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Report of the Law Reform Committee on Online Gaming and Singapore

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REPORT OF THE LAW REFORM COMMITTEE
ON
ONLINE GAMING AND SINGAPORE



SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

JULY 2010

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About the Law Reform Committee

The Law Reform Committee (“LRC”) of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

See Introduction below.

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I. Introduction

1 The terms “gaming” and “gambling” are fairly wide and they refer to a wide range of activities. Traditionally, the term “gambling” has been used to cover lotteries, wagers and casino-style games. “Gaming” has also been used traditionally in some literature to cover not only activities involving gambling but also games of skill or games predominantly of skill. However, in recent times, certain jurisdictions such as the United States (“US”) and Australia have drawn a distinction between “online gaming” and “online gambling”. The former is used to refer to games played in an online environment which do not have the elements of gambling and is not a subset of “online gambling”. The relevant Singapore legislation has not expressly drawn such a distinction though the case law interpreting such legislation appear to be cognisant of it.

2 Each of these activities will be discussed in this section as they raise different issues. Many jurisdictions have laws that ban some or all of these activities in their traditional form in the physical world context. All of these activities however can and have been adapted to an electronic and online format with the use of computers, software and the Internet, but not all countries have addressed the legality of the digital equivalent.

A. Lotteries

(1) Traditional lotteries

3 Lotteries usually involve money being given up in exchange for an opportunity to win a prize typically through the method of being drawn by chance, akin to drawing lots for a prize. The prize can be a monetary amount or anything else such as a car or house. The most common types of lotteries are those operated by governments where one buys a ticket for a set cost such as the Singapore Sweep.¹ Each ticket is numbered and if the number of the ticket is drawn, a prize is awarded. These are popular partly due to their simplicity and customer trust in operations that have governmental backing, which signals an honest and reliable operation. In some countries however, governments do not actually operate their own lotteries but grant licences to private operators, but allow the use of the government’s name and endorsement. In many jurisdictions, such as some European nations, Australia, and the United States, the authorities exercise continued oversight and supervision of lottery operators.

4 Another type of lottery that is popular is the charity lottery. In Australia, one of the oldest charity lottery is the BoysTown Lotteries, the proceeds of which go towards BoysTown’s services, which provide care and support for disadvantaged young

1 See http://www.singaporepools.com.sg/en/lottery/bigswEEP_results.html.

Australians and their families. BoysTown runs 15 lotteries each year – ten House Lotteries and five Prestige Car Lotteries with the prizes being luxury homes and luxury cars respectively. Each ticket costs \$15 and there are generally only three winners in each draw.² BoysTown Lotteries have been in operation since 1961.³ Charity raffles, also a form of lottery, are required to be operated pursuant to rules laid down by governmental authorities in Australia.

(2) *Selecting numbers*

5 A further type of lottery involves players selecting a few numbers out of a larger pool of numbers, eg, six numbers out of 45 numbers and if all the selected numbers are drawn, the player wins the first prize. In some countries such as Australia, the drawings are televised to bolster confidence in the integrity of the operation. To win a lesser prize, at least four of the drawn numbers must be chosen.⁴

6 The Singapore 4D is a unique combination of the traditional lottery and selecting numbers style of play. Players get to choose the four-digit number they desire and if the number is drawn, they win a prize.

(3) *Scratchers*

7 Newer forms of lotteries that have come onto the market in recent years are the scratchers. These are played by players scratching off a latex covering from a part of a ticket to reveal whether the player has won. Typically, they consist of hidden symbols and if the specified symbols, eg, three of the same kind of symbols are revealed, then the player wins a prize.⁵ They are similar in play style to the older forms of paper instant tickets such as the pull-tab and the punchboard. Pull-tabs are still used in bingo operations in some countries, and the concept is similar to scratchers, in that players pull off a piece of paper rather than scratch off a latex covering.

(4) *Slot machines*

8 Slot machines can in some ways be considered a variant of lotteries, scratchers, pull-tabs, and punchboards. When a player buys a scratcher, it consists of data stored on the piece of paper albeit hidden behind a layer of latex. Similarly, when a player puts a coin or credit into a slot machine, data is already stored in the on-board computer of the slot machine, and when one “spins” the slot machine to get the result, the process is the same as scratching off the latex. The major difference between the slot machine and other forms of lotteries is that the odds on the slot machines take more effort to

2 See <http://www.boystown.com.au/lot/about-us.html>.

3 See <http://www.boystown.com.au/lot/history.html>.

4 See http://www.singaporepools.com.sg/en/lottery/toto_overview.html.

5 See http://www.singaporepools.com.sg/en/lottery/scratchit_faststart.html.

control and supervise because of the sheer number of machines to check and the ease in which the odds can be changed with just a small change in one line of the programming code. It is for this reason that many do not consider them as lotteries and would class them as casino-style games.

(5) *Legal position*

9 In many jurisdictions, lotteries are made expressly legal by statutes and regulations although the usual prohibitions on minors purchasing lotteries apply. For example, in the US,⁶ 42 of the 50 states and the District of Columbia allow lotteries.⁷ In some states, archaic laws make it a crime to possess an out-of-state lottery ticket although these laws are rarely enforced.⁸ Some countries and states like New York have laws that declare cross-border lotteries illegal. So when an out-of-state Internet lottery operator accepts lottery purchases from customers from a state with prohibitions against selling lottery tickets, it would likely be violating the local law.⁹

10 In some jurisdictions, regulations specifically allow offline lottery tickets to be sold online such as the BoysTown lotteries in Australia,¹⁰ while in other jurisdictions such as California, charities are expressly prohibited from selling raffle tickets online.

11 Some online lottery operations specifically limit their sales to local residents whereas others deliberately cast the net wider. For example, the Lottery of Finland, Veikkaus Oy,¹¹ attempts to restrict its players to locals by requiring players to have a Finnish bank account and the website is entirely in Finnish with the exception of one page entitled “Finnish lottery for Finns” which explains the background and rationale for the gambling setup in Finland.¹²

12 At the other end of the spectrum, the website <http://www.interlotto.com/> allows players to play the major official national and state lotteries from around the world. A player can choose from the Australian Lotto, to the USA Powerball, to the Japan Jumbo Draw. If there are specific limitations to any of these, there will be disclaimers

6 See generally, Yee Fen Lim, “Internet Gambling – the US Perspective” (1998) 1 No 8 Internet Law Bulletin 114.

7 *Ie* Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, District of Columbia, Virgin Islands, Commonwealth of the Northern Mariana Islands, and Puerto Rico.

8 See, *eg*, RI GEN LAWS § 11-19-4 (2003); NJ STAT ANN § 2C:37-6 (2003).

9 See Yee Fen Lim, “Internet Gambling – the US Perspective” (1998) 1 No 8 Internet Law Bulletin 114.

10 See <https://www.boysstown.com.au/cgi-bin/db2www/94D5C789/BT0005.ndm/Login?Environment=>.

11 See <http://www.veikkaus.fi>.

12 See <https://www.veikkaus.fi/info/yritys/english.html>.

displayed on the relevant webpage; for example, on the webpage for the Euro Millions,¹³ it states that it is “Not Available to Residents of The Netherlands, Pakistan & The Philippines” and that “Offers Void where Prohibited by Law.”

13 Most online operators however just offer online, the same lotteries they offer offline with some operators aggressively advertising and selling tickets on the Internet to players from all around the world.¹⁴ One of the earliest state run lotteries that established an online presence is the United Kingdom (“UK”) national lottery which has been online since 2003.¹⁵ In Canada, British Columbia and the four Atlantic provinces of Nova Scotia, New Brunswick, Newfoundland and Labrador and Prince Edward Island, have had their lottery operations online since 2006.¹⁶ In the US, some state lotteries, such as Indiana’s state lottery, began their Internet operations with “second chance” drawings which used the Internet to give losing tickets another opportunity to win a prize. Players with tickets that did not win a prize could enter their ticket numbers on the Internet for second chance drawings.

14 Some of the US states and territories that allow lotteries now also offer subscription purchase programs where players can use the Internet to enable account betting on their lotteries using their credit cards. So for example, New Hampshire¹⁷ and New York¹⁸ offer subscriptions to their respective state lotteries via the Internet.

15 In China, VODone Limited became the first authorised service provider of mobile lottery betting services to users of data-enabled mobile phones and handheld computers such as Palm Pilots, in late April 2009.¹⁹ It is authorised by the Heilongjiang Welfare Lottery Center, which is a welfare lottery center itself authorised by the Ministry of Finance, the Ministry of Civil Affairs and other relevant Chinese government authorities.²⁰ To play, users need to register, log in and download the lottery software from the website *cai.vodone.com*, before they can place their bets. The system uses a special process of bundling the mobile number and identity card number as the certification information of user registration.²¹ Winnings of less than RMB10,000 can be collected through players’ virtual accounts whereas higher winnings need to be collected at the Welfare Lottery Center.

13 See <https://www.internet-secure.net/il-eu/euromillions.html>.

14 See <http://www.pluslotto.com/>.

15 See <http://www.national-lottery.co.uk>.

16 See <http://www.alc.ca/> and <http://www.bclc.com>.

17 See <http://www.nhlottery.org/subscription>.

18 See <http://www.nylottery.org/ny/myStore>.

19 See http://www.acnnewswire.com/article.asp?art_id=1398&lang=EN.

20 See <http://newsblaze.com/story/2009070803505600001.acn/topstory.html>.

21 See http://www.acnnewswire.com/article.asp?art_id=1398&lang=EN.

16 In 1999, the World Lottery Association was formed with the merger of Intertoto and the International Association of State Lotteries (“AILE”). It had some 140 members and one of the cited aims of the association was to “try and get some control on the Internet.”²²

B. Wagers

17 A “wager” is something, usually a sum of money, which is risked on an uncertain event.²³ Although this definition is broad enough to encompass lotteries, the reference to an uncertain event is more specific, so it becomes more focussed than, for instance, selecting six numbers out of 45 numbers such as in the case of Singapore’s Toto. So in this sense, wager has come to mean the likes of betting on a particular racehorse or greyhound winning a particular race or sports betting.

(1) Horseracing and dog racing

18 Betting on horse races is one of the oldest forms of pari-mutuel betting. With the advent of radio and television which can transmit live information to remote sites, it has been possible for bettors not to be physically present at the racetrack to bet on the horse races, and yet be able to follow the race and know the outcome immediately. Most horse races have a merged pari-mutuel pool, with all bets treated as if they were actually placed at a single location. Off-site betting on races began first by the use of the telephone and has now extended to the use of the Internet.

19 An interesting case study is New York. In 1990, the New York State Legislature amended the State’s Racing, Pari-Mutuel Wagering and Breeding Laws to allow telephone betting by both residents and non-residents,²⁴ even though New York’s Penal Law²⁵ prohibited bookmaking or receiving and forwarding money wagered on horse races.²⁶

20 In the US, the situation is somewhat complicated by federal law. The Interstate Wire Act²⁷ specifically forbids taking bets by interstate telecommunication facilities, which would include the Internet.²⁸ There is an exception – if it is legal to take the bet both at the place where the bet originates and at the place where it is taken.²⁹ In 2000,

22 Patricia A McQueen, “AILE, Intertoto form one group”, *Internal Gaming & Wagering Business* (August 1999) at pp 17, 19.

