any other content or listed carriage service. Subsection 6(1) of the Act imposes a prohibition on the provision of internet gambling services to Australians, subject to some exceptions listed in subsection 6(3).

**Proposed change**

The amendment expands the definition of ‘gambling service’ by clarifying that ‘anything else of value’ includes virtual credits, coins, tokens, objects or anything similar that is purchased within, or as part of, or in relation to, the game. As a result of the amendment a ‘gambling service’ would include:

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72. Ibid., p. 55.

73. The Statement of Compatibility with Human Rights can be found at page three of the Explanatory Memorandum to the Bill.
• a game of chance or of mixed chance and skill
• played for anything of value including ‘virtual’ currency, credits, coins, tokens and objects where
• the player pays money to play the game.

Interpreting the expanded definition of gambling service: would it apply to non-gambling online games?

The Bill does not, as suggested by DBCDE, amend the Act to include the characteristics of a ‘gambling simulation’. However, when interpreting the definition of a ‘gambling service’ as amended by the Bill a court would have to decide the meaning of subparagraph (e)(i) by:

• construing ‘the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute’ 74
• by reference to the language of the instrument viewed as a whole 75 and
• by considering the context, the general purpose and policy of a provision. 76

In short, a court would begin its interpretation by examining the context of subparagraph (e)(i) of the definition of gambling service 77 with a view to arriving at an interpretation that would best achieve the purpose of the Act. 78

What does the Act mean by gambling?

The purpose of the Act is to ‘regulate interactive gambling services’ and ‘prohibit interactive gambling services from being provided to customers in Australia’. 79 Hence the meaning of the word ‘gambling’ (which is not defined in the Act) is central to determining the context, purpose and application of subparagraph (e)(i) of the definition of gambling service.

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76. Commissioner for Railways (NSW) v Agaliano (1955) 92 CLR 390 as per Dixon CJ at 397. See also http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1955/27.html?stem=0&synonyms=0&query=92%20CLR%20390
78. Acts Interpretation Act 1901 (Cth), section 15AA.
According to the Macquarie dictionary, ‘gambling’ is the present-tense form of the word ‘gamble’. Therefore to understand what the Act means when referring to ‘gambling’ the plain English meaning of ‘gamble’ must be considered. Relevantly, the Macquarie dictionary defines ‘gamble’ as:

2. to stake or risk money, or anything of value, on the outcome of something involving chance.\(^{80}\)

Further, the Interactive Gambling Bill 2001 (2001 Bill) Explanatory Memorandum noted in relation to the definition of ‘gambling’ that:

Guidance as to the ordinary meaning of “gambling” can be obtained from the Encyclopedia Britannica which defines “gambling” as “the betting or staking of something of value, with consciousness of risk and hope of gain, on the outcome of a game, a contest, or an uncertain event whose result may be determined by chance or accident or have an unexpected result by reason of the bettor’s miscalculation.”

A promotion such as the chance to win a trip overseas upon signing up to an online service is not a gambling service for the purposes of the Bill. A promotional game or lottery does not involve the betting or staking of something of value, with consciousness of risk and hope of gain.\(^{81}\)

Both these definitions make reference to ‘chance’ as a central feature of ‘gambling’ games. This in turn is reflected in the Act’s definition of a ‘gambling service’. Subparagraph (e)(ii) of that definition provides that for the game to fall within the definition of a ‘gambling service’ it must be ‘a game of chance or of mixed chance and skill’.

**Judicial consideration of ‘game of chance’ and ‘mixed chance and skill’**

The phrases ‘game of chance’ and ‘mixed chance and skill’ have been considered by Australian courts in the past in the context of legislation regulating gambling.

