

JOINT SUBMISSION

AUSTRALIAN INTERACTIVE MEDIA ASSOCIATION (**AIMIA**)
AUSTRALIAN MOBILE TELECOMMUNICATIONS ASSOCIATION (**AMTA**)
AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION (**ASTRA**)
FREE TV AUSTRALIA
INTERNET INDUSTRY ASSOCIATION (**IIA**)

REVIEW OF NSW GAMBLING LEGISLATION

February 2005



Introduction

AIMIA, AMTA, ASTRA, FREE TV AUSTRALIA and the IIA ("Associations") welcome the opportunity to comment on the Review report on the Unlawful Gambling Act 1998 ("UGA"), the Racing Administration Act ("RAA") and the Gambling (Two-Up) Act currently being conducted by the New South Wales State Government ('Review'). Of principal relevance to the Associations are those aspects of the Review relating to the UGA and the RAA.

The Associations

The Associations represent the digital content and carriage industries in Australia. – AIMIA representing the Australian interactive media industry; AMTA for mobile telecommunications industry; ASTRA representing subscription television platforms and channels; Free TV Australia for the commercial free-to-air television networks; and the IIA for the internet industry. A complete list of members of AIMIA, AMTA, ASTRA, Free TV and the IIA is attached as Annexure A.

As part of the provision of entertainment services across mobile, internet, free-to-air and subscription television broadcasting platforms, the Associations' members produce and distribute a broad range of games to consumers in NSW and nationally. This range includes:

- games downloadable from mobile and fixed portals (for example Java games available on a pay per play basis on Optus Mobile's Zoo platform and optuszoo.com.au);
- interactive games on broadcast channels (for example subscription television channels TV1's weekly trivia game) and internet portals (such as ninemsn's *Who Wants to Be a Millionaire* trivia game); and
- entire gaming subscription broadcast channels offering games such as space invaders and trivia, word and puzzle games. We understand examples of these have been provided in ASTRA's submission to the Review late last year.

In its Australian Entertainment and Media Outlook Report (2003), PriceWaterhouseCoopers (PWC) quoted the 2002 global market for interactive games to be worth \$A40.9b. Analysts expect to see the market for emerging platforms such as mobile technology, PDA and online games to increase as a proportion of the total game industry demand. Additionally, interactive television demand, which will be facilitated by increased access to broadband networks, is predicted to grow to \$US7 billion by 2010, with global demand for mobile game products doubling to \$US9 billion by 2010.

The Associations note that domestic demand for games has matched the global appetite for games, with Australian spending about \$A2.3m per day on interactive games alone. Increasing convergence between the games industry and distribution platforms such as subscription television, broadband and mobile devices is an important emerging trend.

The Emergence of the Digital Content Industry

Many of the games described above have become available following private investment in next generation technology, from upgrading to 2.5G and 3G digital signals in the mobile industry, to digitisation in the free and subscription broadcasting industries, to higher delivery speeds of data in the broadband Internet industry.

Such developments in availability and accessibility of digital platforms have brought many new and innovative entertainment services to Australian consumers. These platforms enable the online,

broadcast and wireless delivery of rich media content in the form of text, images, video and audio. Services are increasingly involving interactivity with the user manipulating content, communicating or entertaining. Examples include multiplayer online games, games downloadable to mobile phones, SMS competitions and interactive games offered by broadcast programs and channels.

These technological developments have spawned a new creative industry – digital content. Many creative organisations are increasingly engaged in the production and distribution of rich media content for delivery across mobile, broadband and broadcast platforms.

Digital Content Industry in NSW

The Allen Consulting Group report titled *'Digital Content: Creativity plus Connectivity'* ('the Allen Report') prepared for the NSW Government in September 2003 provided that preliminary estimates of digital content activities contributed approximately \$9.0 billion to the NSW economy in 2001-2. Although these statistics were prior to many of these new generation technologies becoming available (the launch of digital subscription television in 2004 and 3G mobile telephony), the Allen Report found that the digital content industry:

- provides some 157,000 jobs in NSW;
- accounts for 4.7% of total Industry Gross Product in NSW (on par with education and communication services and well ahead of traditional industries such as mining and agriculture); and
- gives NSW a leading position as the largest national exporter in the digital content production component accounting for 44% of Australia's exports of these sorts of goods and services (while NSW normally accounts for approximately 36% of Australian economic activity).

