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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

INTERACTIVE GAMBLING (MORATORIUM) BILL 2000

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Communications, Information
Technology and the Arts, Senator the Hon Richard Alston)

INTERACTIVE GAMBLING (MORATORIUM) BILL 2000

OUTLINE

The Commonwealth Government is concerned that new interactive technology, such as the Internet and datacasting, has the potential to put a virtual 'poker machine' in every home. This 'quantum leap' in accessibility to gambling has the potential to expand both the amount of gambling available in Australia as well as to exacerbate problem gambling.

Australians are already among the heaviest gamblers in the world, spending twice as much on legalised gambling as people in North America and Europe. The negative social impacts associated with excessive gambling affect many Australian families and communities with an estimated one in ten Australians affected in some way by problem gambling.

The Interactive Gambling (Moratorium) Bill 2000 (the Bill) proposes to impose a 12-month moratorium on the development of the interactive gambling industry in Australia by creating a new criminal offence, the provision of an *interactive gambling service*. The new offence prohibits a person from providing an *interactive gambling service* unless the person was already providing the service when the moratorium commenced on 19 May 2000. Consistent with the Government's decision to impose a moratorium for twelve months, the offence ceases to have effect at midnight on 18 May 2001.

The moratorium is intended to pause the development of the Australian-based interactive gambling industry while an investigation into the feasibility and consequences of banning interactive gambling is conducted. The investigation is intended to be completed during the course of the moratorium.

The Bill provides a definition of what is an *interactive gambling service*. An *interactive gambling service* has four essential elements:

- the service is a gambling service; and
- the service is provided in the course of carrying on a business; and
- the service is provided to customers using any of the following communications services:
 - an Internet carriage service or any other listed carriage service; or
 - a broadcasting service or any other content service; or
 - a datacasting service provided under a datacasting licence; and
- the service is linked in a specified way to Australia.

The links to Australia do not require an *interactive gambling service* to be targeted to, or available to, Australians. The proposed *Interactive Gambling (Moratorium) Act 2000* will apply to all *interactive gambling services* that have one or more of the specified links to Australia, irrespective of whether the service is intended to be provided to Australian residents.

The Bill specifically excludes from the definition of *interactive gambling service* services for telephone betting; services relating to the entering into of contracts that, under the Corporations Law, are exempt from a law relating to gaming or wagering; and services that the Minister determines are exempt services. Futures contracts and options contracts are the most common forms of contracts exempt under the Corporations Law from gaming and wagering laws. Online share trading will also not be covered by the moratorium on interactive gambling because online share trading is not an *interactive gambling service* within the meaning of that term in the Bill. Online share trading involves the acquisition of contractual rights and is not a gambling service.

The Bill provides a defence in relation to *interactive gambling services* that were provided prior to 19 May 2000, the date that the Commonwealth Government announced its intention to legislate to impose the moratorium. The defence is intended to allow continuity of provision of pre-19 May 2000 *interactive gambling services*, not an expansion of the pre-19 May 2000 *interactive gambling services*.

The defence makes it clear that whether or not an *interactive gambling service* comes within the moratorium depends on the date on which the *interactive gambling service* was first provided, not the date on which the service was licensed. The effect of the defence is to exclude from the moratorium an *interactive gambling service* that the defendant proves they provided before 19 May 2000. In proving that they provided the service before 19 May 2000, the defendant must prove:

- that the service was the same or substantially the same as the service provided before 19 May 2000;
- that the service was provided under the same name as the service provided before 19 May 2000; and
- that the service had at least one arm's length paying customer before 19 May 2000.

Internet Service Providers will not be guilty of the offence of intentionally providing an *interactive gambling service* under the *Interactive Gambling (Moratorium) Act 2000* unless they themselves provide the content of an *interactive gambling service*. The Internet Service Provider and the provider of the *interactive gambling service* will almost always be different people. The Internet Service Provider is responsible for the carriage of the service rather than the provision of the content of the service. Also not at risk of prosecution are persons providing ancillary services such as bill payment and provision of credit, unless the providers of these ancillary services are also the content providers of the *interactive gambling service*.

FINANCIAL IMPACT

The Bill will not have any significant impact on the finances of the Commonwealth. Enforcement costs are expected to be marginal.

INTERACTIVE GAMBLING (MORATORIUM) BILL 2000

REGULATION IMPACT STATEMENT

ISSUE

The Commonwealth is concerned new interactive communications services will give interactive gambling service providers (IGSPs) new opportunities to:

- expand both the size of the gambling industry and quantum of gambling in Australia; and
- attract new players.

Australia already has one of the largest per capita gambling industries in the world. The Productivity Commission found that, on average, adult Australians currently spend (lose) at least twice as much on legalised gambling as people in North America and Europe - making Australians among the heaviest gamblers in the world. The negative social impacts associated with this industry affect many Australian families and communities as well as cost the Commonwealth Government in terms of welfare and other support functions provided to victims of problem gambling.

Australia is also at the forefront of the information economy. It is one of the top four nations in terms of homes with Internet connections and percentage of population with Internet access. In 1999 six million Australians had access to the Internet and of these more than 75% accessed it more than once a week. Between November 1998 to November 1999 the number of households with Internet access increased by over 100%. Over the next twelve months this access is expected to continue to grow rapidly and significantly. The percentage of households with Internet access is expected to grow from 25% in November 1999 to 35% by November 2000. Gambling on the Internet is not the only concern. Within the next year, new interactive broadcasting and telecommunications services such as wireless applications and datacasting could provide new platforms for gambling. Australians are also becoming increasingly comfortable with conducting electronic transactions online. Over 800,000 people purchased goods or services over the Internet in the year ending November 1999 - an increase of 183% on the previous year's figure of 286,000.

These two factors underlie the Commonwealth and community's concern about the potential for interactive gambling to exacerbate the negative social impacts of excessive gambling by potentially enabling casino or bookmaker services in every Australian home. Interactive gambling gives users access to gambling 24 hours a day, 365 days a year. The Productivity Commission describes this as a "quantum leap" in accessibility. This increase in accessibility could contribute to an associated growth in problem gambling.

Of particular concern is the presence of gambling in the home. Households with children have been early adopters of new interactive technology such as the Internet. Table 1 clearly demonstrates the high level of uptake of the Internet in households with children.

Table 1: Internet access at home

	Nov 1998	Nov 1999
Couples with children	27%	39%
Single parent families	15%	19%
Couples with no children	15%	23%
Single person	9%	10%
Other	22%	25%

Source: "The Current State of Play: Australia and the Information Economy" National Office for the Information Economy, 2000

While parents may take reasonable precautions to prevent their children from accessing gambling within the home (via the home PC, etc), it is possible that parental gambling within the home may encourage children to learn and rehearse gambling activities and behaviours. With gambling occurring in the home, it may be possible for children to watch adults gamble or 'gamble' themselves by using the practice mode offered by many gambling providers. The ability of children to view gambling has not been hitherto possible, with strict regulations preventing minors from entering gambling venues in Australia. Thus an increase in gambling from home could result in younger people taking up gambling and, consequently, lead to an increase in younger problem gamblers.

New interactive technology gives developers the ability to include highly attractive rich multimedia content in game and site development. Internet gambling sites already offer sophisticated graphics, music, virtual casino walk-throughs and live, streamed broadcasts of events such as horse racing. Interactive gambling is easier to play and, potentially, increasingly attractive to gamblers. Improvements in bandwidth, accessibility and processor technology will give developers new opportunities to create new gambling products. Young people, as early adopters of digital technology, may be particularly attracted to using high-tech gambling products. This may create a new population of gamblers and, possibly, problem gamblers. Although technology offers new opportunities for verifying the identity and age of a gambler, the Commonwealth is concerned that savvy users - particularly younger, computer-literate users - may still find ways around these measures and access gambling from the home. The growth and impact of the Electronic Gaming Machine (EGM) market in Australia is an example of how new gambling products can attract new gambling populations as well as create new problem gambling.