23 Merriam-Webster Dictionary, see <http://www.merriam-webster.com/dictionary/wager>.

24 NY RAC PARI-M §1012 (1990).

25 NY PENAL LAW §225.05; see also *People v Busco* (1942) 46 NYS 2d 859.

26 Yee Fen Lim, “Internet Gambling – the US Perspective” (1998) 1 No 8 Internet Law Bulletin 114.

27 18 USC § 1084.

28 Yee Fen Lim, “Internet Gambling – the US Perspective” (1998) 1 No 8 Internet Law Bulletin 114.

29 Yee Fen Lim, “Internet Gambling – the US Perspective” (1998) 1 No 8 Internet Law Bulletin 114 at 116.

the Interstate Horseracing Act³⁰ was amended to expressly allow wagers to be received from out of state through electronic media which would include the Internet. It should be noted however that the Interstate Horseracing Act only allows remote wagers on horse races but some operators have extended the Internet wagering to dog wagers (*ie* greyhound racing).

21 Outside the US, many state-authorised horse and dog racing operators allow residents of other countries to wager on their horse and dog races. For example, Australia³¹ and New Zealand also have pari-mutuel systems and online wagering sites open to all, although the New Zealand site seems to prohibit US residents from setting up an account.³² Even for those countries where horse betting is not pari-mutuel, such as the Caribbean, UK, and some European countries, the websites take bets from anywhere in the world. Canada has gone so far as to expressly allow licensed betting on races in other countries.³³

(2) Betting on sports

22 Sports wagering, *eg*, on the outcome of football or boxing matches, is an activity that has not been without controversy not least because of the possibility and occurrences of professional sportspersons “fixing” the result by deliberately throwing matches. This is one of the major reasons why in the US, there is a prohibition on sports wagering,³⁴ although because of the wording of the provisions, some sports wagering in some states are allowed.³⁵

23 In some countries such as Australia, betting on sports such as football and motor racing is permitted both offline and online.³⁶

(3) Securities, futures and proposition betting

24 In essence, trading on stock and commodities markets is very similar to gambling. But the laws of many countries around the world have moved to expressly exempt such activities from the ambit of anti-gambling laws.

25 One step away from commodities market is predictions markets that allow players to place bets on their predictions. These would straddle the fine line between

30 15 USC §§ 3001.

31 See <http://www.tab.com.au/>.

32 See <https://www.ebetonline.co.nz>.

33 Canada Criminal Code, RSC, part VII, § 204.8.1 (2001).

34 Amateur Sports Protection Act, see 28 USC §§3701–3704 (2008).

35 Yee Fen Lim, “Internet Gambling – the US Perspective” (1998) 1 No 8 Internet Law Bulletin 114.

36 See, *eg*, <http://www.tab.com.au/Sports/Default.aspx?State=2>.

gambling regulation and securities regulation. One of the biggest predictive market online is *intrade.com*, based in Ireland where one's imagination is the limit of what can be wagered on. For example, at the time of writing, the prediction that Ben Bernanke will be re-appointed Chairman of the Federal Reserve in 2010 is trading around 58 points and the prediction that Mahmoud Ahmadinejad will win the Iranian 2009 Presidential election is trading around 94 points. It should be noted that *intrade.com* is blocked by all large American credit cards. The website content indicates that it regards itself as trading in securities (contracts) and not involved in gambling.

C. Casino-style games

26 These generally cover the types of games found in a casino such as blackjack, craps, roulette, slot machines and card games such as poker. In a brick and mortar casino, state authorities usually inspect the equipment to ensure that there is no cheating. For example, the dice must have six different numbers on each of the faces and there must be no magnet or other device flipping the dice to any particular number and so on. For card games, each deck of cards must be unmarked and have all 52 cards with the requisite number of aces, kings and so on.

27 Essentially, in casino-style games, each player is playing against chance and probability. The casino on the other hand makes its money by beating its customers at games of chance. In some "banked" games such as blackjack, the players compete against other players as well as the gaming establishment and as a result, players generally have a better probability of winning. In other games such as roulette, the casino has a natural built-in higher winning probability. In roulette for example, the presence of the zero and often the double zero means that the supposed "even chance" of winning by placing a bet on an odd number or an even number is in reality less than an even chance because if the ball falls into the zero or double-zero slot in the wheel, no player who placed a bet on "odd" or "even" would win anything. The casino would collect on all bets placed in the "odd" and "even" categories, not to mention other categories such as "red", "black", "1st dozen" and "2nd dozen", "3rd dozen" or any of the columns.³⁷

28 Casino-style games can be contrasted with lotteries and pari-mutuel betting. In the latter, the operator acts as a disinterested stakeholder who takes a portion of the wagers and returns the remainder to the winners. With casino-style games, the casino is a player and is not a mere disinterested stakeholder.

29 The other notable feature of casino-style games is the speed at which a player can lose money. For a game like roulette which takes less than one minute to complete, a player can place a bet of up to the maximum table limit which could be any amount

37 See, eg, http://www.starcity.com.au/d/Resource_Library/PDFS/Gaming_pdfs/5L57ERR52NYIKZ7DGJP6T75BYH1R8L/WX3H1CEXMF9I8AN.pdf/Roulette_WEB1.pdf?

between \$10,000 to a million dollars or even higher in a brick and mortar casino. It is not generally possible to lose that quickly with lotteries or horse betting.

30 Turning to the Internet, it should be obvious why there has been much concern over websites offering casino-style games. There are no checks to ensure the casino “equipment” is not rigged. When the digital roulette wheel is spun, there is no guarantee that the ball is not deliberately programmed to fall into a number where players have not placed bets. Where online casinos set no table limit or very high table limits, it also means the rate at which a player can lose money is much faster.

31 Similarly, online slot machines suffer from the high possibility of cheating by the operator. The online reels of an online slot machine can be programmed so as not to give any returns ever. In countries where physical slot machines are allowed, the governments usually stipulate the minimum payout per number of spins to ensure that players have a chance of winning something. Random checks are also often carried out by government inspectors to ensure that slot machines are not tampered with by the operators.

32 The three other major concerns with casino-style games are the possibility for money laundering, the unscrupulous operators who lure underage gamblers and those operators who have a disregard for promoting responsible gambling. Legalisation of this type of online gambling would certainly increase the availability and accessibility of gambling to the ordinary person while at the same time could well undermine the anti-gambling policies of other jurisdictions especially if no technical geo-location techniques are employed.

33 The casino-style game which has grown the most in popularity in recent years is online poker which was reported to have grown in revenue from US\$82m in annual revenue in 2000 to over US\$2bn in 2005.³⁸ The same report listed Antigua as the jurisdiction with the highest number of gambling websites, followed by Costa Rica. In the UK, the Gaming Act in 2005 significantly liberalised the regulation of online gambling with the result that a number of online gambling companies are now publicly traded on the London Stock Exchange. These include PartyGaming, Ladbrokes and Sportingbet.

D. Games of skill

34 Games of skill or games which are predominantly games of skill are not regarded as gambling in most jurisdictions. The most obvious examples are games of tennis, archery, or darts. Sometimes, skill games are provided on the Internet by dedicated operators or as an added draw to websites, which may require the player to play against other players or simply against the computer. To the extent that these are

38 Dresdner Kleiner, “Research Report on Internet Poker” (June 2005).

games of skill, they do not constitute gambling. If they are played for money or some other award, they would be contests or competitions or tournaments. In the US, much controversy has raged over the years at the federal and state levels in the judiciary and legislature over whether certain activities are predominantly games of skill or games of chance.³⁹ Today, it is clear in the US that chess, checkers and pinball machines are games of skill but pinball machines that awarded prizes were banned for a period of time in the past.⁴⁰

35 Similarly, video games played on computers, PDAs, and 3G mobile phones or console-style videogame systems such as PS2 are games of skill and not gambling. The element of chance plays little or no part in determining the outcome of these games.

(1) *Fantasy leagues*

36 Fantasy leagues allow players to create fictional teams utilising the names of real-world athletes and then using their statistics in the real-world matches to determine the winners. So for example, a baseball fantasy team could consist of a pitcher from the New York Yankees and a batsman from the Boston Red Sox and so on. Fantasy league players usually pay an entry fee to become owners of fantasy teams and they can manage their teams throughout the season. The performance of the actual sportsperson is used to determine scores. For example, if a fantasy team has five batsmen who hit home runs in every one of their real-world matches, this fantasy team will stand a better chance at winning the fantasy league than another fantasy team consisting of players who did not hit a ball the whole season.

37 Fantasy leagues are generally regarded in many jurisdictions, such as the US, as games of skills and not gambling as it requires studying the teams and the players to assemble a winning team.⁴¹

(2) *Online games or MMORPGs and virtual worlds*

38 Massively Multiplayer Online Role-Playing Games (“MMORPGs”) usually refer to those themed games such as “World of Warcraft” and “Everquest” in which multiple players can play with and against one another online.⁴² Virtual worlds on the other hand is a more general term that include MMORPGs as well as those persistent virtual environments where the developers do not regard their virtual worlds as games

39 See paras 79–93 on the US analysis below.

40 See, eg, *US v Two Coin-Operated Pinball Machines* 241 F Supp 57 (DC Ky 1965).

41 See also, Unlawful Internet Gambling Enforcement Act (UIGEA) which allows fantasy leagues. See paras 79–93 on the US analysis.

42 Yee Fen Lim, “Is It Really Just a Game? Copyright and Online Role-Playing Games” (2006) 1 *Journal of Intellectual Property Law & Practice* 481.

but as another type of life experience.⁴³ The non-MMORPG virtual worlds are usually free form without storylines and players can create anything their imagination fancies.⁴⁴ Examples of such virtual worlds would include “Second Life”, “*There.com*” and the Chinese virtual world “HiPiHi”.⁴⁵

39 MMORPGs are scripted games of skills with a beginner avatar having little weaponry and little skills. As the avatar progresses up the levels, the avatar will acquire skills, status and weaponry.⁴⁶ This is often achieved as a member of a guild as many quests in MMORPGs cannot be executed alone.⁴⁷ As an avatar kills monsters and executes successful raids, the avatar may acquire inventory which are valuable within the game. These can and often are sold on auction sites like eBay for real world money.⁴⁸ The money made from such sales cannot be considered “winnings” from gambling as there is very little element of chance. An avatar acquires inventory based almost entirely on labour, skills and strategies.⁴⁹ Gambling *per se* is not part of the structure of MMORPGs.

40 Virtual worlds that are not MMORPGs and are not scripted are more likely to present gambling issues. A player may for example create a virtual casino in such a virtual world. When this happened in “Second Life” which is run by Linden Lab, a US company on servers based in the US, the US Department of Justice stepped in and the gambling operations in “Second Life” were closed down. In essence however, gambling operations within virtual worlds do not present any new issue to be dealt with. After all, virtual worlds are run on the Internet and they can and should be treated just like any form of Internet-based gambling. The more pertinent issue is what sort of gambling activities they offer. There is really no difference if BoysTown Australia is selling its lotteries from its own website or from within its own virtual building within “Second Life”, save for the possible jurisdictional issue of where the server is located which may determine the applicability of a country’s laws that it will have to answer

43 Hannah Yee Fen Lim, “Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds” (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1053.

44 Hannah Yee Fen Lim, “Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds” (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1053.

45 Hannah Yee Fen Lim, “Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds” (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1053 at 1054–1057.

46 Yee Fen Lim, “Is It Really Just a Game? Copyright and Online Role-Playing Games” (2006) 1 *Journal of Intellectual Property Law & Practice* 481.

47 Yee Fen Lim, “Is It Really Just a Game? Copyright and Online Role-Playing Games” (2006) 1 *Journal of Intellectual Property Law & Practice* 481.