The Allen Report also noted that the simultaneous emergence of widespread access to digital networks, digital technology communicating over them, increased knowledge of the greater capability of the technology and increased interest in the product of these activities has raised the general ubiquity of digital content.

Legislative Support is Critical

A supportive and encouraging regulatory framework is critical to the ongoing viability, growth and development of the digital content industry in NSW. Legislation regulating games and gaming in NSW extends to games and gaming available via subscription and free television services, mobile telephone services and fixed and wireless Internet services.

The recent technological advances and the emergence of the digital content industry described above would not have fully been considered by the NSW Government when drafting the UGA in the late 1990's. As a consequence, the Associations have considerable interest in the Government's Review of this Act to ensure innocent games and gaming activities available to consumers across many delivery platforms are not inadvertently prohibited to the detriment and retardation of this industry at a critical time in its development.

The Unlawful Gambling Act 1998

The Associations believe that the terms of the UGA do not adequately reflect new technologies and entertainment services.

Greater legislative certainty is paramount to an optimally functioning private capital market for games investment and growth, the attraction and retention of skills base in the digital content industry in NSW, and continued consumer uptake of digital services encouraged by innovation in entertainment services.

The Associations appreciate that the Government's Report suggests that interactive games may *not* be captured by the prohibitions in the UGA. However, without legislative certainty, the Associations consider that the UGA would have 3 serious unintended consequences for New South Wales:

- it will deny the community the enjoyment and benefits of innocent games available across fixed, wireless, mobile, broadband and free and subscription broadcasting platforms.
- it will drive investment opportunities and jobs out of New South Wales thus jeopardising the State's position as the digital media hub in Australia and retarding consumer adoption of new technologies in New South Wales; and
- it will create an inefficient environment for business as New South Wales law is inconsistent with Commonwealth law. This plan will place uncertain restrictions on business opportunities in New South Wales's important game playing industry.

These unintended consequences of the Review and subsequent Report are of significant concern to the Associations and the digital content industry represented by the Associations.

Unlawful Gambling Act 1998

1. The unintended capture of innocent activities

The Associations acknowledge that the Report considers interactive games offered by the subscription television industry, for example, 'are unlikely to be considered 'unlawful games' as defined in the legislation. However, the Associations submits that many definitions contained in the legislation should still be tightened to avoid the unintended capturing of innocent activities offered across mobile, internet and free and subscription television broadcasting platforms to provide greater certainty to business, investment and the consumer.

Particular matters requiring clarification are discussed in detail below. However, as a starting point, it is the view of the Associations, that it is inappropriate and unnecessary to ban the supply of games where there is no wager or stake or no prize. It is our submission that no harm arises from playing games, whether they are games of chance, skill or mixed chance and skill, solely for amusement and banning them is not necessary in order to achieve the objective of harm minimisation.

Unlawful Game: Suggested matters for clarification:

- Games predominantly of skill or where skill determines the winner: The definition of 'unlawful game' in the UGA can be read to include games entirely of skill and skill based games involving some element of chance however small. The Associations believe that the definition should be clarified to avoid any doubt or disagreement in relation to the issue that games of skill are not considered to be gambling and that

this includes games predominantly of skill that may include an element of chance. For example, it should be clear from the terms of the Act that Scrabble is a game of skill even though there is chance involved in the selection of letters, that a quiz is a game of skill even though there is a chance element as to the questions that might be asked and that a game of Space Invaders is a game of skill even though there is a chance element as to the appearance and trajectory of the space invaders.