The Commonwealth is aware of broad community concern about gambling. The Productivity Commission found that while most Australians gamble, around 70 per cent of Australians (including a substantial majority of regular gamblers) consider that gambling does more harm than good to the community. A significant proportion of the submissions made to the Senate Information Technologies Select Committee's inquiry

into Internet gambling expressed concern about the potential for interactive gambling to exacerbate problem gambling in Australia.

For these reasons the Commonwealth is keen to pause the further expansion of this industry in order to provide an opportunity to investigate thoroughly the feasibility and consequences of banning interactive gambling.

OBJECTIVE

The Commonwealth is concerned that the interactive gambling industry has the potential to expand rapidly in Australia over the next 12 months and that any further expansion of interactive gambling could exacerbate problem gambling in Australia. Because of this concern, the Commonwealth wishes to prevent the further expansion of the Australian-based interactive gambling industry while it thoroughly examines the feasibility and consequences of banning new interactive gambling services.

OPTIONS

The Commonwealth has three options available to it to prevent the further expansion of interactive gambling in Australia while it conducts its investigation into the feasibility and consequences of banning interactive gambling:

1. maintaining the status quo;
2. relying on its Constitutional powers to legislate for a temporary moratorium on all interactive gambling services within Australia; or
3. relying on its Constitutional powers to legislate for a moratorium on the introduction of new interactive gambling services in Australia.

The Commonwealth does not currently have any practical administrative options available to it to effect an immediate pause in the growth of the interactive gambling industry in Australia.

The Commonwealth cannot rely on the States and Territories to halt the growth of the interactive gambling industry. On 19 April 2000, the Commonwealth signalled its concern about the potential for interactive gambling to exacerbate the negative social impacts of problem gambling in Australia and called on the States and Territories to join it in imposing a voluntary moratorium on the introduction of new interactive gambling services. Only New South Wales and Western Australia indicated support for this initiative. Since this meeting, a number of jurisdictions have continued to issue new interactive gambling licences.

Improving regulation or self-regulation within the industry will not stem the growth of the interactive gambling industry. Regulatory options may improve the safety and security of the industry but will not prevent the industry from growing. Throughout the history of the Australian gambling industry, legalisation and the legitimisation that comes from legalisation has resulted in the growth of the gambling industry. For example, the

Totalizator system, which replaced illegal SP bookies, is now a multi-billion dollar business.

The groups most likely to be affected are:

- current gambling providers;
- prospective gambling providers;
- State and Territory Governments;
- interactive gambling consumers;
- problem gamblers; and
- welfare and problem gambling agencies.

Option 1: Status Quo

The Commonwealth could opt to take no action to slow the immediate growth of interactive gambling while it investigates the feasibility and consequences of banning interactive gambling.

Impacts

Interactive gambling industry (current and prospective providers)

Doing nothing is unlikely to slow the growth of this industry in Australia. The Commonwealth is mindful of the difficulty States have experienced in trying to deal with harm created by the recent rapid expansion of another mode of gambling, Electronic Gaming Machines (EGMs). This EGM experience suggests it is easier to deal with a potentially harmful industry while it is still in its early stages of development than trying to deal with it once that industry has become large and established.

Interactive Gambling Consumers

If the Commonwealth does not take any action to stem the immediate growth of the Australian-based interactive gambling industry, gamblers will continue to have access to interactive gambling provided by a range of Australian-based IGSPs and offshore sites. Given that Australian States and Territories have already issued a number of interactive gambling licences, it is reasonable to expect that interactive gambling consumers will have access to an ever-increasing choice of providers.

Problem gamblers

Under this option, potential problem gambling related to interactive gambling will remain unchecked. Because interactive gambling may appeal to new types of gamblers it is possible that the types of problems encountered by problem gamblers may also be new and different.

State and Territory Governments

Under the status quo option, State and Territory Governments will be able to continue to license new interactive gambling service providers. This will enable the licensing authorities to continue to collect fees and will provide ongoing opportunities to generate revenue.

Welfare and problem gambling agencies

If the Australian-based industry is left unchecked it may continue to grow. If it does grow, there is a reasonable expectation that problem gambling and the demand for problem gambling support services in Australia will also continue to grow. Moreover, because interactive gambling may attract new players, there is a chance that problem gambling support agencies may need to adapt to deal with growing numbers of problem interactive gamblers.

Option 2: Legislating for a moratorium on all interactive services

The Commonwealth could rely on its Constitutional powers to impose a temporary moratorium on all interactive services including existing providers. This option goes beyond the main objective of the Commonwealth of pausing the further expansion of the industry and is, in effect, an immediate temporary ban on the industry in Australia. The Commonwealth, however, has already indicated that although predisposed to banning the industry - it wishes to investigate thoroughly the feasibility and consequences of such a ban before making a final decision.

Interactive gambling industry

The option of legislating for a 12 month moratorium on new and existing interactive gambling providers is likely to affect the Australian-based interactive gambling industry. It is possible this option could have significant consequences for the industry and industry employees.

Although the moratorium would be for a 12 month period it is possible that the industry could view this as a permanent ban on the industry as it would apply to new and existing providers. Investment in the industry could be affected and possibly lead to Australian-based IGSPs relocating to offshore jurisdictions. A number of Australian-owned companies have already preferred to obtain licenses from less heavily regulated offshore jurisdictions such as Vanuatu.

Although predisposed to banning the industry, the Commonwealth has indicated that it wants to investigate the implications of such a ban on the interactive gambling industry before taking such a decision.

State and Territory Governments

Preventing IGSPs from trading could result in States and Territories losing revenue derived from interactive gambling taxation for the duration of the moratorium. However, it is also possible that interactive gamblers deprived of access to an Australian-regulated interactive gambling services may substitute interactive gambling with non-interactive gambling products. States and Territories would then continue to derive revenue from gambling - in some cases at a higher rate of tax than currently applies to interactive gambling.

Although predisposed to banning interactive gambling in Australia, the Commonwealth has indicated that it wants to understand the implications of such a ban on States and Territories before taking such a decision, and has invited them to provide advice on the possible implications.

Interactive gambling consumers and Problem gamblers

A moratorium on all interactive gambling services in Australia that does not prevent access to offshore gambling services would result in Australian interactive gambling consumers not having access to a locally regulated industry but still having access to offshore interactive gambling providers. A number of industry representatives claim that many offshore sites may be of a lesser standard than Australia's in terms of probity, security and player protection. Therefore any policy that allows continued access to these sites might be undesirable.

Although disposed to banning, the Commonwealth has indicated that it intends to investigate thoroughly the consequences of any banning option on consumers and problem gamblers before it makes a final decision on whether to ban.

Welfare and problem gambling agencies

It is not clear what effects a moratorium on all services would have on demand for welfare and problem gambling support services.

Option 3: Legislating for a moratorium on new interactive services

The Commonwealth's proposal is to impose a 12-month moratorium from 19 May 2000 to prevent prospective and existing providers from offering new interactive gambling services. The Commonwealth will achieve this by legislating to make it an offence for IGSPs based in Australia to use a specified communications service to provide new interactive gambling services. The law will clearly define what constitutes new interactive gambling services and will specifically exclude other similar services not intended to be covered by the moratorium such as phone betting. During the period of the moratorium the Commonwealth Government will, preferably with the cooperation of the States and Territories (whose input has been sought) investigate the feasibility and consequences of banning interactive gambling.