48 Yee Fen Lim, “Is It Really Just a Game? Copyright and Online Role-Playing Games” (2006) 1 *Journal of Intellectual Property Law & Practice* 481.

49 Yee Fen Lim, “Is It Really Just a Game? Copyright and Online Role-Playing Games” (2006) 1 *Journal of Intellectual Property Law & Practice* 481 at 483–488. See also, Yee Fen Lim, *Cyberspace Law: Commentaries and Materials* (Oxford University Press, Melbourne, 2nd Ed, 2007) at pp 674–678.

to.⁵⁰ Currently, “Pok3d” operating from Cyprus is one of the few virtual worlds offering purely gambling activities.⁵¹

E. Note on terminology

41 In the past, legislators and the judiciary have used the word “gaming” to refer to “gambling”. While some literature may use the words “gambling” and “gaming” interchangeably, in general, this occurs when referring to offline gambling and they usually occur in older materials. In recent years, legislators in many jurisdictions have begun using the word “gambling” in statutes to make sure that there are no mistakes as to the subject matter they are referring to, and to be more accurate and precise.

42 With the advent of the Internet, there has been a tendency for the word “online” to be added in front of almost any word to refer to the networked or Internet version of whatever is the subject matter. So today we have online music, online videos, online news and so on. However, the usage of “online gaming” in many jurisdictions has been confined to referring to the types of “games of skill” referred to above and not to mean online gambling. When referring to gambling on the Internet, the norm has been to use the phrase “online gambling” so that the latter is not a subset of online gaming. Hence, the two definitions refer to mutually distinct subject matters. However, Singapore laws have not drawn such a clear distinction as yet.

II. Singapore Legal/Regulatory Landscape

43 The regulatory regime in Singapore on gambling is currently antiquated and may not cover all the permutations and types of online gaming or online gambling activities, whether operated out of or conducted within Singapore. With the opening of the Integrated Resorts (“IRs”) and the casinos in Singapore, the government’s policy on gambling and regulatory laws has been updated to include licensing requirements and gambling controls on their operation.⁵² One area that the government will probably have to look at beyond the IRs will be the regulation or prohibition of online gambling activities, but in order to do so, we need to understand the current state of affairs.

50 See generally, Yee Fen Lim, *Cyberspace Law: Commentaries and Materials* (Oxford University Press, Melbourne, 2nd Ed, 2007) at Ch 2 on “Jurisdiction”.

51 See <http://www.pok3d.com/>.

52 See the responses given by the Ministry of Trade and Industry (MTI) on the Singapore Integrated Resorts website at <http://integratedresorts.com.sg/gov/>.

A. *Singapore gambling laws*

44 Singapore's history of legalised but controlled gambling dates back to the colonial days with proceeds from gambling regulations being used to fund government services like the colonial police. Since then, gambling had always been restricted with the government taking a strong stance against gambling as a business concept based on the fear of social problems and potential criminal activities that are likely to arise from it, until its recent measured change of stance. For a long time, gambling was under the strict and limited purview of the Singapore Totalisator Board ("Tote Board") until the recent enactment of the Casino Control Act of 2006 which allowed the establishment of licensed casinos in Singapore.

(1) *Introduction*

45 Singapore currently has a two-pronged approach to gambling: regulating its operation under a limited and controlled environment with a view to benefiting society and social causes (eg, the Tote Board manages the donation of surplus funds) while prohibiting and discouraging gambling as a vice, particularly among Singaporean citizens and residents.

46 In relation to the former, gambling activities are currently regulated by the Tote Board and more recently the Casino Regulatory Authority of Singapore. In relation to the latter, there are anti-gambling statutes that criminalise unregulated gambling and laws that limit the enforcement of gambling debts (until quite recently). These will be examined consecutively.

(2) *Singapore Totalisator Board Act (Cap 305A) ("STBA")*

47 Pursuant to the STBA, the Tote Board was established on 1 January 1988 to oversee the operation of the Singapore Turf Club and later in 2004, the Singapore Pools as well. The Tote Board holds the legal right to "operate horseracing and totalisator operations through its agent and proprietary club, the Singapore Turf Club (formerly known as Bukit Turf Club, set up in March 1988); and 4D, Toto, Singapore Sweep and football betting through its agent and wholly-owned subsidiary, Singapore Pools (Private) Limited (acquired in May 2004)."⁵³

(3) *Casino Control Act (Cap 33A) ("CCA")*

48 The CCA establishes the Casino Regulatory Authority of Singapore as the industry regulator, whose functions are to maintain and administer systems for the licensing, supervision and control of casinos. This is meant to ensure that the management and operation of casinos are above board and free from criminal influence or involvement, and that measures are in place to protect vulnerable members of society

53 See the Tote Board website at <http://www.toteboard.gov.sg/index.html>.

and the social fabric, such as minors and potential addicts to gambling. It has since authorised the award of two casino licenses in Singapore.

49 The CCA also regulates the operational aspects of licensed casinos and includes the provisions on the following: the making of contracts relating to the supply of goods or services for the operations of the casino; licensing of employees of the casino employed in a managerial capacity, authorised to make decisions involving the exercise of their discretion that regulate casino operations or whose work involve activities such as the conduct of gambling; the movement, exchange or counting of money or chips about the casino premise; security and surveillance of the casino; and the operation, maintenance, construction or repair of gambling equipment.

B. Anti-gambling statutes

50 The four principal statutes in Singapore that govern gambling are the Common Gaming Houses Act (Cap 49), the Betting Act (Cap 21), the Private Lotteries Act (Cap 250) and the Betting and Sweepstakes Duties Act (Cap 22). Each deals with a different aspect of gambling and is either prohibitory or regulatory, and a particular gambling product can fall under more than one statute. They are as follows:

(1) Common Gaming Houses Act (Cap 49) (“CGHA”)

51 The CGHA governs gaming and public lotteries.⁵⁴ It broadly makes it an offence to operate or be involved or invested in a common gaming house or in a public lottery, subject to certain prescribed exemptions.⁵⁵ It is also an offence to be a customer of such places or activities. The CGHA does not expressly draw a distinction between “gaming” and “gambling” since the definition of “gaming” is “the playing of any game of chance or of mixed chance and skill for money or money’s worth” under s 2.

52 The recent decision of *PP v Peh Chye Heng*⁵⁶ demonstrates the applicability of the CGHA and the extent to which it covers online gaming offences. Briefly, the accused was charged under s 4(1)(a) of the CGHA for running an Internet cafe which provided online casino gaming services to customers. In coming to its conclusion, the court noted that these online games were “games of chance which did not require skill”,⁵⁷ and that the owner Peh was liable because the Internet cafe constituted a

54 *Ie* a lottery to which the public has access.

55 Public lotteries conducted by businesses to promote products and services, lotteries promoted by certain charities or institutions of public character, public lotteries incidental to events like trade fairs and dinners and dances, and certain types of gaming in private clubs have been exempted from the ambit of the CGHA. Additionally, as will be further noted later, various *ad hoc* exemptions have been granted to various entities for specific gambling events hosted by or held in Singapore since late 2002.

56 [2009] SGDC 100.

57 [2009] SGDC 100.

common gaming house since it was “open to the public and anyone could access to bet on online casino games via the computers”.⁵⁸

53 Two important observations can be made from this:

53.1 First, at the fundamental and more obvious level, it demonstrates that the mode of gaming does not matter (*ie* it does not matter whether the activity is conducted online or offline) provided all the other elements of the offence is satisfied (and this is where there may be some lacuna in the law). Instead what matters is the nature of these games, in particular whether these games are games of chance or skill. This emphasises the substantive similarities between the type of gambling that enforcement is taken against whether it is conducted electronically or physically (and hence leaves outside of its ambit gaming activities that arguably involves skill).

53.2 Secondly, although the above case only dealt with the liability of the owner of the premises on the basis that cyber cafes that conduct such activities are common gaming houses because they were places which the “public has or may have access to”,⁵⁹ then the individuals who visit such places as customers will also attract liability under ss 7⁶⁰ and 8(1)⁶¹ of the CGHA.

54 Additionally, the CGHA arguably also covers culpability of individuals who manage online gaming websites locally. This is a slight variation from the above scenario since culpability can be ascribed even if the place at which the individual manages the website is not open to public access. This is due to the definition of “common gaming house” to include “any place kept for habitual gaming”.⁶² As long as “habitual gaming” can be proven, which is highly probable based on the frequency and duration required in managing a website, then the requirement for public access is dispensed with under the Act. As such, the individuals who manage online gaming websites locally can be held liable under the Act although clearly this form and method of operating gambling business was not envisioned when the Act was enacted, which was at a time before the Internet was popularised.

58 [2009] SGDC 100.

59 Section 2 defines a common gaming house to include any place which the public “has or may have access” to.

60 Section 7 ascribes liability to any person who “games in a common gaming house”.

61 Section 8(1) empowers police officers to arrest without warrants any persons found gaming in a public place.

62 Section 2(1).

55 From this assessment, it is possible to see how the CGHA may be adequate to regulate online gaming to a significant extent, at least relating to the existing notions of gambling activities currently enforced against its physical equivalent. However, there are some problems with coverage that will be examined below.

(2) *Betting Act (Cap 21) (“BA”)*

56 The BA governs betting and wagering activities. Generally speaking, this Act makes it an offence to operate or be involved in common betting house or betting information centre, and to publish information relating to any horse race or sporting event for the purpose of illegal betting. Like the CGHA, customers of such place or activities are also caught under its criminal provisions. Also similar to the CGHA, the BA permits exemptions, and the Tote Board and the Singapore Pools have been exempted from it.

57 The two pieces of legislation deal with different types of gambling. The CGHA deals more with “games of mixed chance and skill for money or money’s worth”⁶³ which is reflective more of casino-style gambling while the BA deals with “bets or wagering on any event or contingency of or relating to any horse race or other sporting event”⁶⁴ which is reflective more of sports-type betting. This distinction is important because it differentiates the culpability of individuals who engage in online casino-type gambling as opposed to those who engage in online betting or wagering.

58 After analysing both pieces of legislation, some key observations can be made: In general, the current legal framework in Singapore adopts a prohibitive stance towards online gambling; the BA’s prohibitive stance is more clearly discernible than the CGHA because of its inherently broader phrasing; and both Acts contain inadequacies in dealing with certain issues unique to the phenomenon of online gambling.

(3) *Private Lotteries Act (Cap 250) (“PLA”)*

59 The PLA regulates “private” lotteries. These are lotteries which are confined to members of a society established and conducted for purposes not connected with gaming, wagering or lotteries, and covers, for example, jackpot machines in private social and country clubs that operates these machines for its member’s recreational enjoyment while utilising its proceeds for club management and funds. Such lotteries are prohibited, except as permitted by the Commissioner of Estate Duties. The Act sets out the applicable conditions for such permits.

63 Section 2(1) defines gaming: Gaming “with its grammatical variations and cognate expressions, means the playing of any game of chance or of mixed chance and skill for money or money’s worth.”

64 Section 2(1).

(4) *Betting and Sweepstakes Duties Act (Cap 22) (“BSDA”)*

60 The BSDA governs the applicable duties on betting and sweepstakes. Other than that it does not otherwise regulate gambling activities.