For example, in *Tahapi Pty Ltd v Avery* (1986) 6 NSWLR 138 after reviewing the history of gambling legislation in Australia, Kirby P noted that the introduction of the phrase ‘mixed skill and chance’ into gambling legislation occurred in response to court decisions which ruled that a ‘game of chance’ was one in which there was no substantial element of skill.\(^{82}\) This resulted in doubts arising as to the meaning of a ‘game of chance’ in various gambling statutes and its application to various forms of gambling, such as blackjack.\(^{83}\) Kirby P formed the view that:

Rather belatedly, the legislature had recognised the difficulty the courts had long faced in characterising games as “games of chance” where, as was usually the case (and virtually always in card games) skill in the playing of the game was a regular feature of the game, contemplated by the rules and such an attribute of the game as to be part of its nature.\(^{84}\)

He concluded that the motivation of the legislature to insert the phrase ‘mixed skill and chance’ into the *Gaming and Betting Act 1912* (NSW) was:

82. *Tahapi Pty Ltd v Avery* (1986) 6 NSWLR 138 as per Kirby P at [157B].
83. *Tahapi Pty Ltd v Avery* (1986) 6 NSWLR 138, as per Kirby P at [155-159].
84. Ibid., at 157D.
... nothing more than an attempt to patch the loopholes in the previous legislation, including no doubt the loophole driven by the decision of Cussen J and the strict interpretation he proposed, in the somewhat different Victorian legislative context, to the expression "game of chance." 85

Further, he found that there were two types of games:

1. ‘Games of Skill’ are games where ‘nothing of significance is left to chance’86 and

2. ‘Games of Chance’ are games are where substantially nothing else but chance predominates the outcome for the player87 or where chance is a predominate feature of the game, but skill can reduce the hazards which chance inevitably introduces.88

The overlap between games of ‘chance’ and ‘mixed skill and chance’ was summarised by Kirby P as follows:

Because, as has been shown, most games (and all card games) include varying degrees of skill and chance, the notion that the new category "mixed skill and chance" will entirely subsume any game where the slightest skill is required, so that "game of chance" appearing elsewhere in the subsection has no operation seems most unlikely.89

As such, ‘games of mixed skill and chance’ are simply ‘games of chance’ that involves a level of skill, but cannot be characterised as ‘games of skill’. Kirby P concluded that to determine if a game is a ‘game of chance’ it was necessary to start by:

... asking the question whether the predominant nature of the game in question, as shown in the evidence, is one of chance or skill. Given that both elements may be present, it is necessary for the Court (however artificial the task may be) to determine whether the game may, by reference to its dominate or governing element, be properly characterised as a "game of chance".90

As a result, for a game to be a game of ‘chance’ or ‘mixed chance and skill’ for the purposes of the Act, the games dominate nature must be one of chance, even if the element of skill is present. The phrase ‘mixed skill and chance’ (or as the Act puts it ‘mixed chance and skill’) must be read in the context of the intention of the parliament to capture gambling games that, whilst having some element of skill, are games whose dominate or governing element is chance.

Based on the interpretation applied in Tahapi Pty Ltd v Avery, even where a game involves both elements of chance and skill (for example, World of Warcraft where chance partly determines a player’s success in an online battle) it will only deemed be a game ‘of mixed chance and skill’ for the purposes of the Act if chance is a ‘dominant or governing element’ of the game that impacts on the likelihood of winning. This view is consistent with and reinforced by the Explanatory Memorandum

85. Ibid., at 160D.
86. Ibid., 162C.
87. Ibid., 155D, 157B.
88. Ibid., 162D.
89. Ibid., 158F.
90. Ibid., 161F-161G.
to the Interactive Gambling Bill 2001, which provided examples of ‘games of chance’ and ‘mixed skill and chance’, as discussed below.

Whilst both the plain English meaning of ‘gambling’ and prior judicial consideration of the phrases ‘game of chance’ and ‘mixed skill and chance’ support the proposition that the definition of a ‘gambling service’ as amended by the Bill would be narrowly construed and not applied to non-gambling games, a court would nonetheless need to consider the context and purpose of the provisions of the Act itself.

What is the context and purpose of provisions in the Act?