The Commonwealth is concerned that, while it examines the banning option, unless there is a moratorium in place the Australian interactive gambling industry will continue to expand, attract new players and contribute to an overall increase in problem gambling in Australia.

Current Interactive Gambling Service Providers

A moratorium will prevent current IGSPs from introducing new interactive gambling services. This constraint will inhibit the ability of these providers from responding to changing market conditions. This will effectively mean that IGSPs will not be able to offer new services. This constraint could adversely affect the perceived value of publicly listed IGSPs.

Conversely, it is possible that operating IGSPs will enhance their value because they will enjoy a relatively protected position in the market due to the absence of new Australian competitors.

Prospective Interactive Gambling Service Providers

A moratorium will prevent prospective IGSPs from offering interactive gambling services for 12 months. Given the global market for this industry is in its nascency, providers delayed for 12-months may miss an opportunity to establish a market presence. On the other hand, the very infancy of the market could also mean that it will not change significantly within a 12 month period.

Some recently licensed providers who had not launched its gambling service at 19 May 2000 have incurred costs associated with obtaining a licence - including fees and extensive probity checks at their own expense. However, given the Commonwealth is not extinguishing the licensing arrangement, and notwithstanding the Commonwealth's predisposition to examine the possibility of banning interactive gambling - it is possible that licensed operators may still be able to offer services at the end of the moratorium.

Some recently licensed providers may have made business decisions and investments based on an ability to generate revenue in the near future. Given a moratorium will temporarily delay these providers from entering the market, it is possible the providers will have to carry the cost of any investment decisions taken before the announcement of the moratorium. Recent licensees frustrated from operating by the moratorium may claim for restitution from States and Territories for the costs associated in obtaining a license. Principles of restitution will apply to any contracts frustrated by the Commonwealth's action to prevent one party to a contract from gaining a windfall benefit at the expense of the other party.

State and Territory Governments

Although the proposed 12-month moratorium does not purport to invalidate State and Territory licensing arrangements it may deter prospective IGSPs from applying for State and Territory licences during the period of the moratorium. States and Territories may not receive revenue from licensing and the other benefits that may flow from the establishment of new interactive gambling industries. It is not possible to estimate the potential loss given uncertainty about the number of enterprises contemplating licensing and the competitive licensing arrangements.

As noted above, States and Territories may be subject to claims for restitution for recent licences allegedly frustrated by the moratorium. The self-governing Territories have identified interactive gambling as a potential revenue generating industry and have been actively licensing operators.

Online gambling consumers

Online gamblers will have ongoing access to operating IGSPs both inside and outside Australia. However, by restricting the number of potential providers in Australia to 19 May 2000 levels, consumers will have a fixed choice of Australian-based providers. Furthermore, as at 19 May 2000, Australia's first licensed and operating interactive casino, Lasseters, did not offer casino gambling to Australian residents beyond the immediate area around its land-based casino in Alice Springs.

Problem gamblers

The moratorium will not restrict Australian gamblers' current ability to access offshore sites.

By freezing the interactive gambling industry to 19 May 2000 levels, the moratorium may lessen the growth of problem gambling that could have occurred had the industry continued to grow. However, given the moratorium will not prevent the expansion of the offshore industry or the availability of traditional gambling products, it is not possible to gauge whether this will directly affect demand.

The moratorium will mean that Australian gamblers will have access to a local interactive gambling industry that is fixed for 12 months at 19 May 2000 levels. This could result in the uptake of interactive gambling services plateauing at current levels for 12 months. If this happens, it is reasonable to anticipate a similar plateauing of problem gambling generated by interactive gambling.

Welfare and problem gambling services

If the moratorium results in a plateauing of associated problem gambling resulting from interactive gambling, welfare and problem gambling support services will benefit by not having to provide increasing levels of service to those affected. It is important to note that

the Productivity Commission (PC) found that for every problem gambler there are at least seven other individuals directly affected to some extent. The PC estimated that there are 290,000 problem gamblers in Australia with around 130,000 having severe problems. Because interactive gambling is relatively new it is not clear how many of the estimated 90,000 Australians who used the Internet in 1998-99 to gamble were problem gamblers or had developed problem gambling.

PREFERRED OPTION

The option most suited to the Commonwealth's objective of preventing the further expansion of the Australian-based interactive gambling industry whilst it investigates thoroughly the feasibility and consequences of banning interactive gambling is the imposition of a moratorium on the introduction of *new* interactive gambling services (option 3). The status quo option will not necessarily halt the further expansion of this industry. The option of imposing a 12-month moratorium on the entire industry is likely to have a significant impact on the industry. Although predisposed to banning interactive gambling, the Commonwealth intends to investigate thoroughly the feasibility and consequences before taking such a decision.

Other issues

Restriction on competition

The moratorium effectively limits the opportunities operating IGSPs have to respond to market conditions. Australian IGSPs may be disadvantaged relative to offshore providers. The moratorium also prevents recently licensed prospective operators from entering the interactive gambling market for 12 months.

Effects on small business

Although small businesses will not face any additional compliance costs, a moratorium will effectively prevent new IGSPs from entering the market for 12 months. IGSPs range in size from individual bookmakers through to larger enterprises employing 50 to 100 people.

Effects on regional Australian jobs

The proposed moratorium will not adversely impact on any existing rural or regional jobs although it may limit the potential number of new high-tech jobs created in such areas.

Trade Impact Analysis

Given the global market for interactive gambling service is largely untapped, the Australian interactive gambling industry has the potential to generate export revenue.

The Australian industry is relatively new and small. As at early June 2000 there were approximately 15 providers operating. States and Territories had issued 25 interactive gambling licences. At least one jurisdiction, Norfolk Island, claimed to have received over 250 expressions of interest in the past 12 months and at least 9 formal applications for licences.

Evidence provided to the Senate Select Committee on Information Technologies' inquiry into Internet gambling indicates that, although new, a number of providers have had rapid growth and are generating export revenue.

Australia's first Internet casino, Lasseters, was launched in April 1999 and since then has attracted over 62,000 players from 196 countries and generated \$78 million in turnover. Given Lasseters almost exclusively targets overseas players (except for a small area around Lasseters' land-based casino in Alice Springs) the majority of this revenue is export revenue. Lasseters claim a growth rate of over 75% per month.

Centrebet was the world's first interactive bookmaking service. Since then it has grown to become the predominant provider in the global market. Centrebet currently has over 50,000 clients from 80 countries and an annual turnover in excess of \$100 million.

ACT-based bookmaking service, Canbet has been a licensed bookmaker since 1996. In 1996 its annual turnover was \$14.6 million. Since then, and due in large part to going online, Canbet's turnover in 1999 was \$47 million. It is forecasting turnover of \$98 million in 2000. Canbet claims that 98% of its clients are from the United States.

A moratorium will prevent existing and prospective IGSPs from introducing new interactive gambling services from 19 May 2000. This will constrain the industry's potential to generate additional revenue from offshore and local markets. However, under the moratorium, operating IGSPs will still be in a position to offer the same services to the same markets as they could prior to 19 May 2000. Accordingly, the industry should be able to generate at least the same amount of revenue as it did as at the date the moratorium takes effect.

The proposed moratorium is also for a limited period of time (12 months). Accordingly, unless the Commonwealth imposes a ban on interactive gambling following its inquiry into the industry, the effects of a moratorium on the local gambling industry would be temporary.