C. *Enforceability of gambling debts*

61 Under s 5(1) of the Civil Law Act (Cap 43), all contracts and agreements by way of gaming or wagering are null and void. The Singapore High Court had decided in *Star Cruise Services Ltd v Overseas Union Bank Ltd*⁶⁵ that gaming and wagering debts will not be enforced by the courts in Singapore on the basis that s 5(2) of the Civil Law Act applies irrespective of where the gambling transaction took place, and that no recovery on an underlying gambling contract would be permissible.

62 However, in the subsequent case of *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat*,⁶⁶ following from its opinion in *Star City Pty Ltd v Tan Hong Woon*,⁶⁷ the High Court took the opposite view on gambling: that it was not against public policy in Singapore to allow the recovery of money lent for the purposes of gambling abroad as long as the transaction was a genuine loan which was valid and enforceable according to that foreign law. In fact, it would be against public policy for Singaporeans to gamble abroad and return to Singapore to escape from their debts incurred abroad. Thus, s 5 of the Civil Law Act merely negated the enforcement, but not the validity, of a gaming contract. It remains that no action will lie in Singapore to recover a sum of money won on a foreign wagering contract, even if that contract was valid under its governing law.

63 In the latest twist, the Court of Appeal in *Poh Soon Kiat v Desert Palace Inc* disagreed with this stance.⁶⁸ In a lengthy assessment of Singapore’s public policy position on the matter, the judges concluded that the views of the High Court in the abovementioned cases to the effect that gambling was no longer contrary to Singapore’s public policy *as a rule* was not justified either by the evidence before the court on those cases or by the policy considerations encapsulated in s 5(2) of the Civil Law Act. The legal position on enforceability of gaming debts (but not the policy position on gambling generally) is only partly addressed by the exception made for the casinos to be opened and operated at the two Integrated Resorts here. Specifically in relation to these casinos, s 40 of the Casino Control Act provides that ss 5(1) and 5(2)

65 [1999] 2 SLR(R) 183, on the basis that the then s 6(1) of the Civil Law Act (now s 5(1)) rendered securities given in respect of gambling contracts void for public policy reasons. Prior to this case, gambling debts were held enforceable on the basis that the contract was made in Nevada in the United States and was governed by its laws which legalised gambling. See *Vegas Hilton v Khoo Teng Hock Sunny* [1996] SGHC 182.

66 [2004] 2 SLR(R) 436. See also the Court of Appeal decision that affirmed the High Court’s judgment, *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR(R) 690.

67 [2002] 1 SLR(R) 306.

68 [2009] SGCA 60 at [81]–[126].

of the Civil Law Act shall not apply in relation to any contract entered into with a casino operator or his agent for the playing in the casino of a game that is conducted by or on behalf of the casino operator or his agent, or for the use of a gaming machine in the casino, or for the purchase of chips or chip vouchers, at any time while the casino license is in force. The court in *Desert Palace* itself noted that just because *exceptions* were made by statute for regulated gambling did not mean that unregulated gambling (ie “all other forms of gambling”) was no longer against Singapore’s public policy.

D. Singapore and online gambling

(1) Gaming and gambling events in Singapore

64 Singapore has in recent years been hosting gaming and gambling events with more frequency,⁶⁹ and in the process, exceptions have been made to the existing statutory impediments by way of statutory exemptions to the CGHA for organisers of private events to organise gambling events in Singapore.⁷⁰ These developments suggest a more open policy towards controlled and revenue-generating gambling activities and events and, together with the development of the casinos, portends similar approaches and attitudes to online gambling if they are assessed to accord with the same public policy benefits and are of strong economic interest to Singapore.⁷¹ However, the opinion of the Court of Appeal in the latest case of *Poh Soon Kiat v Desert Palace Inc*,⁷² given in December 2009, points to a more cautious and conservative view of the public policy considerations relating to gambling. Until the government takes an expressed stance on the issue, the matter will remain uncertain for the moment. This reinforces the need for clarity in policy and in the law on online gambling.

(2) Issues under CGHA

65 Revisiting *PP v Peh Chye Heng*,⁷³ as noted previously, the District Court sentenced the accused under s 4(1)(a) of the CGHA for operating a cybercafe as a premise for online casino gaming to which any class of public had access to make bets on games of chance via computers. The operator charged in this case was the physical

69 Eg, the Betfair Asian Poker Tour in 2006, where permission was given to Capital Events (a local event organiser) and Betfair (a UK-based Internet betting exchange) to organise the Asian Poker Tour of 2006 in Singapore.

70 Eg, Common Gaming Houses (Exemption) (No 4) Notification 2006.

71 See Lau Kok Keng & Siew Kum Hong, “In the Name of Gaming: Taking a Chance on the Law” *Law Gazette* (February 2005) and Lau Kok Keng, “Entertainment and Gambling: A Changing Landscape” *Law Gazette* (September 2006) at 15. See also, Daren Tang, “New Dress for an Old Vice: Should Singapore be an Online Gambling Hub?” *Inter Se* (January 2007).

72 [2009] SGCA 60, available at http://www.singaporelawwatch.sg/remweb/legal/ln2/rss/judgment/65218.html?utm_source=rss%20subscription&utm_medium=rss.

73 [2009] SGDC 100.

operator of a cybercafe.⁷⁴ Notably, this case involved actual physical premises and the presence of gamblers on site. This contrasts with the usual scenario of a sole gambler gambling from private premises like his home or office, interacting with an automatic agent or other individuals from remote locations, and through the use of an online gambling website operated from a remote location elsewhere and which therefore does not fall under Singapore jurisdiction.

66 One of the unique problems created by the Internet is that it lets individuals gamble online from the comfort of their own homes or anywhere else, private or public. If one recognises that culpability can only be ascribed to an individual if the offending act takes place in a common gaming house, then one can immediately see the potential loophole in the CGHA, which may not cover the individual who does not commit the offending act in the conventional “common gaming house” as defined in by the CGHA. The problem thus centres mainly on the definition of “common gaming house” under s 2 of the CGHA.

67 Section 2 of the CGHA defines “common gaming house” as including any place “*kept or used* for gaming” to which the public has or may have access to, and any place “kept for habitual gaming” *whether or not* the public has or may have access to.

68 Clearly, in the above scenario where an individual accesses online gaming websites from the privacy of his home, the first definition of common gaming house will not apply since it will be quite impossible to argue that the individual’s home is a place where the public has or may have access to. Based on this definition, the individual who engages in such activity from his home can thus escape liability.

69 Similarly, although the second definition of “common gaming houses” dispenses with the requirement for public access, the requirement that the place must be “kept for habitual gaming” makes it equally, if not more difficult to ascribe liability to the individual. There are two potential hurdles to cross in this context, namely satisfying the condition that the user had engaged in “habitual gaming” and that his home was “kept” for this purpose. Issues of what constitutes “habitual gaming” and the difficulty of proving it aside, it is difficult to also prove that the individual’s home was “kept” for the purpose of habitual gaming.

70 Reading the statutes in context, it would appear that the word “kept for” necessarily implies that the place had to serve a dominant or sole purpose of habitual gaming for an extended period of time. This is in contrast to the word “used” as included in the first definition that prescribes liability even for a one-time off

74 The accused was the sole proprietor of CB Cyber Cafe and he rented the premises at 38 Lorong 17 Geylang since 1 June 2008. The Internet cafe provided online casino gaming to customers. In the process of such operation, the accused even employed a cashier to man the counter and operate the online casino. See also, *Ong Johnny v PP* DAC 27993/2008.

occurrence.⁷⁵ The fact that the drafter evidently omitted the word “used” in the second definition further indicates that there is a difference in the meaning of a place being “kept” and “used”, and that these terms ought not to be used interchangeably. As a result, in order to make an individual’s home qualify as a common gaming house under the second definition, one would have to prove that the individual not only engaged in habitual gaming, but that his home was kept for this sole or dominant purpose. It is an open question as to whether the individual who engages in recreational online gaming in his spare time would fall within s 7. Therefore, it is unclear how whether CGHA is adequate in dealing with individuals who access online gaming websites from private places.

71 The other issue is the definition of the “common gaming house” within the CGHA, which is inadequate and ambiguous when confronted with the question of whether a virtual gaming house falls within the traditional definition of a common gaming house. It can be argued that when an individual accesses an online gaming website which caters to the general public, that person accesses a virtual common gaming house and in doing so ought to be liable under the CGHA.

72 One possible interpretation turns on the definition of “place” under s 2 of the CGHA. Under s 2 of the CGHA, a “common gaming house” is one which *includes any place* kept or used for gaming or habitual gaming, which the public has or may have access to, where “place” is defined to mean “any house ... and any *place or spot*, whether open or enclosed ...” In this instance, the question to consider is whether the general words “place or spot” can be extended to cover the virtual domain, such that accessing online gaming websites constitutes “gaming in a common gaming house” under s 7 of the CGHA. However, it is unclear whether the ambit of the CGHA extends to the virtual domain, which was clearly not within legislative contemplation due to the time when it was drafted. Apart from the awkwardness of describing the virtual domain as a “place or spot”, the application of the *ejusdem generis* rule would suggest that the term “place or spot” must be restricted to the same class as the preceding specific descriptors, all of which arguably belong to the physical realm.⁷⁶ It is therefore unclear whether the ambit of the CGHA is limited to only the physical domain, even if the more persuasive view is that it is so limited.

73 Another possible interpretation of the CGHA is that as a “common gaming house” under s 2 of the CGHA is one that “*includes any place kept ...*”, it presupposes that the list of definitions of a “common gaming house” is not exhaustive, and Parliament could have perhaps intended that wider interpretation would be applicable as technology progressed. The CGHA could therefore be extended to include a virtual common gaming house even though the legislation is silent on this matter. Also, a purposive interpretation as advocated under s 9A of the Interpretation Act (Cap 1) and

75 Section 2(2)(b) states that “a place shall be deemed to be used for a purpose if it is used for that purpose even on one occasion only”.

76 Section 2 states that a “place means any house, office, room or building and any place or spot ...”.

that promotes the purpose and the objective of the CGHA to curb illegal common gaming areas, would mean extending the ambit of the CGHA to cover the virtual domain.⁷⁷

74 As can be seen, these are two equally plausible interpretations of the CGHA with diametrically opposing results, reflecting the inadequacy of the CGHA in such ambiguity. In particular, it is unclear whether individuals who access and participate in online gaming sites have run afoul of the CGHA. A simple amendment to include virtual common gaming houses in the definition (if indeed this is the intention) would resolve this inadequacy.

75 Furthermore, because the CGHA does not apply to and cannot affect the operation of foreign gambling websites, in the absence of express language to prohibit the patronage of such websites, the latter can continue to target and attract Singaporean gamblers to their websites without either party facing any consequences under the CGHA.⁷⁸

(3) Over-inclusiveness of the legislation

76 There are also ambiguities on what constitutes “gaming” and the activities covered by the CGHA, given the swath of gaming activities that have emerged online as examined in Section I. These gaming activities which have arisen after the enactment of the CGHA, can be caught under the CGHA in view of the wide definition of “gaming”, even though they are games of skill or predominantly of skill. These games may involve money or money’s worth.

E. Conclusion and comments

77 The existing laws were evidently formulated with social concerns in mind, as perceived at the time of their formulation. With the changes and update in policy that Singapore has taken with the Integrated Resorts (“IRs”) and the focus on economic and financial interest taking the forefront with social concerns, it is foreseeable that we will have to consider the impact and implications of online gambling on Singapore with a view to developing consistent and clear policy and laws on how to deal with this new “economy” in a manner that is in line with those objectives. In particular, the challenges posed by transnational gambling and gamblers as well as the participation of financial intermediaries also requires a thorough examination before deciding on the best course to take, even in relation to something as basic as whether to update the

77 This is premised on the argument that these online gaming websites are common gambling areas because the public has or may have access to it and it is used for the sole purpose of gambling.

