



Submission to the Review of the Impact of Illegal Offshore Wagering

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December 2015

www.ipa.org.au

IPA Institute of
Public Affairs
THE VOICE FOR FREEDOM
ESTABLISHED - 1943

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Introduction

It is the longstanding view of the Institute of Public Affairs that governments ought to respect the autonomous decision of consumers to gamble with their own money, as the choice to do so reflects their individual preferences. In this context, the Interactive Gambling Act 2001 is in need of reform. In the 14 years since the act was first passed by the parliament, a number of significant technological developments have undermined the efficacy of the act. This submission addresses five issues.

First: the ban on 'live' or 'in the run' betting is technologically illiterate and easy to avoid. Techniques which firms have used to arbitrage around the current legislative framework demonstrate the weakness of legislative controls on gambling practices. Live betting offers consumers more choice, greater participation in spectator sport, and the opportunity to manage betting risk more responsibly.

Second: limiting Australian consumers' access to overseas markets is a form of protectionism that favours some sports industries over others and which does not reflect consumers' preferences.

Third: the likely mechanism that would prevent access to offshore websites - website blocking using the existing tools in the Telecommunications Act - constitute a severe restriction on freedom of speech.

Fourth: restrictions on online betting, onshore and offshore, are paternalistic and unjustifiable on liberal democratic grounds. Policymakers cannot assume that imposing their own scepticism of the benefits of gambling is a reflection of the actual preferences of consumers.

Fifth: restrictions on offshore gambling are an example of rent-seeking. While the desire for competitive neutrality between onshore and offshore wagering operators is understandable, such neutrality could be achieved through the elimination of fees, rather than the elimination of foreign competition in gambling. The racing industry should not be funded by a tax on gambling, but through its own entrepreneurial efforts in an open market.

Restrictions on live betting should be repealed

The current ban on 'live betting' is illogical and illiberal. The law discriminates based on the particular technological platform that a consumer chooses to use, and it makes an illegitimate distinction based on the point in time at which a bet is placed.

The *Interactive Gambling Act 2001* prohibits live betting online. A live bet is a bet placed after the commencement of an event. For instance, a bet placed on the outcome of an AFL game after the first bounce is defined as a live bet. Section 15 of the Act outlines the prohibition, which carries a \$360,000 fine.¹ The prohibition on online betting does not apply to in person bets, for instance, those placed at a TAB outlet. It also doesn't apply to bets placed over the telephone.²

The rise of the use of smartphones – which are capable of making both traditional telephone calls and granting access to the internet – has made this provision obsolete.

Smartphone applications offered by some wagering companies allow for a live bet to be placed using a process which is remarkably similar to that used for non-live bets. These applications use what has become known as a 'click to call' function. Click to call has a button to confirm the bet, and then makes an automated VOIP call to place the bet. This regulatory workaround is legal because a telephone call is not considered 'interactive gambling' under the act. Subsection 5(3) specifically excludes telephone services from the live betting ban. William Hill, Tom Waterhouse and Bet 365 all offer click to call services to Australian customers using their smartphone applications.

The current restriction on live betting is unjustified. It is a longstanding principle of regulatory reform that Australian law ought to treat an activity the same regardless of the technology being used to conduct that activity. Policy ought to be platform neutral.

However, platform neutrality needs to be achieved in the interests of consumers, not as a goal for its own sake. The 2011 Department of Broadband, Communications and Digital Economy report into the Interactive Gambling Act 2001 concluded that the demands of platform neutrality meant live betting should be banned from telephone wagering and in person venues, as well as online.³ This was however at odds with the research conducted for the review by the Allen Consulting Group which could find no empirical evidence to suggest that live betting was of any extra concern for problem gamblers.⁴ That the DBCDE came to such a conclusion illustrates the knee-jerk paternalism that infects discussions about gambling.

¹ Section 15, *Interactive Gambling Act 2001* (Cth).

² Section 5, *Interactive Gambling Act 2001* (Cth).

³ Department of Broadband, Communications and Digital Economy, Review of the Interactive Gambling Act 2001, *Final Report* (2012)

⁴ The Allen Consulting Group, *Research for the review of the Interactive Gambling Act 2001: Online Gambling and 'In-the-run' betting: Report to the Department of Broadband, Communications and the Digital Economy*, 17 April 2012

Live betting should be legalised because it adds significant consumer value. Gambling is itself a sport, and placing a bet on a given outcome is a recreational activity:

Gambling is an integral part of game and sport, but it is also transcendent to both in the respect that players may gamble within a game, but spectators may gamble from outside the game. The uncertain outcomes of games and sport allow spectators as well as players to participate through the activity of gambling. Gambling is play on top of play. It is in a sense a meta-sport. It concentrates the essence of gaming and sport into a superordinate sport.⁵

The significance of this observation is that to prohibit certain forms of gambling is to restrict both a popular recreational activity and to reduce by statute the level of engagement that non-participants can have with Australian sports. Live betting offers Australian consumers a deeper participatory experience.