Consultation

On 19 May 2000 the Commonwealth wrote to State and Territory Ministers outlining the Government's intention to legislate for a moratorium. The letter invited States and Territories to provide input into the nature and scope of a legislated moratorium. The Commonwealth also issued several public statements outlining its approach to the moratorium and this resulted in a number of queries and correspondence from industry representatives. The Commonwealth's intention has been to signal in a very broad way

its intention to legislate for a moratorium. The Commonwealth will be in a better position to consult on the detail of the moratorium once it has developed and introduced legislation into Parliament.

The Commonwealth has received responses to its letter of 19 May 2000 from Tasmania, Western Australia, Norfolk Island, Victoria and Northern Territory. In its response, Western Australia expressed qualified support for a moratorium although it highlighted its view that the focus of the moratorium should be on interactive gaming and not wagering. The Victorian government's response indicated a willingness to hold off proclaiming its new *Interactive Gaming (Player Protection) Act 1999* for 3 months and invited the Commonwealth to suggest improvements to this law that might address its concerns about problem gambling. The Northern Territory's reply did not directly address the moratorium. It expressed an interest in working with the Commonwealth and other jurisdictions to improve gambling regulation rather than expressing a view on a moratorium. Both Tasmania and the Northern Territory outlined their efforts to address problem gambling and to effectively minimise harm.

Although the Commonwealth has yet to receive replies from New South Wales, South Australia, Queensland and the ACT it notes:

- the New South Wales' government's strong expressions of support for the Commonwealth's approach to interactive gambling made at the Ministerial Council on Gambling meeting of 19 April 2000 and in subsequent public statements; and
- the ACT Assembly motion directing the ACT Minister responsible for gambling to not grant any further interactive gambling licenses or grant any further authorisations to conduct interactive games until the ACT's Gambling and Racing Commission had reported on the adequacy of ACT legislation.

The majority of responses received so far from industry and consumers have generally expressed concern about the Commonwealth's proposal to legislate for a moratorium. Most of these responses argue that Australia already has a well-regulated interactive gambling industry with the potential to generate considerable revenue. A number of other public statements from industry representatives also express concern that uncertainty created by the Commonwealth's moratorium announcement may adversely affected investment in the industry.

The Commonwealth has also received letters and public statements of support from a number of church and welfare organisations for its proposal to legislate for a moratorium.

The National Office for the Information Economy (NOIE) has consulted with a number of Commonwealth agencies including:

- Department of Prime Minister and Cabinet;
- The Treasury;
- Department of Family and Community Services;
- The Attorney-General's Department; and
- Department of Transport and Regional Services.

CONCLUSION AND RECOMMENDED OPTION

Given the majority of States and Territories rejected a voluntary moratorium, the Commonwealth's only viable option to effect an immediate halt to the further expansion of the local interactive gambling industry for 12 months is to legislate for a moratorium.

The Commonwealth considers the benefits to the community of imposing a temporary pause on the further expansion of the interactive gambling while it investigates the feasibility and consequences of banning the industry outweigh the costs to the industry in terms of restricted competition.

Implementation and review

Following Royal Assent, the Commonwealth intends the Australian Federal Police to enforce the moratorium on the introduction of new interactive services. The moratorium legislation will not require any review, as a sunset clause will ensure the law ceases to have effect after 12 months.

Enforcing the moratorium may impose costs on the Commonwealth. However, it should be noted that the Commonwealth will only incur costs when and if the Commonwealth prosecutes providers in breach of the law. Moreover, given an existing enforcement agency, the Australian Federal Police, will enforce the moratorium, the costs of enforcement will be marginal.

Over the term of this moratorium, the Commonwealth will investigate the feasibility and consequences of banning interactive gambling. If the outcome of this investigation requires regulatory change, a further Regulation Impact Statement will be prepared.

INTERACTIVE GAMBLING (MORATORIUM) BILL 2000

NOTES ON CLAUSES

Part 1 – Introduction

Clause 1 - Short title

Clause 1 provides for the Act to be cited as the *Interactive Gambling (Moratorium) Act 2000*.

Clause 2 - Commencement

Clause 2 provides that the *Interactive Gambling (Moratorium) Act 2000* commences on the day after the day on which it receives the Royal Assent.

Clause 3 – Simplified outline

Clause 3 sets out a simplified outline of the *Interactive Gambling (Moratorium) Act 2000*.

Clause 4 – Definitions

Clause 4 sets out the definitions of terms used in the *Interactive Gambling (Moratorium) Act 2000*.

Australia is defined in clause 4 to include the external territories (including Norfolk Island, Cocos (Keeling) Islands and Christmas Island).

Bet is defined in clause 4 to include a wager. A bet in a pool betting scheme such as the TAB or Tattsлото is a “bet” for the purposes of the *Interactive Gambling (Moratorium) Act 2000*.

Definitions of the terms **broadcasting service** and **broadcasting services bands** in clause 4 are the same as the definitions of these terms in the *Broadcasting Services Act 1992*.

Business is defined in clause 4 to include a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis. The definition of **business** in clause 4 has been included so that it is clear that a person would be providing a service in the course of carrying on a business for the purposes of the *Interactive Gambling (Moratorium) Act 2000* even if the person conducted a one-off or irregular commercial activity.

The definition of **Chapter 8 agreement** in clause 4 is the same as the definition of the term in the Corporations Law.

Content service is defined in clause 4 as a content service provided using a listed carriage service. The definitions of the terms **content service** and **listed carriage service** are the same as the definitions of those terms in the *Telecommunications Act 1997*. The definition of **content service** includes:

- a broadcasting service (as defined in the *Broadcasting Services Act 1992*);
- an on-line service (including those for information, entertainment and education); and
- a service specified in a determination by the Minister.

The definition of **datacasting licence** in clause 4 is the same as the definition of the term in subclause 6(1) of the *Broadcasting Services Act 1992*. Datacasting licences are established by Part 2 of Schedule 6 to the *Broadcasting Services Act 1992*.

Datacasting service is defined in clause 4 as a service that delivers content in any form to persons having equipment appropriate for receiving that content where delivery of the service uses the broadcasting services bands and the service is provided in Australia under a datacasting licence.

The definition of **futures contract** in clause 4 is the same as the definition of the term in the Corporations Law.

Gambling service is defined in clause 4 to mean:

- (a) a service for the placing, making, receiving or acceptance of bets; or
- (b) a service the sole or dominant purpose of which is to introduce individuals who wish to make or place bets to individuals who are willing to receive or accept those bets; or
- (c) a service for the conduct of a lottery; or
- (d) a service for the supply of lottery tickets; or
- (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; or
- (f) a gambling service (within the ordinary meaning of that expression) that is not covered by any of the above paragraphs.

Types of services that fall within the definition of **gambling service** are discussed below in clause 5.

Game is defined in clause 4 to include an electronic game.

Interactive gambling service is defined in clause 4 to have the meaning given by section 5 of the *Interactive Gambling (Moratorium) Act 2000*. An interactive gambling service is a **gambling service** where the service satisfies the conditions in paragraphs 5(1)(a)-(c) and the service is not a service specified in subclause 5(3).

Internet carriage service is defined in clause 4 to mean a **listed carriage service** that enables end-users to access the Internet. Like the *Telecommunications Act 1997*, the term “end-user” is used without being defined. An end-user need not necessarily be a

customer of an Internet Service Provider or Internet content host. The definition of **Internet carriage service** is the same as the definition of **Internet carriage service** in Schedule 5 to the *Broadcasting Services Act 1992* (Online Services).

The definition of **listed carriage service** in clause 4 is the same as the definition of the term in section 16 of the *Telecommunications Act 1997*. The definition is intended to include a service for the carriage of Internet communications.