78 This is a very real possibility, given how research has shown that the average Singaporean spends US\$940 a year, three times as much as the average American. See Wayne Arnold, “The Nanny State Places a Bet”, *The New York Times* (23 May 2006), available at <http://www.nytimes.com/2006/05/23/business/worldbusiness/23casino.html>.

existing laws or to draft new laws to separately deal with the issue. As we shall see from the existing approaches taken in other jurisdictions, the options in relation to gambling operators and companies as well as financial intermediaries are either regulation through licensing or prohibition.

III. Approaches in Other Jurisdictions

78 The regulatory regime for land-based gambling operations is well established in many countries but the gambling laws in such countries may not necessarily have been updated to take into account the Internet and the ability to offer gambling services online.

A. *United States of America*

(1) *Introduction*

79 The online gambling laws and policy in the United States are primarily state driven although the federal government have in more recent years attempted to prohibit, and then regulate, Internet gambling in various stages.

(2) *What is gaming, what is gambling, and which is to be regulated?*⁷⁹

80 In the US, the ordinary definition of “gaming” is, in the contemporary context (*ie* online games)⁸⁰ “the activity of playing computer games”, while in the more traditional context refers to “the activity of playing cards or other games of chance for money” (*ie* gambling). “Gambling” on the other hand refers to “when people risk money or possessions on the result of something which is not certain, such as a card game or a horse race”.⁸¹

81 In the US, “gambling” is generally used to more narrowly describe games of chance involving the wagering of money or money’s worth, and thus of activities that are regulated or prohibited. “Gaming” on the other hand is more loosely used to cover all forms of games, whether of chance, skill or mixed, that may or may not involve the exchange of money, money’s worth of material value whether in trade or bet. It is thus the *genus* to the *specie* that is a gamble.⁸² Under a matrix of a game of chance involving

79 David R Johnson, “How Online Games May Change the Law and Legally Significant Institutions” 49 NYL Sch L Rev 51 (2004).

80 These include the following categories: First Person Shooter, Real Time Strategy, Cross-Platform Online Play, Browser Games and Massive Multi-Player Online Games.

81 *Longman Dictionary of Contemporary English*, available at <http://www.ldoceonline.com>.

82 Some articles make no distinction between “gambling” and “gaming” and use them inter-changeably.

money for bet on the one hand, which is most probably gambling, compared to a game of skill not involving money on the other, which is most probably gaming, we see that the existing types of game, both online and offline, are myriad.

(3) *What is the US federal approach to regulation and what is the underlying policy basis?*⁸³

82 The US federal approach has been a prohibitory one, mainly guided by the concerns of money laundering and protection of revenue. Yet it remains largely under the control of state laws. Table 1 encapsulates the general guiding factors for US policy and law approach in this area.

Table 1 Underlying Concerns⁸⁴

For Prohibiting or Restricting	For Facilitating or Sanctioning
<ul style="list-style-type: none"> • Potential for fraud over the Internet • Protect minors from gambling sites • Protect against gambling addictions • Need to preserve revenues generated from lawful state-run gambling operations 	<ul style="list-style-type: none"> • Drive network development • Provide an alternative for consumers • Increase competition in gambling services

(4) *Who are the parties involved in the process of gambling and what are their liabilities and responsibilities?*⁸⁵

83 The US approach seems to place the direct onus on the facilitators of online gambling websites, in particular the financial services sector and advertisers,⁸⁶ which have an impact on the operators that are largely based abroad. The players are not generally targeted for any form of sanctions or responsibility under US legislation.

84 Financial services bear the main responsibility under US federal legislation as will be seen below. As for advertisers, due to the position taken by the US Department of Justice that the Wire Act relating to telephone betting applies to Internet gambling, and that advertising such activities may be considered aiding and abetting, Google and Yahoo!, the big players in the search engine business have in 2004 announced their

83 Lisa Lester, "Beating the Odds: Regulation of Online Gaming Stateside and Abroad" (2008) 28 J Nat'l Ass'n L Jud 621. See also, <http://newsblaze.com/story/2009070803505600001.acn/topstory.html>.

84 Andrea M Lessani, "How Much Do You Want To Bet that the Internet Gambling Prohibition Act of 1997 Is Not the Most Effective Way to Tackle the Problems of Online Gambling?" (1998) The UCLA Online Institute for Cyberspace Law and Policy Archive, available at <http://www.gseis.ucla.edu/iclp/alessani.html>.

85 Mia Garlick, "Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers" (2005) 7 Yale J L & Tech 422.

86 Daniela Rosette, "The Application of Real World Rules to Banks in Online Games and Virtual Worlds" (2008) 16 U Miami Bus L Rev 279 and Megan E Frese, "Rolling the Dice: Are Online Gambling Advertisers 'Aiding and Abetting' Criminal Activity or Exercising First Amendment-Protected Commercial Speech?" (2005) 15 Fordham Intell Prop Media & Ent LJ 547.

withdrawal from online advertising business for gambling websites. Since then, advertising for gambling is not part of the policy of search engine operators.⁸⁷

(5) *Federal*⁸⁸

85 The US Congress and federal government can only regulate gambling activity affecting interstate commerce and the main federal statutes that have been ostensibly applied to online gambling are:⁸⁹

85.1 The Wire Act⁹⁰ – The Internet was not even in existence when it was enacted in 1961, but the US Department of Justice has since taken the position that the statute applies to all forms of Internet gaming.⁹¹

85.2 The Travel Act⁹² – This 1961 statute prohibits anyone from travelling or using any facility in interstate or foreign commerce with the intent to promote or carry on unlawful activity. The courts have held that the transportation of gambling across state lines violates the Travel Act because “the use of a telephone or a voice or a message can be and is actually transported by wires across state lines to the same extent as materials are transported over state lines in moving vehicles.”⁹³

85.3 The Interstate Horseracing Act⁹⁴ – The intent of this 1978 was to give the States the primary responsibility of determining what forms of gambling can take place within their own borders and to further the horseracing and legal off-track betting industries in the US. It was

87 See eg, Yahoo!’s “Editorial Guidelines” on online gambling sites at <http://help.yahoo.com/l/us/yahoo/ysm/sps/articles/editorial9.html>.

88 Mattia V Corsiglia Murawski, “The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet Gambling Enforcement Act of 2006” (2008) 48 Santa Clara L Rev 441; Michael D Schmitt, “Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006” (2008) 17 S Cal Interdis LJ 381 and Benjamin C Wickert, “All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States” 10 Vand J Ent & Tech L 215 (2007).

89 Other federal statutes have been identified by one commentator or another as being potentially applicable in one way or another. These include, for example, the Interstate Transportation of Wagering Paraphernalia Act of 1961; the Illegal Gambling Business Act of 1970; Racketeer Influenced and Corrupt Organizations Act of 1970; Professional and Amateur Sports Protection Act of 1992; Interstate Wagering Amendment of 1994; Amendment to Interstate Horseracing Act and the Illegal Money Transmitting Business Act of 1992.

90 18 USC § 1084 (2007).

91 Seth Gorman & Antony Loo, “Blackjack or Bust: Can US Law Stop Internet Gambling?” (1996) 16 Loy LA Ent LJ 667 at 671–74. But see, *In re Mastercard Int’l Inc, Internet Gambling Litig* 132 F Supp 2d 468 (ED La 2001), where the court held that sports betting conducted over the Internet was illegal, but that casino games were legal.

92 18 USC § 1952 (2007).

93 *United States v Smith* 209 F Supp 907 (ED Ill 1962) at 916.

94 15 USC § 3001–3007.

amended in 2000 to reflect the changes brought on by the onset of Internet gambling to explicitly expand interstate off-track wagers to include wagers through the telephone or other electronic media.

(6) *The Unlawful Internet Gambling Enforcement Act of 2006 and beyond*

86 The first US statute to deal directly with the issue of online gambling was the Unlawful Internet Gambling Enforcement Act of 2006.⁹⁵ The UIGEA was incorporated into the SAFE Port Act,⁹⁶ which prohibits financial institutions from processing payments from sites that are deemed illegal. The UIGEA basically makes it illegal for financial institutions to collect on debts incurred on an online gambling site. The UIGEA's stated purpose is "to prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling, and for other purposes." It serves basically to disable the financial services sector from facilitating the transmission of funds in making bets and wagers, thereby prohibiting online gambling within the US jurisdiction by anybody through any company.⁹⁷

87 The UIGEA (§ 5363 and § 5366) bans and criminalises the acceptance of funds from bettors by operators of most online gambling websites, hence it applies to those involved in the business or operation of betting or wagering. It does not make it illegal for players to make online bets or wagers. § 5262 of the UIGEA defines a bet as the staking or risking of property in order to win something of value based on the outcome of a contest of others, a sporting event, or a game subject to chance; the purchase of a chance to win a lottery or other prize the award of which is predominantly subject to chance and the making of a wager prohibited under the Professional and Amateur Sports Protection Act.⁹⁸ Notably excluded from the definition are, for example, pay-for-play games such as god games or fantasy games as well as social and networking sites.⁹⁹

95 See also the American Gaming Association, "Federal Issues: Status Reports" available at http://www.americangaming.org/hillupdate/reports_detail.cfv?id=9 and Gerd Alexander, "The US on Tilt, Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet" (2008) Duke L & Tech Rev 6, available at <http://www.law.duke.edu/journals/dltr/articles/2008DLTR0006.html> (calling for licensing and regulation instead).

96 SAFE Port Act of 2006, Pub L No 109-347, HR 4954, 109th Cong (passed by Congress on 13 October, 2006), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04411:>.

97 It defers to state-authorised and licensed in-state gambling activities but does not do so for other countries. The Act appears to have extra-territorial reach over foreign-owned and registered financial institutions that operate online and that may transact in a manner that falls under the provisions of the UIGEA.

98 Including "any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering".

99 The UIGEA includes exemption for intrastate online gambling that is "expressly authorised" by state law such as lotteries. It also includes an exemption for "any activity that is allowed under the 'Interstate Horseracing act of 1978'". This law makes no changes to the two favoured forms of gambling that generates revenue and campaign contributions. It also lets the established physical casinos to offer remote gambling as long as it does not cross state borders. UIGEA has effectively failed at banning Internet gambling but its success and its impact can only be measured in future considerations. It depends on the way banks and financial institutions are able to easily identify and block financial transactions and also in

(cont'd on the next page)

88 The UIGEA defines “Unlawful Internet Gambling” as follows: “To place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”¹⁰⁰

89 Judging from the approach of the UIGEA, it can be inferred that the US has been mainly motivated by financial outflow and money-laundering concerns; and only secondarily by morality and social concerns.