Live betting also allows informed participants to manage their risk. As Betfair has noted, “For many punters, this type of betting is crucial for hedging bets to minimise their exposure or enable a guaranteed return from an event”.⁶ Eliminating the risk management option provided by live betting makes it harder to be an informed and responsible gambler.

From the perspective of Australian industry, the growth in offshore betting is being driven by the availability of prohibited forms of betting in Australia. While the technological arbitrage represented by in-app phone calls has offered a workaround for Australian corporate bookmakers, more intense regulatory action on this front - such as the DBCDE’s proposed ban on all live betting, or attempts to crack down on regulatory arbitrage - would push consumers onto offshore services.

⁵ Vicki Abt, Martin C. McGurrin & James F. Smith, “Gambling: The Misunderstood Sport - A Problem in Social Definition”, *Leisure Sciences*, Volume 6 Number 2 (1984)

⁶ Betfair Pty Ltd, Submission to the Joint Select Commission on Gambling Reform: Inquiry into the Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011, p. 4

Offshore wagering should not be “illegal”

Restraints on trade that offshore wagering laws presents are harmful to consumers as well as to the competitive dynamism of the wagering industry.

Offshore wagering offers consumer and competitive benefits. It expands the choices for Australian consumers. While the growth in corporate bookmaking has been a welcome increase in choice, limiting Australia consumers to Australian wagering firms is unjustifiable on any economic grounds.

Australian gamblers are engaged in a global industry and trying to firewall their gambling from the rest of the world goes against fundamental principles of Australia’s open economy.

Offshore wagering also provides valuable competitive pressure on the Australian wagering industry. Greater competitive pressure leads to more competitive odds, greater opportunities for informed betting, and moves the market closer to a reflection of the “true” odds of uncertain events. A more liquid market is in the interest of consumers, as well as the wagering industry more generally.

Blocking offshore websites would be a restriction on freedom of speech

The historian John O'Hara writes of the debate surrounding the growth in off-course betting in the first half of the twentieth century that "If the press agencies could be stopped, radio broadcasts banned and newspapers prevented from publishing betting odds and racing tips, much of the incentive to bet off course would be removed".⁷ This underlines the relationship between restrictions on off course and offshore wagering and freedom of speech.

It has been reported that one proposal being considered is the expanded use of section 313 of the Telecommunications Act to target offshore betting agencies.⁸ S 313 is designed as a measure to prevent and disrupt criminal activities in Australia. The provision sets up a regime that gives law enforcement and regulatory agencies the power to issue notices to internet service providers to block web content which relates to the commission of criminal offences.

In relation to wagering, the proposal would be to require Australian internet service providers to block offshore wagering websites. The Institute of Public Affairs has previously been critical of s 313.⁹ S 313 breaches the human right to freedom of expression. The s 313 regime sets up an explicit censorship regime. This is an unavoidable consequence of a provision designed to block users from accessing particular content online. Australians should be deeply uncomfortable with government bureaucrats making decisions about what websites they can and cannot view online.

Furthermore, there are practical problems with the use of s 313. The expanded use of s 313 also risks the accidental blocking of legitimate websites. In 2013, it was reported that the Australian Securities and Investments Commission, which has the power to demand ISPs block websites under the *Telecommunications Act*, accidentally blocked 250,000 legitimate websites in an attempt to block just one.¹⁰ When questioned about the over-blocking at a subsequent Senate estimates hearing, ASIC admitted that it had on a previous occasion blocked 1200 sites when it intended on blocking just one.¹¹

⁷ John O'Hara, *A Mug's Game: A history of gaming and betting in Australia*, New South Wales University Press, Kensington, p. 192

⁸ Renai LeMay, "Internet filter scope creep: Govt may censor offshore gambling sites", Delimiter, 25 November 2015. At <https://delimiter.com.au/2015/11/25/internet-filter-scope-creep-govt-may-censor-offshore-gambling-sites/>

⁹ Simon Breheny, 'Gillard Government's New Censorship Regime Worse Than Internet Filter,' Media Release, 9 November, 2012; Chris Berg, 'When Does Mission Creep Become Censorship?,' *The Drum*, 21 May 2013.