Lottery is defined in clause 4 to include an electronic lottery. For clarification, the ordinary meaning of **lottery** is relevant in the context of the *Interactive Gambling (Moratorium) Act 2000*. The *Macquarie Dictionary* definition of **lottery** is a scheme or arrangement for raising money...by the sale of a large number of tickets, certain among which, as determined by chance after the sale, entitle the holders to prizes.

An example of a scheme which has recently been generally touted as a lottery, but is not a lottery for the purposes of the *Interactive Gambling (Moratorium) Act 2000*, because it is not a “lottery” within the ordinary meaning of the term “lottery”, is the Sydney Olympic Ticket Lottery. In this “lottery” people paid for tickets to the Olympics when they put in an application for a specific number of tickets to specific events (or alternative events) and if not successful, their money was refunded. In a lottery within the meaning of the term in the *Interactive Gambling (Moratorium) Act 2000*, money is not refunded to a person who is unsuccessful.

The definition of **option contract** in clause 4 is the same as the definition of the term in Chapter 7 of the Corporations Law.

The definition of **relevant agreement** in clause 4 is the same as the definition of the term in the Corporations Law.

The definition of **standard telephone service** in clause 4 is the same as the definition of the term in section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The definition of **standard telephone service** includes voice telephony and another form of communication that is equivalent to voice telephony that would be required to be supplied to the end-user in order to comply with the *Disability Discrimination Act 1992*.

Ticket is defined in clause 4 to include an electronic ticket.

Voice call is defined in clause 4 to include a call that involves a recorded or synthetic voice or an equivalent call to a voice call for a person with a disability. The reference to an equivalent call to a voice call for a person with a disability has been included to ensure that it is clear that use of the National Relay Service and a teletypewriter by hearing impaired persons is considered to be a voice call for the purposes of the definition of **voice call**.

Clause 5 – Interactive gambling services

Clause 5 sets out what an *interactive gambling service* is for the purposes of the *Interactive Gambling (Moratorium) Act 2000*. Essentially four elements must be satisfied for a service to be an *interactive gambling service*:

- the service must be a *gambling service* (within the meaning of the definition of that term in clause 4);
- the service must be provided in the course of carrying on a business (paragraph 5(1)(a));
- the service must be provided to customers using a specified communications service such as an Internet carriage service (paragraph 5(1)(b)); and
- the service must have a specified link to Australia (paragraph 5(1)(c)).

Subclause 5(3) specifically excludes certain services from being *interactive gambling services*. These services are telephone betting services, services relating to option contracts, futures contracts and various other specified contracts that are excluded under the Corporations Law from gaming and wagering laws, and services that the Minister determines are exempt services under subclause 5(5).

What is a gambling service

Subclause 5(1) provides that an *interactive gambling service* is a *gambling service* where the service satisfies all of the conditions in paragraphs 5(1)(a) to 5(1)(c), and the service is not an excluded service set out in subclause 5(3).

A *gambling service* is defined in clause 4 as:

- (a) a service for the placing, making, receiving or acceptance of bets;
- (b) a service the sole or dominant purpose of which is to introduce individuals who wish to make or place bets to individuals who are willing to accept or receive those bets;
- (c) a service for the conduct of a lottery;
- (d) a service for the supply of lottery tickets;
- (e) a service for the conduct of a specified kind of game; or
- (f) any other gambling service (within the ordinary meaning of the expression gambling service) that is not covered by paragraphs (a) – (e).

Service to Introduce Individuals

Paragraph (b) of the definition of *gambling service* in clause 4 provides that a service, the sole or dominant purpose of which is to introduce individuals who wish to make or place bets to individuals who are willing to accept or receive those bets, is a *gambling service*. Two individuals merely having a bet over the Internet would not be a *gambling service* and would, therefore, not be an offence under the *Interactive Gambling (Moratorium) Act 2000*.

The question of what is the sole or dominant purpose of a service for the purposes of paragraph (b) is a question of fact, which would be determined by a Court in the event of a prosecution under section 10 of the *Interactive Gambling (Moratorium) Act 2000*.

Service for the conduct of a lottery or supply of lottery tickets

A service that merely provides lottery results is not a service for the conduct of a lottery for the purposes of the definition of ***gambling service*** set out in paragraph (c) of the definition in clause 4.

Service for the conduct of a game

Paragraph (e) of the definition of ***gambling service*** in clause 4 provides that a service for the conduct of a specified game is a ***gambling service***. The kind of game specified is one in which all of the following conditions are satisfied:

- the game is played for money or anything else of value;
- the game is a game of chance or of mixed chance and skill; and
- the customer of the service gives, or agrees to give, consideration to play or enter the game.

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. For example an on-line competition on knowledge of Australian history should be regarded as a game of skill even though it could be argued that there is an element of chance in relation to the questions that are asked. 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.

Other Gambling Services

Paragraph (f) of the definition of ***gambling service*** in clause 4 refers to a gambling service, within the ordinary meaning of that expression, that is not covered by any of the paragraphs (a) – (e) of the definition of ***gambling service***. This paragraph is intended to ensure that any gambling service not specifically provided for in the definition of ***gambling service*** at paragraphs (a) – (e) of the definition is subject to the *Interactive Gambling (Moratorium) Act 2000*.

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.”

Examples of services that are not interactive gambling services because they are not gambling services

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 and is not covered by the *Interactive Gambling (Moratorium) Act 2000*. A promotional game or lottery does not involve the betting or staking of something of value, with consciousness of risk and hope of gain.

A service for online share trading is not a ***gambling service*** because online share trading involves the acquisition of contractual rights. As a service for online share trading is not a ***gambling service*** it cannot be an ***interactive gambling service***.

A service that carries an ***interactive gambling service***, such as an Internet carriage service does not itself become an ***interactive gambling service*** for the purposes of the Bill merely because the Internet carriage service carries an ***interactive gambling service***. A service that is ancillary to an ***interactive gambling service*** such as a billing service for an ***interactive gambling service*** is not a ***gambling service*** for the purposes of the Bill, and therefore is not an ***interactive gambling service***.

Service is provided in the course of carrying on a business - paragraph 5(1)(a)

Paragraph 5(1)(a) provides that one of the conditions that must be satisfied for a ***gambling service***, as defined in clause 4, to be an ***interactive gambling service*** is that the service is provided in the course of carrying on a business. There is a definition of ***business*** in clause 4.

The settled legal meaning of “carrying on a business” is to conduct some form of commercial enterprise, systematically or regularly, with a view to a profit (*Hyde v Sullivan* [1956] SR (NSW) 113). The definition of ***business*** in clause 4 varies the ordinary meaning of ***business*** so that it is clear that, for the purposes of the *Interactive Gambling (Moratorium) Act 2000*, a one-off or irregular gambling service that satisfies the definition of a gambling service, is provided using a communications service specified in paragraph 5(1)(b) and has a link to Australia, as satisfied by one of the conditions at paragraph 5(1)(c), would be an ***interactive gambling service*** (unless the service is an excluded service in subclause 5(3)).

A commercial enterprise that provides a service with a view to a profit is clearly providing a service in the course of carrying on a business. However an in-house electronic raffle run by a staff member of a commercial enterprise to raise money for a charity would not be a service provided in the course of carrying on a business, even though it takes place within a commercial enterprise. The motive in this example is not for profit.

In contrast, a not-for-profit body, such as a religious, community or sporting association would generally not be regarded to be providing a service in the course of carrying on a business because, in carrying on its activities, such an association does not exist for the purpose of making a profit. However, the relevant consideration for a Court in assessing

whether a service is provided in the course of carrying on a business would be the nature of the particular activity and the profit motive. For example a not-for-profit amateur sporting association that runs an electronic lottery once or twice a year as a fund-raising activity would not generally be regarded as providing that service in the course of carrying on a business due to the absence of the profit motive.