90 This is more apparent with the introduction of the Internet Gambling Regulation and Enforcement Act of 2007¹⁰¹ and the Internet Gambling Regulation and Tax Enforcement Act of 2007,¹⁰² which opt for the adoption of an online gambling licensing scheme so that the US government can obtain revenue from the industry and exert some control over it. The final solution to the regulation of online gambling is yet to be reached as evidenced by the need for more research in the area.¹⁰³ Most recently, in May 2009, a bill for an Internet Gambling Regulation Consumer Protection and Enforcement Act was introduced to establish a US federal regulatory and enforcement framework which will require Internet gambling operators to obtain licenses authorising them to accept bets and wagers from individuals in the US. It is yet to be seen how far this bill will go in Congress.¹⁰⁴

(7) *State*

91 US State anti-Internet gambling laws typically take one of two forms. Either it prohibits all forms of Internet gambling without exception or it prohibits online gambling, with the exception of authorising local State gambling operations to take bets online.¹⁰⁵ Few states have however adopted specific laws prohibiting online gambling.

the way these institutions will cooperate with the regulations. The Federal Reserve and Department of the Treasury released final regulations pertaining to the UIGEA in November 2008. The final regulations went into effect on 19 January 2009, but the companies have until December 2009 to comply with the new regulations.

100 31 USC § 5362(10)(A) (2007).

101 HR 2046, 110th Cong (1st Sess 2007).

102 HR 2607, 110th Cong (1st Sess 2007).

103 Internet Gambling Study Act, HR 2140, 110th Cong (1st Sess 2007).

104 See <http://www.scribd.com/doc/15022333/DC-Internet-Gambling-Regulation-Consumer-Protection-and-Enforcement-Act-050609>. This bill calls for a federal system to license, regulate, and tax Internet gambling operators. It was introduced together with the Internet Gambling Regulation Consumer Protection and Enforcement Act (see <http://www.scribd.com/doc/15031573/DC-Internet-Gambling-Regulation-and-Tax-Enforcement-Act-of-2009-Rep-Jim-McDermott-050609>), which requires any organisation licensed under the former legislation to pay a two percent federal tax on all deposits. The bill also provides protection against tax cheating.

105 Nelson Rose, “The Future Legal Landscape for Internet Gambling, Gambling and the Law” (3 November 2000), available at <http://www.gamblingandthelaw.com/antigua.html>.

For an overview and state-by-state comparison, see Annex.¹⁰⁶ Special mention should at this point be made of the popularly-used test for constituting “gambling”. Under the so-called “Dominant Factor Analysis”, “chance” is one of the elements generally required to be present in order for a game to violate a State anti-gambling statute. Where the element of chance predominate over other elements (in the case of multiple factors), in particular skill, in determining the outcome of a wager then gambling occurs. Some states allow gambling for money in a purely social context, which usually means that no player or other person, such as a bookie or host, makes or earns anything other than as, and on an equal footing with, a mere player in the game.

(8) *International*¹⁰⁷

(a) The trade law (WTO) dispute¹⁰⁸

92 An action was brought against the US in 2004 in the World Trade Organization (“WTO”) by Antigua and Barbados.¹⁰⁹ This resulted in a WTO tribunal ruling of some significance on the form that online gambling laws can take. The tribunal that heard the case found that the aggressive efforts of the US government to curb Internet gambling were in violation of WTO commercial service accords.¹¹⁰ The Tribunal explicitly found that the US was unfairly prohibiting foreign Internet gambling operators from accessing the American market, while allowing domestic companies to legally accept online bets. The WTO ruling against the US gave the WTO the ability to impose trade sanctions against her. Since then, the European Union, India, Japan, Australia, Canada, and other countries have joined Antigua and Barbados in seeking compensation from the US for economic injury resulting from this trade agreement violation.¹¹¹

106 Gambling-Law-US website at <http://www.gambling-law-us.com>.

107 Katherine A Valasek, “Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities” (2007) Mich St L Rev 753; John D Andrie, “A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States” (2004) 37 Vand J Transnat’l L 1389.

108 Clint Bodien, “Cross-Retaliation in the WTO: Antigua and Barbuda’s Proposed Remedy Against the United States in an Online Gambling Dispute” (2008) 14 Law & Bus Rev Am 847; Michael Park, “Market Access and Exceptions under the GATS and Online Gambling Services” (2006) 12 Sw JL & Trade Am 495 and Eric J Carlson, “Drawing Deas: Recognizing Problems with Congress’ Attempt to Regulate the Online Gambling Industry and the Negative Repercussions to International Trade” (2008) 32 Suffolk Transnat’l L Rev 135.

109 “Request for Consultations by Antigua and Barbados, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services” S/L/110WT/DS285/1 (13 March 2007).

110 “Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services” WT/DS285/R (10 November 2004).

111 “Representative Frank Questions Need for Internet Gambling Study and Warns of WTO Internet Gambling Dispute Consequences” *PR Newswire* (4 October, 2007). The US appealed the judgment, but the appellate court found that she violated the General Agreement on Tariffs and Trade (GATT) by the grant of authority to allow Internet betting on horse races. Another panel also later ruled that she had not taken sufficient steps to comply with both the appellate and the initial ruling. See “Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services” WT/DS285/AB/R (7 April 2005).

93 Meanwhile, the extraterritorial application and enforcement of its laws remain a problem for the US in seeking to fully implement its policies regarding Internet gambling.¹¹²

B. United Kingdom

(1) Background

94 In the late 1990s, the UK Government commissioned a Review Body, led by Sir Alan Budd, who published a “UK Gambling Review Report” (“Report”).¹¹³ The Report discussed the trends in online gambling and urged policy makers to legalise most types of online gaming. Three main factors that the Review Body considered in the Report were: the increasing ease of consumer access to the technology, the commercial disadvantages facing UK-based operators and the need for control. It was regarded as undesirable that British companies could not set up Internet gaming sites in Britain while British Internet users had lawful access to overseas sites which were entirely unregulated.¹¹⁴ Prevention by means of placing an obligation on Internet service providers to block access to offshore gaming sites and persuading the banking sector to refuse to recognise such sites for payment purposes were thought to face substantial practical and jurisdictional difficulties.¹¹⁵

95 In response to the Report, a subsequent White Paper was published by the Government entitled “A Safe Bet for Success: Modernising Britain’s Gambling Laws”.¹¹⁶ This White Paper adopted most of the recommendations in the Report. In particular, it endorsed the proposal that UK should legalise the provision of the full range of online gambling services provided by operators based in UK. These online operators have to meet entry standards and their operations will be subject to approval and monitoring by the proposed Gambling Commission to ensure compliance. It was agreed that the prohibition of online gaming by British consumers was totally unrealistic, even if it was thought desirable.¹¹⁷ In addition, gambling operators based in

112 Ola O Olatawura, “Why There May Not be an Extraterritorial Sport Right to Online Gambling” (2005) 27 Loy LA Int’l & Comp L Rev 371. Due to the inability to establish jurisdiction, the question is how the US can regulate off-shore based Internet gambling companies and whether it has any legitimate right to do so.

113 “UK Gambling Review Report” available at http://www.culture.gov.uk/reference_library/publications/4642.aspx/.

114 “UK Gambling Review Report” available at http://www.culture.gov.uk/reference_library/publications/4642.aspx/ at Ch 30.

115 “UK Gambling Review Report” available at http://www.culture.gov.uk/reference_library/publications/4642.aspx/. See also Department for Culture, Media and Sport, “The Future Regulation of Remote Gambling: A DCMS Position Paper” (April 2003) at para 102.

116 “A Safe Bet for Success: Modernising Britain’s Gambling Laws” is available at <http://www.culture.gov.uk/images/publications/gamblingreportpgs.pdf>.

117 “A Safe Bet for Success: Modernising Britain’s Gambling Laws” is available at <http://www.culture.gov.uk/images/publications/gamblingreportpgs.pdf> at para 4.46.

UK would be encouraged to compete with the vast range of services offered in the international markets.¹¹⁸

96 Following the Government's response to the Report, the Department for Culture, Media and Sport published "The Future Regulation of Remote Gambling: DCMS Position Paper" in 2003 ("DCMS Position Paper"), which considered in detail, the practical implementation of the recommendation, with the aim of "introducing a reliable system of regulation for a newly legalised onshore remote gaming industry".¹¹⁹ In addition, the DCMS Position Paper stated that Ministers have "expressed a hope that Britain will come to be a world leader in all fields of gambling activity"¹²⁰ and that proportionate regulation is necessary to create the right conditions for operators to choose to be based in Great Britain.

(2) *Overview of the Gambling Act ("GA")*

97 The UK Gambling Act 2005 ("GA") was enacted in 2005 and became fully operational on 1 September 2007. The GA repealed the previous UK legislation on gambling, namely the Betting, Gaming and Lotteries Act of 1963, the Gambling Act of 1968 and the Lotteries and Amusements Act of 1976. The GA created a new and unified framework for regulating not only land-based gambling but also online gambling in the UK.¹²¹ The GA also set up the Gambling Commission as the regulatory body. The basic framework under the GA is that operating and personal licences are granted that enable the provision of remote gaming, lottery and betting activities and premises. In addition to the GA, other aspects of the regulation are achieved via secondary legislation, conditions on licence, codes of practice and guidance.

98 The Gambling Commission regulates all commercial gambling in Great Britain, and is responsible for granting operating and personal licences for commercial gambling operators and personnel working in the industry. It also regulates certain lottery managers and promoters. Appeals for decisions made by the Gambling Commission are heard by the Gambling Appeals Tribunal.

99 Under the GA, the objectives of licensing are stated as: (a) prevent gambling from being a source of crime and disorder, being associated with crime or disorder or being used to support crime; (b) ensuring that gambling is conducted in a fair and open

118 "A Safe Bet for Success: Modernising Britain's Gambling Laws" is available at <http://www.culture.gov.uk/images/publications/gamblingreportpgs.pdf> at para 4.48.

119 Department for Culture, Media and Sport, "The Future Regulation of Remote Gambling: A DCMS Position Paper" (April 2003).

120 Department for Culture, Media and Sport, "The Future Regulation of Remote Gambling: A DCMS Position Paper" (April 2003) at para 16.

121 National lottery and spread betting fall outside of the Act, which are regulated by the National Lottery Commission and the Financial Services Authority respectively.

way; and (c) protect children and other vulnerable persons from being harmed or exploited by gambling.¹²²

100 The GA defines “gambling” as comprising gaming, betting and participating in a lottery. “Remote gambling” means gambling in which persons participate by the use of remote communication; and “remote communication” means communication using the Internet, telephone, television, radio, or any other kind of electronic or other technology for facilitating communication. “Gaming” means playing a game of chance for a prize; and “game of chance” includes:

- (a) a game that involves both an element of chance and an element of skill;
- (b) a game that involves an element of chance that can be eliminated by superlative skill; and
- (c) a game that is presented as involving an element of chance,
- (d) but does not include a sport.

101 The term “remote gambling” was used because the UK Government wanted the regulations to be technology neutral and to cater for all forms of player not present gambling.¹²³

(3) *Licensing*

102 A remote operating licence is one which authorises activity to be carried on in respect of remote gambling, or by means of remote communication. The types and number of remote operating licences that have been granted by the Gambling Commission during 2008 are:¹²⁴

- (a) general betting – 72
- (b) society lottery – 50
- (c) gambling software – 49

122 Gambling Act 2005, s 1.

123 DCMS Position Paper, para 11.

124 Source: Gambling Commission, Industry Statistics 2008/2009 (October 2009), available at <http://www.gamblingcommission.gov.uk/pdf/gambling%20industry%20statistics%202008%202009%20-%20update%20-%20october%202009.pdf>.