¹⁰ Ben Grubb, "How ASIC's attempt to block one website took down 250,000", *Sydney Morning Herald*, 5 June 2013. At <http://www.smh.com.au/technology/technology-news/how-asics-attempt-to-block-one-website-took-down-250000-20130605-2np6v.html>

¹¹ Commonwealth Parliamentary Debates, Senate, Economics Legislation Committee, 4 June 2013, p.129-134

Controls on gambling are paternalistic

The Institute of Public Affairs believes that controls over gambling are paternalistic and that paternalism has no legitimate place in a free and liberal society. Gambling laws which prohibit certain activities, or nudge individuals into making decisions they would otherwise not have made, violate the assumption of moral autonomy and individual capability that underpins democratic participation. As we told a Senate inquiry recently: “Paternalism treats citizens like subordinates. The paternalist's model of irrational individual choice is starkly at odds with the democratic philosophy of individual choice”.¹²

This is not to deny that some individuals suffer from problem gambling. Government intervention in problem gambling should be limited to information provision where there is evidence that consumers do not understand the risks of gambling, and the provision of services for individuals who have gambling problems. Currently the gambling industry has been highly proactive in offering services for problem gamblers.¹³ Given the close proximity of the industry to the gamblers themselves, this is more likely to be an effective approach than bans or regulation, and offers a solution without the cost of restricting the liberty of non-problem gamblers.

¹² Commonwealth Parliamentary Debates, Senate, Economics References Committee, 11 September 2015, p. 42.

¹³ Mikayla Novak and Richard Allsop, *Free to gamble: The roles of the gambling industry and policy in a modern Australian society*, Institute of Public Affairs, February 2009. At https://www.ipa.org.au/library/publication/1235604569_document_free_to_gamble.pdf

Wagering fees should be eliminated

It is striking that the sole argument presented in the Terms of Reference against offshore wagering operators is that offshore wagering operators are “evading” the fees “that assist with funding racing and sports facilities, integrity measures, prize money and participant payments and other operational costs.” This makes clear that the question of whether to allow offshore wagering firmly one of industry policy.

The argument for the continuation of the legacy funding arrangements for racing are weak.

In its 2009 report on gambling, the Productivity Commission argued that the outcome of a race has the characteristics of a “public good,” insofar as it is non-rival and non-excludable, that the free-riding of wagering operators on racing results would lead to the underfunding and therefore underprovision of racing, “to the detriment of wagering operators and consumers, as well as the racing industry itself”.¹⁴

However this merely shows the weakness of reasoning from the existence of a public good to government policy. Knowledge of *any* event on which a bet could possibly be made has the characteristic of a public good. The three racing codes are not the only sporting codes on which consumers might choose to bet and whose knowledge of results have the characteristics of a public good.

In fact, the funding arrangements for racing are a classic case of path dependency. The hybrid regulatory system which allows for corporate bookmakers as well as TABs to offer off-course wagering exists not because of any fundamental market failure in racing. Instead, it exists because of a series of legislative bargains to compensate the racing industry for the loss of revenue after the emergence of off-course betting.

The consequences of the existing fundamental arrangements have been detrimental to the racing industry. As one participant told the Productivity Commission there are now “too many races, horses, tracks and dependant employees to say nothing of the superstructure of associated contributors hanging off this inefficient industry”.¹⁵ While the Productivity Commission argued that the existing system should be replaced with a national funding model, they failed to interrogate the necessity of continuing the compulsory finance system.

Offshore wagering should be seen as merely the latest demonstration of weakness in the attempts to protect racing from the effect of technological change. Eliminating the fee-based funding arrangements would encourage racing to develop new funding models. Regulatory controls to maintain nineteenth century business models are not appropriate when consumers can as easily bet on races in South Africa as their local racetrack.

¹⁴ Productivity Commission, *Gambling*, Volume 2 February 2010, 16.3-16.4

¹⁵ Productivity Commission, *Gambling*, Volume 2 February 2010, 16.5

Conclusion

Gambling has been part of the human experience for millennia. It is a way human beings come to term with risk, understand uncertainty, and engage with the metaphysical concept of chance. It is culturally central to our engagement with sport. While the technologies through which gambling can be conducted have changed - we now have the ability to play against bookmakers on different continents – paternalistic and protectionist restrictions and controls over wagering are not in the interest of Australian consumers.