Use of specified communications services - paragraph 5(1)(b)

Paragraph 5(1)(b) provides that one of the conditions that must be met for a gambling service, as defined in clause 4, to be an *interactive gambling service* is that the service is provided to customers using any of the following communications services:

- an Internet carriage service;
- any other listed carriage service;
- a broadcasting service;
- any other content service; or
- a datacasting service.

The terms *Internet carriage service*, *listed carriage service*, *broadcasting service*, *content service* and *datacasting service* are defined in clause 4.

Link with Australia – paragraph 5(1)(c)

Paragraph 5(1)(c) sets out the conditions that establish a link with Australia. This link to Australia is one of the conditions which must be met for a *gambling service*, as defined in clause 4, to be an *interactive gambling service* for the purposes of the *Interactive Gambling (Moratorium) Act 2000*.

To satisfy paragraph 5(1)(c):

- the service must be provided in the course of carrying on a business in Australia; or
- the central management and control of the service must be in Australia; or
- the service must be provided through an agent in Australia.

These conditions are all that is required to establish a link to Australia. Residency or citizenship issues are not relevant in relation to whether a condition is satisfied.

An example of the central management and control of a service being in Australia when a service would be considered to be carrying on business in Australia is that of a company that provides an on-line gambling service such as a casino which has its web-site maintained in an offshore jurisdiction and the company executives (or principal company executives) are based in Australia.

Subclause 5(2)

Subclause 5(2) provides that subsection 5(1) of the *Interactive Gambling (Moratorium) Act 2000* has effect subject to subsection 5(3). As a result of subclause 5(2) a service that is an *interactive gambling service* because of subsection 5(1) is taken not to be an *interactive gambling service* if it is an excluded service provided for in subsection 5(3).

Excluded Services - services that are not *interactive gambling services* – subclause 5(3)

Subclause 5(3) specifically provides that several services are not *interactive gambling services*. The specified services are not, as a result, subject to the moratorium.

Telephone Betting

Paragraph 5(3)(a) specifically provides that a *telephone betting service* is not an *interactive gambling service*. A *telephone betting service* is defined in clause 4. This paragraph ensures that the expansion of telephone betting services such as TAB Phone Betting is not subject to the *Interactive Gambling (Moratorium) Act 2000*.

The reference in the definition of *telephone betting service* in clause 4 to the requirement for dealing with customers being “wholly by way of voice calls” is a reference to dealings with customers in relation to the content of the gambling service. A dealing with a customer of a telephone betting service in relation to an ancillary aspect of the service, such as bill-payment, in some way other than by way of voice call does not negate the telephone betting exception.

Online option trading and futures trading

A service that relates to the entering into of contracts that, under the Corporations Law, are exempt from a law relating to gaming or wagering is not an *interactive gambling service*. Subclause 5(4) sets out those contracts that are exempt, under the Corporations Law, from gaming or wagering laws. It includes option contracts covered by subsection 778(1) of the Corporations Law, relevant agreements covered by subsection 778(2) of the Corporations Law, futures contracts covered by subsection 1141(1) of the Corporations Law, and Chapter 8 agreements covered by subsection 1141(2) of the Corporations Law. These contracts and agreements may, for example, involve speculation on whether the price of a share may rise or fall or on what level of a Stock Exchange Index a share may be at a particular time in the future. Exempting such services from the moratorium is consistent with the exemption, under the Corporations Law, from a law relating to gaming or wagering.

Ministerial determinations – exempt services

Paragraph 5(3)(c) also provides that an “exempt service” is not an *interactive gambling service* for the purposes of the Bill. Subclause 5(5) provides the Minister with a power to determine that each service in a class of services is an exempt service and therefore is taken not to be an *interactive gambling service* for the purposes of the *Interactive Gambling (Moratorium) Act 2000*.

This Ministerial determination power has been included in the Bill to ensure that, if there is a service in a class of services that would arguably be an *interactive gambling service* as a result of subclause 5(1), but the service is not the kind of service that should be covered by the moratorium, the Minister may determine that each service in the class of services is exempt and therefore is taken not to be an *interactive gambling service*.

The Ministerial determination power is intended to be used only in extraordinary circumstances to ensure that the moratorium does not apply to services to which it was never meant to apply. The Ministerial determination may not specify that a particular provider is taken not to provide an *interactive gambling service*. The determination must be a general rule of application, which relates to each service included in a specified class of services.

Subclause 5(7) provides that a determination under subsection 5(5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. Any determination will therefore be required to be published in the Commonwealth Gazette, tabled in both Houses of Parliament, and will be subject to Parliamentary disallowance.

Clause 6 – Extended meaning of use

Clause 6 provides that unless the contrary intention appears, a reference in the *Interactive Gambling (Moratorium) Act 2000* to the *use* of a thing is a reference to use of the thing either in isolation or in conjunction with one or more things. Section 24 of the *Telecommunications Act 1997* is the same as clause 6.

Clause 6 has been included because paragraph 5(1)(b) of the *Interactive Gambling (Moratorium) Act 2000* refers to an *interactive gambling service* being provided to customers using an Internet carriage service, any other listed carriage service, a broadcasting service, any other content service, or a datacasting service. Clause 6 ensures that it is clear that a customer would be considered to use an Internet carriage service for example if the customer uses the Internet carriage service in conjunction with another listed carriage service.

Clause 7 – Crown to be bound

Subclause 7(1) provides that the *Interactive Gambling (Moratorium) Act 2000* binds the Crown in right of the Commonwealth, and each of the States and Territories.

Subclause 7(2) provides that the *Interactive Gambling (Moratorium) Act 2000* does not make the Crown liable to be prosecuted for an offence.

Subclause 7(3) provides that the protection in subclause 7(2) does not apply to an authority of the Crown.

Clause 8 – Extension to external Territories

Clause 8 provides that the *Interactive Gambling (Moratorium) Act 2000* extends to every external Territory. The external Territories include Norfolk Island, Christmas Island and Cocos (Keeling) Islands.

Clause 9 – Extra-territorial application

Clause 9 provides that, unless the contrary intention appears, the *Interactive Gambling (Moratorium) Act 2000* extends to act, omissions, matters and things outside Australia.

This clause has been included to displace the general rule in paragraph 21(1)(b) of the *Acts Interpretation Act 1901* which provides that, unless the contrary intention appears, references to localities, jurisdictions and other matters and things shall be construed as references to matters and things in and of the Commonwealth.

The effect of this general rule is that, if not for clause 9, all references in the Bill to matters and things would be construed as matters and things in and of the Commonwealth. For example, in clause 5, the provision of a **gambling service** to customers using an Internet carriage service would be interpreted as the provision of a **gambling service** to customers using an Internet carriage service in Australia.

As the intention of the Bill is to pause the development of the Australian-based interactive gambling industry, which includes provision of services to persons outside Australia, the general *Acts Interpretation Act 1901* rule needs to be displaced. As a result of its displacement, the reference to provision of a **gambling service** to customers using an Internet carriage service in clause 5 refers equally to the provision of a **gambling service** to customers using an Internet carriage service inside Australia and outside Australia.

The links to Australia specified in paragraph 5(1)(c) of the Bill are an example of a contrary intention referred to in clause 9.

Part 2 – Moratorium on the provision of new interactive gambling services

Clause 10 – Offence relating to the provision of interactive gambling services

Clause 10 is the offence provision of the *Interactive Gambling (Moratorium) Act 2000*.

Subclause 10(1) provides that a person is guilty of an offence if the person intentionally provides an **interactive gambling service**. The meaning of **interactive gambling service** is set out at clause 5 of the Bill.