- (d) pool betting – 42
- (e) general betting (telephone) – 40
- (f) casino – 20
- (g) betting intermediary – 19
- (h) gaming machines technical – (full, supplier and software) – 17
- (i) external lottery managers – 10
- (j) bingo – 9

103 Ancillary remote operating licences are required by holders of non-remote operating licences to permit specific activities to be provided by means of specified communication that are ancillary to the specified activities covered by the non-remote operating licences. For example, if a person is applying for a non-remote general betting licence but want to offer betting services by telephone, he may add an ancillary remote licence to the main licence type. The Gambling Commission considers an activity to be ancillary to the specified licensed activity when an activity is only an additional or secondary activity to the specified licensed activity.¹²⁵

104 Probity checks will be conducted on the applicants for the licences. The price of the licence is set at a level that meets not only the costs of issuing the licence but also the associated regulatory costs of monitoring that activity on the basis that this is a service to applicants.¹²⁶ Licences are time limited.

105 The provision of facilities for gambling or using premises for gambling is an offence unless the appropriate permission is given.¹²⁷ Such permission may come from a licence, permit or registration granted pursuant to the GA or exemption given pursuant to the GA.

(4) *Overseas Internet gambling sites*

106 The GA does not purport to regulate overseas Internet gambling sites. Section 36 of the GA expressly provides that s 33 (which criminalises the provision of

125 Source http://www.gamblingcommission.gov.uk/gambling_sectors/betting/getting_a_licence_what_you_need/do_i_need_a_licence/what_operating_licences_do_i_n.aspx.

126 DCMS Position Paper at para 30.

127 Gambling Act 2005, s 33.

facilities for gambling without the requisite licence) applies to the provision of remote gambling facilities only if at least one piece of remote gambling equipment used in the provision of the facilities is situated in Great Britain, whether or not the facilities are provided for use wholly or partly in the UK.

107 Players in UK are free to access overseas Internet gambling sites. Regulation only addresses those sites which are based in UK, with the underlying rationale being that while punters have a choice of gambling in a regulated environment or taking a chance with an overseas operator, they would be encouraged to gamble in a regulated environment. All gambling sites which are licensed will carry a kite-mark on their websites.

108 Operators in UK are not required to refuse to accept customers in certain jurisdictions though the Government has a reserve power to impose restrictions.¹²⁸

(5) *Location of the gambling activity*

109 The presumption made is that regulated activity takes place where the operator is based.¹²⁹ The reason for this mode of regulation is described as follows:¹³⁰

[The] player, wherever he is situated, must go to the operator's site to take part in the gambling event and a bet is not struck until it is accepted by the operator. At its most fundamental, the analogy is of an overseas citizen choosing to travel to UK and gamble in a properly regulated establishment ...

(6) *Advertising*

110 Sections 330 and 331 of the GA make it an offence to advertise unlawful and foreign gambling respectively. "Foreign gambling" is gambling that either physically takes place in a non-European Economic Area ("EEA") state (non-remote gambling), or is gambling by remote means that is not regulated by the law of any EEA state. Section 331(3) provides that Gibraltar shall be treated as an EEA state, which means that the gambling operators who are based there will be permitted to advertise in the United Kingdom, and the section gives power to the secretary of state to specify other places and countries to be so treated.

111 Section 327 sets out what it means to advertise gambling. The definition is very broad and covers anything that is done to encourage people to take advantage of facilities for gambling. It also covers bringing information about gambling facilities to people's attention with a view to increasing the use of those facilities and extends the

128 Gambling Act 2005, s 355.

129 DCMS Position Paper at para 113.

130 DCMS Position Paper at para 113.

advertising of gambling to include those who participate in or facilitate such activities. Advertising includes entering into arrangements such as sponsorship or brand-sharing agreements.

(7) *Online gambling industry and observations*

112 The remote gambling market in UK was valued by the Gambling Commission at £896m in 2009.¹³¹ The Gambling Commission has observed that the majority of the gambling sites accessible to British citizens are regulated overseas. In many cases, the operator is licensed by the Gambling Commission for remote betting but its remote casino and poker operations are licensed overseas.

C. *Australia*

(1) *Background*

113 In December 1999, the Productivity Commission, an independent Commonwealth agency, released a report entitled “Australian Gambling Industries”. One of the key findings in this report was that the availability of gambling services on the Internet greatly facilitates the accessibility of gambling, and has the potential to exacerbate problem gambling.

114 As a consequence, the Interactive Gambling Act 2001 (“IGA”) was passed in Australia. The IGA came into operation in August 2001. The IGA aims to restrict Australian access to interactive gambling services. The Australian Government chose a targeted prohibition approach, rather than regulation (as was the case in the UK), for the following reasons:¹³²

- (a) increased accessibility to gambling services aggravates problem gambling;
- (b) there is a high social cost of gambling addiction, including effects on families and welfare;
- (c) Australia already has one of the highest per-capita gambling industries in the world;
- (d) Australia is one of the top four countries in the world in terms of per-capita Internet connections. Statistics reveal that Australians are

131 Gambling Commission, *Industry Statistics 2008/2009*, October 2009.

132 IGA Explanatory Memorandum, available at http://www.austlii.edu.au/au/legis/cth/bill_em/igb2001203/memo2.html.

becoming increasingly computer and Internet literate and are increasingly comfortable conducting electronic transactions online including the use of electronic payment mechanisms. Minors are similarly early adopters of technology; and

- (e) other new interactive broadcasting services (broadband connection and third-generation networks) could soon provide new platforms for gambling. This will increase accessibility leading to increased problem gambling and associated social costs.

(2) *Overview of the Interactive Gambling Act (“IGA”)*

115 The IGA makes it an offence to provide an interactive gambling service, if any or all of the customers of the service are “physically present in Australia”. This is regardless whether the service provider is based in Australia or offshore and whether the provider is local or foreign owner. It is possible for the Government to widen the offence to prohibit Australian based interactive gambling services from being provided to customers in designated countries.¹³³ The offence carries a maximum penalty of A\$220,000 per day for individuals and A\$1.1m per day for corporations.¹³⁴

116 A distinction is drawn between interactive gambling services and wagering services. Interactive gambling services include online casino-style gaming services of chance or mixed chance and skill¹³⁵ such as roulette, poker, craps, online poker machines and blackjack. Wagering services are generally not prohibited, unless the wagers were accepted online after a sporting event started. Among the list of services excluded from the prohibition are:¹³⁶

- (a) telephone betting services;
- (b) wagering services, including betting on a horse race or sporting event, where the bet is placed prior to the event starting;

133 IGA, s 9A.

134 IGA, s 15.

135 In the Explanatory Memorandum to the IGA, it was stated that 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.” The example given was an online 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 will not be aware of what another player might do and yet may act in anticipation of what the other player might do.

136 IGA, s 5(3).

- (c) lottery services;
- (d) gaming services that are provided to customers in a public place;
- (e) services that have a designated broadcasting or datacasting link;
- (f) services pursuant to certain contracts which are exempt from gaming or wagering under the Corporations Act 2001; and
- (g) any service declared exempt by the Minister.

117 The rationale for excluding wagering services is that the Internet is merely a new mechanism for placing bets. Australians can still access overseas-based websites in Australia, subject to the effectiveness of the complaints scheme and investigations following the lodgement of complaints (see para 118 below).

118 It is a defence to the offence of providing a prohibited interactive gambling service in Australia if the provider of the service did not know or could not with reasonable diligence have ascertained that the service was being provided to customers physically within Australia.¹³⁷ The burden is on the defendant to show such lack of knowledge.

119 The IGA also establishes an industry-based complaints scheme that allows Australians to make complaints to the Australian Communications and Media Authority (“ACMA”) about prohibited interactive gambling services on the Internet. If the prohibited Internet gambling content is hosted in Australia, and ACMA considers that the complaint must be referred to the Australian police force, such referral must be made accordingly. If the prohibited Internet gambling content is hosted outside Australia, ACMA must: (a) notify the content to Internet service providers (“ISPs”) so that the ISPs can deal with the content in accordance with procedures specified in an industry code or industry standard; and (b) if the ACMA considers that the content should be referred to a law enforcement agency, further notify the content to a member of an Australian police force. Bodies and associations have the option of contributing to the development of a code by a representative body that would provide for approved content filters to be made available to Australian Internet users.

(3) *Advertising*

120 The IGA prohibits the broadcasting of interactive gambling service advertisements in Australia.¹³⁸ The prohibition extends to all forms of media both

137 IGA, s 15(3).

138 IGA, s 61DA.

electronic and non-electronic. The prohibition does not extend to advertisements published in overseas media, such as magazines that are published overseas, or websites that are aimed at non-Australian audiences.

(4) *Effectiveness of the IGA*

121 The effectiveness of the IGA's targeted prohibition approach has been mixed.

The "Review of the Operation of the Interactive Gambling Act 2001 Report"¹³⁹ found that:

121.1 The introduction of the IGA had the effect of, and was associated with, the closure of all but one interactive gaming operator licensed in Australia and the minimal use of offshore gaming services by Australian consumers. Industry reports also confirm that the IGA had a substantial effect in curtailing the provision of gambling services in Australia.

121.2 Relatively few Australians are engaging in Internet gaming activities prohibited under the IGA, with only 18,000 Australian adults using the Internet to gamble for money on gaming services in the 12 months to April 2003. Although surveys have indicated growth in the overall consumption of Internet gambling services by Australians in the four years since the publication of "Australian Gambling Industries", the majority of the growth has been in legal sports wagering services.

122 However, commentators have criticised the actual effectiveness of the IGA for several reasons, including the following:

122.1 The targeted prohibition approach under the IGA allows Australians to access any foreign-based sites that have not yet been the subject of the complaints scheme.¹⁴⁰

122.2 The enforcement of the IGA is questionable, particularly in view of the fact that the methods of filtering Internet content are not 100% effective in blocking access to online gambling sites by Australians.¹⁴¹ Australians can use other methods to circumvent the blocking mechanisms, such as calling an overseas service provider from

139 Australian Government Department of Communications, Information Technology and the Arts, *Review of the Operation of the Interactive Gambling Act 2001 Report* (July 2004).

140 See A Essa, "The Prohibition of Online-Casinos in Australia: Is it Working" 4 Queensland U Tech L & Just J 88.

141 See A Essa, "The Prohibition of Online-Casinos in Australia: Is it Working" 4 Queensland U Tech L & Just J 88.

Australia, using encryption, using anonymous proxy servers or assessing those sites that are not restricted.

123 In a draft report of the Productivity Commission dated October 2009,¹⁴² it was observed that by outlawing the provision of online gaming, the effect has been to limit the development of online gambling in Australia. However there was significant spending offshore (estimated at 4% of the gambling expenditure), reflecting the fact the Australian Government is not able to effectively enforce a ban on foreign suppliers. The Productivity Commission, in its draft report, recommended the repeal of the IGA and to allow online gambling, subject to a strict regime of consumer protection.

D. Hong Kong

(1) Introduction

124 Prior to the enactment of the Gambling (Amendment) Ordinance 2002, Hong Kong policy makers became concerned with the increasing number of unauthorised offshore bookmakers taking bets from Hong Kong through IDD and the Internet, some of whom even openly and extensively promoted their business and offered betting-relating services in Hong Kong.¹⁴³ The Gambling Ordinance was seen as being inadequate to deal with activities with an extraterritorial dimension, since the provisions in the Gambling Ordinance dealt with land-based gambling activities. The concern was that if actions were not taken, such activities would grow rapidly and the policy to restrict gambling opportunities to limited authorised outlets would be rendered largely ineffective.¹⁴⁴

125 Commentators have observed that, additionally, the Government had direct financial interest in the gambling activities.¹⁴⁵ The Hong Kong Jockey Club, is one of the largest betting houses in the world. It was reported in 2003 that the Hong Kong Jockey Club has an annual betting turnover of \$80bn and attracts some two million punters a year, and in fact, has the highest betting turnover per race in the world.¹⁴⁶ However, it was also reported in 2003 that the Hong Kong Jockey Club had seen its profits being channelled out of town as its annual turnover had been slipping.¹⁴⁷ It was

142 Productive Commission, *Draft Report: Gambling (Draft)* (October 2009).

143 Home Affairs Bureau, Gambling (Amendment) Ordinance 2002 (June 2002), available at <http://www.hkce.com/standards/note2.htm>.