After considering the plain English meaning of ‘gambling’ and prior judicial consideration of underpinning concepts such as ‘game of chance’ as discussed above, a court would then examine subparagraph (e)(i) of the definition of gambling service in the context of the other applicable paragraphs in the Act that define a ‘gambling service’. These include references to ‘placing bets’, and ‘lotteries’. 91 Further, the purpose of subparagraph (e)(i) can be ascertained by reference to relevant extrinsic materials such as the Explanatory Memorandum or second reading speeches. 92 The Explanatory Memorandum to the Interactive Gambling Bill 2001 stated that in relation to the definition of a ‘gambling service’:

For the purposes of paragraph (e) a game played for money or anything else of value is a game played for some kind of prize which is of monetary value. An example of a game of chance is Roulette. There is no skill involved in a game of Roulette. An example of a game of mixed chance and skill is Blackjack.

The reference to a game of mixed chance and skill is not intended to include games that would generally be regarded to be games of skill even though it could be argued that the outcome of the game might be affected by chance... Similarly a network electronic game like Quake, a game for one or multiple players, should be regarded as a game of skill even though it could be argued that there is an element of chance in relation to game play. For example there are elements of chance in that a player won’t be aware of what another player might do and yet may act in anticipation of what the other player might do. 93

Senator Xenophon noted in the Bill’s second reading speech that ‘many of the games currently operating, which any reasonable person would consider to be gambling, do not come under the regulations set out in the Act’ (emphasis added). 94 As such, when the context and purpose of subparagraph (e)(i) of the definition of gambling service is examined, it appears that a ‘gambling service’ should be interpreted as only applying to:

91. Interactive Gambling Act 2001, paragraphs (a), (b), (c), and (d) of the definition of ‘gambling service’ at section 4.
92. Acts Interpretation Act 1901, section 15AB.
• online gambling games: games where money or anything else of value is risked on the outcome of something involving chance and

• not to other forms of online games such as MMORPGs that are not by their nature, gambling orientated or based and are not examples of gambling as understood by ‘any reasonable person’ as they are games of skill even though ‘it could be argued that the outcome of the game might be affected by chance’.

However, even if a court were to conclude that language in subparagraph (e)(i) of the definition of gambling service was ambiguous and could be interpreted in a manner that would ‘inadvertently capture other games that contain some gambling elements’, it would likely consult the Bill’s Explanatory Memorandum and the second reading speech to determine its meaning and purpose. As noted above, these clearly display the intention that the expanded definition of ‘gambling service’ only applies to:

• gambling activities using virtual items purchased with real currency and

• games… which any reasonable person would consider to be gambling...

It therefore appears unlikely that subparagraph (e)(i) of the definition of gambling service would be interpreted by a court (which must strive to arrive at an interpretation that would best achieve the purpose of the Act) as applying to online games such as MMORPGs as that are not gambling orientated or based and that no ‘reasonable person would consider to be gambling’.

Despite not including the characteristics of a ‘gambling simulation’ discussed above as recommended by DBCDE it appears likely that subparagraph (e)(i) would be construed by courts as applying to online gambling games only. Further, it appears very clear that the intention of Parliament when enacting the Act was that it would not apply to ‘a network electronic game like Quake’ or ‘a game for one or multiple players’ such as World of Warcraft, even if it ‘could be argued that there is an element of chance in relation to game play’.

As a result it does not appear likely that paragraph (e) of the definition of gambling service, incorporating amended subparagraph (e)(i), could be construed as applying to games where players can use real money to either play the game or purchase virtual items (or both) but are not based or centred on gambling, such as MMORPGs and other non-gambling online multiplayer games, even if they feature gambling sub-games as a minor feature of the overall (non-gambling) gaming experience.

96. Acts Interpretation Act 1901, section 15AB.
99. Acts Interpretation Act 1901 (Cth), section 15AA.
Concluding comments

The Bill appears to effectively extend the operation of the Act to include online gambling games or ‘gambling simulations’ that allow gamblers to purchase ‘virtual’ currency using real money without capturing MMORPGs and other non-gambling online multiplayer games.

Given that this is a Private Senator’s Bill, the current legislative workload before the parliament and political environment, it appears unlikely that the Bill will be debated. However, it has raised significant issues for consideration by the new Parliament.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.