The penalty for the offence is 2,000 penalty units. A penalty unit is currently \$110, so the current maximum penalty is \$220,000. Under subsection 4B(3) of the *Crimes Act 1914*, if a body corporate is convicted of an offence against a Commonwealth law, the Court may impose a penalty of up to 5 times the amount of the maximum penalty that could be imposed on a natural person. As a result, the current maximum penalty that could be imposed on a corporation is \$1.1 million.

Internet Service Providers will not be prosecuted for the offence of intentionally providing an *interactive gambling service*, unless they themselves are the providers of the content of an *interactive gambling service*. The offence relates specifically to the provision of an *interactive gambling service* and does not apply to a person who carries the service – an Internet Service Provider. Similarly, the offence will not result in the prosecution of any person who provides services ancillary to an *interactive gambling service*, such as bill payment in relation to an *interactive gambling service*, unless the person is also the provider of the content of the *interactive gambling service*.

Subclause 10(2) provides that a person who contravenes the offence provision in subclause 10(1) is guilty of a separate offence in respect of each day (including a day of a conviction for the offence or any later day) during which the contravention continues. The effect of subclause 10(2) is that the maximum possible penalty that may be imposed for contravention of the offence in subclause 10(1) is, for an individual, 2,000 penalty units multiplied by the number of days during which the contravention continues. If a contravention continued for 10 days, the current maximum penalty would be \$2.2 million. If a body corporate contravened the offence provision in subclause 10(1) for 10 days, the maximum penalty would be \$11 million.

As clause 2 of the Bill provides that the Bill commences the day after the Bill receives the Royal Assent, the penalty in relation to the offence does not apply until the day after the Bill receives Royal Assent.

Subclause 10(3) provides that section 10 ceases to have effect at the end of 18 May 2001. The *Interactive Gambling (Moratorium) Act 2000* only intends to impose a moratorium on the provision of an *interactive gambling service* for 12 months commencing on 19 May 2000.

Clause 11 – Exemption for interactive gambling services in existence before 19 May 2000

Clause 11 provides for a defence to the offence in section 10 of the *Interactive Gambling (Moratorium) Act 2000*. The defence is intended to allow continuity of provision of a pre-19 May 2000 *interactive gambling service*, not an expansion of a pre-19 May 2000 *interactive gambling service*.

An example is useful to illustrate clause 11. If OzGaming Pty Ltd was prosecuted for providing an *interactive gambling service* under the name OzCasinos on 1 January 2001, it would be a defence to the offence of intentionally providing an *interactive gambling service* if OzGaming Pty Ltd proved that:

- (a) on any day or days before 19 May 2000, OzGaming Pty Ltd provided an *interactive gambling service*; and
- (b) the service as at 1 January 2001 is substantially the same as the pre-19 May 2000 service; and
- (c) the pre-19 May 2000 service was provided under the name OzCasinos; and
- (d) the pre-19 May 2000 had at least one paying customer sufficiently removed from OzGaming Pty Ltd to be a genuine paying customer.

Burden of proof

In order to prove the defence, the defendant bears the legal burden of proving each element of the defence on the balance of probabilities. A legal burden requires proof of the existence of the matter. This means that the defendant must prove that they were providing the particular *interactive gambling service* in relation to which they have been prosecuted before 19 May 2000. Generally a defendant bears an evidential burden only in proving a defence. An evidential burden only requires the defendant to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Placing a higher standard of proof on the defendant is necessary in the context of the *Interactive Gambling (Moratorium) Act 2000* because all the elements of the defence are matters that are peculiarly within the knowledge of the defendant. It would be almost impossible for the prosecution to disprove the elements of the defence raised by the defendant, whereas it would be possible for the defendant to prove the elements on the balance of probabilities. For example, the provider of an *interactive gambling service* would be in a position to bring forward evidence to prove, on the balance of probabilities, that they commenced providing a new *interactive gambling service* before 19 May 2000. Similarly, the defendant will be in a position to bring forward evidence to prove that the service was the same or substantially the same as the pre-19 May service and how many, if any, paying customers were using the service prior to 19 May 2000.

When a service is the same or substantially the same

In relation to when a post-19 May 2000 service would be regarded to be the same or substantially the same as a pre-19 May 2000 service, it is intended that a service which is either identical to the earlier service, or identical with respect to the essential elements of the service, would be regarded as the same or substantially the same as the earlier service.

In considering when a service is the same or substantially the same as a pre-19 May 2000 service, it is essential to keep in mind that the intention of the moratorium is to pause the Australian based interactive gambling industry in the state it was on 18 May 2000, the day before the moratorium was announced. This intention applies to the number and kind of *interactive gambling services* provided prior to 19 May 2000.

In relation to the kind of services provided, a number of aspects of an *interactive gambling service* are so central to what kind of service the service is, that if a service is different from a pre-19 May 2000 service in respect of any of those aspects, it is intended that the service would not be regarded to be the same or substantially the same as the pre-19 May 2000 service. These central aspects of an *interactive gambling service* are:

- the type of betting offered on the service;
- the restrictions, if any, on customers who may access the service;
- the type of communications service used to provide the service to customers; and
- the subject matter of the service.

Non-central aspects of an *interactive gambling service* could vary in relation to a post-19 May 2000 service and it is intended that the service would still be regarded be the same

or substantially the same as a pre-19 May 2000 service. The non-central aspects of the service include aesthetic changes to the service, such as a change to the appearance of a service or the addition of music to the service, or changes to ancillary aspects of the *interactive gambling service* such as billing procedures or application procedures.

For example, if a service on 1 January 2001 is the same as the *interactive gambling service* provided before 19 May 2000 in all respects other than its appearance, it is intended that the later service would be regarded as the same or substantially the same as the pre-19 May 2000 service. In contrast, if an *interactive gambling service* is provided on 1 January 2001 using a datacasting service, and that service is the same as a service provided before 19 May 2000 in all respects other than that before 19 May 2000 the service was provided by an Internet carriage service, it is intended that the later service would not be regarded as the same or substantially the same as the earlier service.

Examples in relation to casino games

In the case of an *interactive gambling service* providing betting on a casino game, it is intended that a service would be regarded as the same or substantially the same as a pre-19 May 2000 service if the service offered a game with the same rules, even if the presentation of that service is different from the presentation pre-19 May 2000. For example, if a pre-19 May 2000 service offered Blackjack with black and white graphics and no music, a service that on 1 January 2001 offered Blackjack with colour graphics and music would be regarded as the same or substantially the same as the pre-19 May 2000 service. In contrast, a service that pre-19 May 2000 offered Blackjack would not be regarded as the same or substantially the same as a service that on 1 January 2001 offered Baccarat. The rules of Blackjack and Baccarat are quite different.

In the case of a pre-19 May 2000 *interactive gambling service* that offered both Blackjack and Baccarat, it is intended that a service that on 1 January 2001 still offers Blackjack, but no longer offers Baccarat, would be regarded as the same or substantially the same as the pre-19 May 2000 service in relation to the provision of Blackjack. For example if the provider of an *interactive gambling service* that offers Blackjack is being prosecuted for providing an *interactive gambling service*, it would be a defence if the provider of the service could prove that he or she was providing an *interactive gambling service* pre-19 May 2000 that included Blackjack.

Examples in relation to sports betting

In relation to an *interactive gambling service* offering betting on sport, it is intended that a pre-19 May 2000 service would be regarded as the same or substantially the same as a post-19 May 2000 *interactive gambling service* if the wagering is the same and the sport is the same. Changes to the aspects of the service such as its appearance, how one applies to use the service, or how one is billed for use of the service are not intended to be relevant to whether the service is the same or substantially the same.