144 Home Affairs Bureau, Gambling (Amendment) Ordinance 2002 (June 2002), available at <http://www.hkce.com/standards/note2.htm>.

145 See Rob Deans, "Legislative Developments in Hong Kong: The Hong Kong Jockey Club Fights Back", 7 Gaming L Rev 323 (October 2003) at 323–327.

146 See Rob Deans, "Legislative Developments in Hong Kong: The Hong Kong Jockey Club Fights Back", 7 Gaming L Rev 323 (October 2003) at 323–327.

147 See Rob Deans, "Legislative Developments in Hong Kong: The Hong Kong Jockey Club Fights Back", 7 Gaming L Rev 323 (October 2003) at 323–327.

reported that the Hong Kong Jockey Club contributes about 10% of the Hong Kong government's tax revenue.¹⁴⁸

(2) *Overview of Gambling Ordinance ("GO")*

126 The Gambling Ordinance (Amendment) Ordinance 2002 was enacted specifically to cover gambling over the Internet. Under the amended Gambling Ordinance ("GO"), all gambling activities are unlawful except when expressly exempted or authorised by the Government.¹⁴⁹ The sole authorised domestic operator is the Hong Kong Jockey Club.¹⁵⁰

127 The definition of "gambling" includes gaming,¹⁵¹ betting and bookmaking.¹⁵² "Bookmaking" is specifically defined as including the Internet as a means through which such activity can be done.¹⁵³

128 Any person, other than the Hong Kong Jockey Club, who operates gambling establishments or assists in the operation of gambling establishment commits an offence.¹⁵⁴ A person who engages in bookmaking commits an offence, including persons who receive bets from persons outside Hong Kong.¹⁵⁵ It is also an offence to bet with a bookmaker.¹⁵⁶

129 Accordingly, the GO prohibits the operation of Internet gambling services involving any foreign-based operator or local operator other than the Hong Kong

148 See Rob Deans, "Legislative Developments in Hong Kong: The Hong Kong Jockey Club Fights Back", 7 Gaming L Rev 323 (October 2003) at 323–327.

149 GO, s 3.

150 The Hong Kong Jockey Club operates pari-mutuel betting on horseracing, fixed odds and pari-mutuel betting on football and the Mark Six lottery. See PP de Sena, "Internet Gambling Prohibition in Hong Kong: Law and Policy" (2008) HKLJ 453.

151 "Gaming" is defined very widely as the playing of or at any game for winnings in money or other property whether or not any person playing the game is at risk of losing any money or other property. "Game" is in turn defined as "a game of chance and a game of chance and skill combined and a pretended game of chance or chance and skill combined, and also means any game whatever in which (a) a bank is kept by one or more of the players exclusively of the others; or (b) the chances of the game are not equally favourable to all the players, including among the players, the banker or other person by whom the game is managed or against whom the players stake, play or bet".

152 GO, s 2.

153 "Bookmaking" is defined as the "soliciting, receiving, negotiating or settling of a bet by way of trade or business whether personally or by letter, telephone, telegram or online medium (including the service commonly known as the Internet) or by any other means": GO, s 2.

154 GO, s 5.

155 GO, s 7.

156 GO, s 8.

Jockey Club. An overseas bookmaker commits an offence if he takes bets from someone in Hong Kong on the Internet. It is also illegal to place bets with an unauthorised operator and offshore Internet gambling websites, other than the Hong Kong Jockey Club. It should be noted that it does not matter whether the overseas operator may be licensed in its own home jurisdiction.¹⁵⁷

130 Betting with a bookmaker, whether the bet is received in Hong Kong or outside Hong Kong, is an offence. It carries a punishment of HK\$10,000 fine and three months' imprisonment on the first conviction, HK\$20,000 fine and six months' imprisonment on the second conviction and a fine of HK\$30,000 and nine months' imprisonment on the third and subsequent conviction.¹⁵⁸

131 It has been argued that on the construction of the legal framework in Hong Kong governing bookmaking may not cover some kinds of Internet gambling, namely, online lotteries and casino-style gambling. Such online lotteries and casino-style games should be governed under the provisions on the prohibition of the operation of gambling establishments, which arguably cover the Internet.¹⁵⁹

(3) *Advertisements*

132 The GO restricts advertisements on gambling activities, including prohibiting the promotion or facilitation of bookmaking¹⁶⁰ and the restriction of broadcasts of forecasts, hints, odds or tips via TV or radio on unauthorised horse and dog racing.¹⁶¹ Advertising or marking betting-related services and other acts to facilitate offshore booking are prohibited.¹⁶² In particular, the provision of banking services (*ie* facilitating the opening and maintaining of accounts and transmissions of deposits and winnings) fall within the scope of the prohibition.¹⁶³ Without such banking services, players will have to find other ways for the collection of deposits and bets and for payments, and it would be more expensive and inconvenient for them to do so.

157 The rationale for disallowing foreign-based operators targeting Hong Kong players, even though they are licensed in their home jurisdictions, was stated as allowing offshore bookmakers to operate legally in Hong Kong would make a mockery of the gambling policy of providing a limited number of authorised outlets and would put the authorised outlets at a disadvantage since they had to pay taxes. See Submission of Hong Kong SAR Home Affairs Bureau to Legco's Bills Committee on the Gambling (Amendment) Bill on 11 May 2001, available at <http://www.legco.gov.hk/yr00-01/english/bc/bc56/papers/1524e01.pdf>.

158 GO, s 8.

159 See PP de Sena, "Internet Gambling Prohibition in Hong Kong: Law and Policy" (2008) HKLJ 453. There is a difference as to whether such activities fall within "bookmaking" or operating gambling establishment, due to the differences in burden of proof and admissibility of evidence.

160 GO, s 16B.

161 GO, s 16E.

162 GO, s 16C.

163 GO, s 16C(1)(b)(iii-vi).

IV. Challenges and Options for Singapore

133 It is clear that the legislative framework on gambling in Singapore, which primarily addresses land-based gambling activities, and enacted prior to the introduction of the popularity of the Internet and the World Wide Web (“WWW”) as well as current policy towards controlled gambling, is inadequate to deal with the myriad online gaming and gambling activities, whether operating in or out of Singapore. It also falls behind other significant jurisdictions which have updated their laws to take into account the varied kinds of such relevant online activities listed in Section I of this paper. In particular, with reference to Section II of this paper:

133.1 The CGHA is unclear on the ambit of its operation and raises issues such as whether it covers a person who operates an online or virtual gaming house or a person who accesses such virtual gaming house.

133.2 The CGHA is over-inclusive, and appears to criminalise online gaming activities as distinct from online gambling, due to the wide definition of gaming in CGHA.

134 Based on the experiences of the other jurisdictions reviewed in this paper, a position can be expressly adopted on the legal framework dealing with online gambling and gaming. The options that have been adopted in other jurisdictions are:

134.1 Option 1 (US approach) – Enact legislation that expressly govern online gambling and target facilitators to online gambling websites. The US federal approach has directly enacted legislation to prohibit the acceptance of financial instruments for unlawful Internet gambling by gambling businesses. The US approach targets the facilitators to online gambling websites, particularly the financial services sectors and advertisers.

134.2 Option 2 (UK approach) – Directly regulate the acts of businesses or individuals that provide gambling facilities and premises by the granting of licences. Under the UK Gambling Act of 2005, anyone who wants to operate a remote gambling website will need to obtain an appropriate licence, and only the unlicensed provision of gambling activities and premises are criminalised.

134.3 Option 3 (Australian approach) – Enact legislation that prohibits the provision of online gambling services to domestic customers, but do not criminalise citizens or residents from accessing overseas online gambling services, and do not prevent the provision of online gambling services to customers in other countries. This is the approach under the IGA. Note, however, that there is a proposal to repeal the IGA and to liberalise online gaming.

- 134.4 Option 4 (Hong Kong approach) – Enact legislation to prohibit the operation of Internet gambling services involving any foreign-based or local-based operator but permit certain authorised domestic operators, and prohibit the placing of bets with unauthorised operators. This is the approach under the GO.

135 Any amendment, if appropriate, to the legislation in relation to online gambling should consider and deal with the following issues amongst others:

- 135.1 Provide clarity on the types of online gambling and ancillary activities that should be addressed by legislation.
- 135.2 Consider whether to impose criminal sanctions on the operators, Internet service providers (intermediaries), the individual gamblers, advertisers and/or financial intermediaries who are either engaged directly or who facilitate the prohibited activities.
- 135.3 Consider whether to extend the enforcement of criminal sanctions against persons that are not domiciled in Singapore and who are engaged in or who facilitate prohibited activities here.

136 The selection of an appropriate option for Singapore is ultimately a policy decision and this paper is not intended to make any recommendation on the appropriate policy decision. Instead, this paper highlights the ambiguities in the law given technological developments in the field of gaming and gambling, and is meant also to suggest that it is timely to review the existing gambling legislation.

ANNEX

OVERVIEW AND STATE-BY-STATE COMPARISON IN THE US

State	Dominant Factor Test Applied	Allows Social Gambling	Express Internet Prohibition
Alabama	Yes	Yes	No
Alaska	Yes	Yes	No
Arizona	No	Yes	No
Arkansas	No	No	No
California	Effectively, Yes	Yes	No
Colorado	Questionable	Yes	No
Connecticut	Yes	Yes	No
Delaware	Questionable	Yes	No
Dist. of Columbia	Yes	Probably	No
Florida	No	\$10 Limit	No
Georgia	Yes	No	No
Hawaii	Yes	Yes	No
Idaho	Yes	No	No
Illinois	No	No	Yes
Indiana	Yes	No	Yes
Iowa	No	No	No
Kansas	Yes	No	No
Kentucky	Yes	Yes	No
Louisiana	No	Yes	Yes
Maine	Yes	Yes	No
Maryland	No	No	No
Massachusetts	Yes	Unclear	No
Michigan	Yes	No	No
Minnesota	Yes	Yes	No
Mississippi	Yes	No	No
Missouri	Yes	No	No
Montana	Questionable	Yes	Yes
Nebraska	Yes	No	No
Nevada	Yes	Yes	Yes
New Hampshire	Yes	No	No
New Jersey	Yes	Yes	No
New Mexico	Yes	Yes	No
New York	Yes	Yes	No
North Carolina	Yes	No	No
North Dakota	Yes	Yes	No
Ohio	Yes	Yes	No
Oklahoma	Yes	No	No
Oregon	Yes	Yes	Yes
Pennsylvania	Yes	Unclear	No
Rhode Island	Yes	No	No
South Carolina	Yes	Yes	No
South Dakota	Yes	No	Yes
Tennessee	Questionable	No	No
Texas	Yes	Yes	No
Utah	Yes	No	No
Vermont	Questionable	Fine Only	No
Virginia	Yes	Yes	No
Washington	Yes	Yes	Yes
West Virginia	Yes	No	No
Wisconsin	Yes	No	Yes
Wyoming	Yes	Yes	No