In relation to when the wagering would be regarded to be the same, it is intended that an *interactive gambling service* that provided fixed odds betting only in relation to thoroughbred racing before 19 May 2000 would be regarded as the same as a later service

that provided fixed odds betting only in relation to thoroughbred racing. For example, it is intended that a thoroughbred racing *interactive gambling service* would be regarded as the same or substantially the same as a service provided before 19 May 2000 if the later service offers the opportunity for gambling on different race fixtures than the pre-19 May 2000 service.

In contrast, it is intended that a pre-19 May 2000 fixed odds thoroughbred racing *interactive gambling service* would not be regarded as the same or substantially the same as an *interactive gambling service* that provided spread betting in relation to thoroughbred racing after 19 May 2000. It is also intended that this service would be regarded as not the same or substantially the same as a later service that provided fixed odds betting in relation to harness racing. In this last example, while the type of wagering is the same as the type of wagering for the pre-19 May 2000 service, the subject matter of the *interactive gambling service* is different.

In relation to when it is intended that the subject matter of an *interactive gambling service* for betting on sports, other than types of horse racing, would be regarded as the same or substantially the same as a pre-19 May 2000 service, the same narrow approach as is outlined in relation to horse racing is intended. This approach is consistent with the intention of the moratorium being to pause the development of the *interactive gambling service* industry. A broad approach to when a service would be regarded as the same or substantially the same would undermine the effectiveness of the moratorium, as it would allow the provider of a pre-19 May 2000 service to expand the *interactive gambling service* provided.

For example, in relation to the football codes, it is intended that a service that, before 19 May 2000, offered spread betting in relation to the Australian Rules Football national competition (the AFL) and the Rugby League national competition (the NRL), would not be regarded as the same or substantially the same as a service that, after 19 May 2000, offered spread betting in relation to the AFL, the NRL and the National Soccer League, the national soccer competition.

A service that, before 19 May 2000, offered spread betting in relation to the AFL is intended to not be regarded as the same or substantially the same as a service that after 19 May 2000, offered spread betting in relation to the AFL and the Australian Rules Football competition in Western Australia. It is intended that the service would only be regarded as the same or substantially the same in relation to the AFL.

It is intended that a service that, before 19 May 2000, offered fixed odds betting in relation to World Cup Rugby Union would not be regarded as the same or substantially the same as a service that offered fixed odds betting in relation to the Rugby Super 12 competition. However, an *interactive gambling service* that, before 19 May 2000, offered fixed odds betting on the NRL is intended to be regarded as the same or substantially the same as a service that offered fixed odds betting on the Australian national rugby league competition, if the name of that competition was changed from the NRL to another name.

In relation to cricket, it is intended that a service that, before 19 May 2000, offered spread betting only in relation to the 1999-2000 Cricket World Series Cup in Australia would be regarded as the same or substantially the same as a service that offered spread betting in relation to the 2000 Cricket World Series Cup in a country other than Australia, even where the teams playing in the series are different. It is also intended that an *interactive gambling service* that, before 19 May 2000, only offered spread betting in relation to the 1999-2000 Cricket World Series Cup in Australia would be regarded as not the same or substantially the same as a post-19 May 2000 service that offered spread betting in relation to a cricket Test Match series.

Restrictions on access to the service

It is intended that a service provided prior to 19 May 2000 which specifically restricted access to the service to certain customers would not be the same or substantially the same as a post-19 May 2000 service that provided the *interactive gambling service* to people to whom access had previously been specifically restricted. Restrictions on access to a service might be technical restrictions or practical restrictions, such as a policy not to take bets from persons in specific locations or under a certain age. It is intended that a decision taken by the provider of a service to increase restrictions on access to the service, would not, however, prevent a service being regarded as the same or substantially the same as a pre-19 May 2000 service. This is because increasing any restrictions on access to a service is consistent with the intention of the moratorium being to pause the development of the industry.

For example if, prior to 19 May 2000, a provider of an online *interactive gambling service* specifically barred access to persons in the United States, and sometime after 19 May 2000 lifted this restriction on access, it is intended that the later service would not be regarded to be the same or substantially the same as the pre-19 May 2000 service. However, if prior to 19 May 2000, the provider of an online *interactive gambling service* specifically barred access to persons in the United States, and after 19 May 2000, specifically barred access to persons in the United States and persons under the age of 21, it is intended that this change to the service would not prevent the service from being regarded as the same or substantially the same as the pre-19 May 2000.

At least one arm's length customer

In relation to the requirement that the pre-19 May 2000 service had at least one paying customer, this has been included to ensure that the defence is only available in relation to *interactive gambling services* that were genuinely being provided to paying customers before 19 May 2000.

A defendant who provided a service that provided free or trial casino games to Internet users before 19 May 2000, but did not take payments from the users until after 19 May 2000, would not be able to prove the defence. This defendant's pre-19 May 2000 service did not have at least one arm's length paying customer.

Similarly a service that, before 19 May 2000, had only tested the planned payment system for the service by debiting the credit card of an employee of the service would not be regarded to have had at least one arm's length paying customer, and the defendant would not be able to prove the defence.

A defendant who had been licensed to provide an *interactive gambling service* on or before 19 May 2000, but did not provide the service to a paying customer until 1 December 2000, would not be able to prove the defence. Such a defendant did not have at least one arm's length paying customer on 19 May 2000.

Part 3 – Miscellaneous

Clause 12 – Application of *Criminal Code*

Clause 12 provides that Chapter 2 of the *Criminal Code* applies to an offence against the *Interactive Gambling (Moratorium) Act 2000*.

The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995*, which was enacted as part of the development of a nationwide uniform criminal code. Chapter 2 of the *Criminal Code* contains all the general principles of criminal responsibility that apply to any offence against a law of the Commonwealth. For example Chapter 2 sets out:

- the elements of an offence;
- the circumstances in which there is no criminal responsibility (for example if a child is under 10, duress, self defence);
- the general principles of corporate criminal responsibility;
- offences which deal with extensions of criminal responsibility (for example attempt and conspiracy); and
- the proof of criminal responsibility.

While Chapter 2 of the *Criminal Code* does not apply to all existing Commonwealth offences until on and after 15 December 2001, the Code is being applied to all new legislation which contain offences, to ensure that they are consistent with the Code once it comes into operation. Clause 12 ensures that the general principles contained in the Code will apply to an offence against the *Interactive Gambling (Moratorium) Act 2000*.

Clause 13 – Service of summons or process on foreign corporations – criminal proceedings

Clause 13 provides a special rule for the service of summons or process on foreign corporations for criminal proceedings under the *Interactive Gambling (Moratorium) Act 2000*. The special rule is additional to the general rule for service of documents at section 28A of the *Acts Interpretation Act 1901*.

The special rule allows a summons or process in criminal proceedings under the *Interactive Gambling (Moratorium) Act 2000* to be effected by serving the summons or

process on an Australian agent of a body corporate incorporated outside Australia in the following circumstances:

- (a) the body corporate does not have a registered office in Australia; and
- (b) the body corporate has an agent in Australia.

Clause 14 – Operation of State and Territory laws

Clause 14 provides that the *Interactive Gambling (Moratorium) Act 2000* is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with the *Interactive Gambling (Moratorium) Act 2000*.

Clause 14 has been included to ensure that any State or Territory law that is capable of operating concurrently with the *Interactive Gambling (Moratorium) Act 2000* is not affected by the *Interactive Gambling (Moratorium) Act 2000*.

Clause 15 – Regulations

Clause 15 provides that the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the *Interactive Gambling (Moratorium) Act 2000*.

It is likely that there will not be a need for regulations to be made under clause 15. The power to make regulations has been included for completeness.