- A fee to play a skill based game is not “staked or risked” even if there is a cash prize: The Associations also believe that the definition should be clarified to avoid any doubt or disagreement that currently exists in relation to pay-per-play games involving skill based games. The two relevant limbs in the definition of unlawful game for the purposes of interactive games are ss5(1)(c) and 5(1)(h) of the UGA. Section 5(1)(c) is considered below in relation to prohibited gaming devices. Section 5(1)(h) requires that "money is staked or risked by a person on an event or contingency". The Associations note that paying an entry fee for playing a game (pay-per-play), where the fee is small and not proportionate to the potential prize (i.e. the prize does not increase if more money is paid) is most likely not a "stake or risk of money". However, the legislation does not contain a definition of stake or wager. Legislative certainty would be improved by amending the legislation to make it clear that the provision is not intended to prevent or restrict pay for play skill based games where the prize is money or has a money value.
- Games of skill provided by subscription permitted: The Associations acknowledge and agree with the statement at 4.6.6 of the Report that "games available by subscription do not entail any stake or risk of money ... [and are] unlikely to be considered to be unlawful games." However, the fact that this observation is stated in the report is accurately, directed at the possible application of the Act to subscription games. The Associations seek amendment to the Act to clearly state that the supply of games by subscription does not constitute a stake or wager even if there is a money prize for playing the game/s and the subscription is paid at regular intervals.

The Associations submit that the legislation should be amended remove ambiguity and increase certainty. It is submitted that, particularly arising from the issues identified above, the current definition of "unlawful game" can prevent innocent activities offered across mobile, Internet and free and subscription television broadcasting platforms. Clarification of the scope of the legislative prohibition would provide greater certainty to business, investment and the consumer and encourage investment.

The Associations appreciate the suggestion made in the Report that consultation with industry should occur to assist the Government in fully understanding the innocent types of interactive games and gaming offered by the subscription television industry. The Associations requests the same consultation opportunity to reflect the broader impact to the digital content industry with a view to providing certainty regarding the legal status of such services under NSW legislation.

Prohibited Gaming Device

The Associations are concerned about the broad type of activities that may be illegal by the prohibition of gaming involving a ‘prohibited gaming device’. The prohibition in the New South Wales legislation appears to be a response to concerns expressed in the 1995 Task

Force report¹ that various devices could be converted to enable gambling and which in turn would be difficult to prosecute – hence the desire to prohibit such activities.

The definition of 'prohibited gaming device' includes only games involving some element of chance. Therefore hardware for the operation of a game of skill will not be a prohibited gaming device and will not fall within the definition of 'unlawful game' through the operation of s5(1)(c).

However, many games that are educational or otherwise harmless to consumers involve an element of chance. The Associations believe the definition of "prohibited gaming device" should not prohibit amusement and educational devices that are not related to gambling.

The Associations appreciate that the Report concluded that there is a clear need to resolve the existing uncertainty in relation to this issue. The Associations is keen to further consult with the Government in relation to legislative solutions to ensure the definitions do not prohibit innocent games and accordingly provide legislative certainty to industry.

Gambling and the unintended capture of minor's innocent activities

The New South Wales legislation includes prohibitions on gambling with, or by, a minor. Gambling is defined to include gaming, betting and wagering. The broad definition of "gambling" could have the effect that children are prohibited from playing any type of game, including the innocent games featured on children's television programs and channels, internet portals or mobile and other wireless devices.

The Associations submit that the definition of "gambling" should be amended so that it only includes betting, wagering, and unlawful gaming (ie casino type gaming where money is staked). This would avoid a situation where children are prevented from playing harmless games that assist their learning and development, or are simply innocuous games played for entertainment.

Trade Promotions

As discussed above, the Associations submit that the prohibition under the UGA should only apply to gambling. It should not extend to games of chance provided only for amusement and, and not to games of skill, or to games of mixed skill and chance. The Associations note that in particular a prohibition on a game of mixed skill and chance has far-reaching and unintended applications, as most games of skill involve some element of chance.²

In addition to an exemption for interactive games not involving gambling, there should be clarification of the treatment of subscription services under the UGA and the Lotteries and Art Unions Act 1901 (NSW).

¹ Review of the New South Wales Gaming and Betting Laws Report of April 1995 of the Gaming and Betting Laws Task Force Review of the New South Wales Gaming and Betting Laws Report of April 1995 of the Gaming and Betting Laws Task Force

² In Scrabble, for example, the letters drawn are determined by chance – potentially satisfying a definition of mixed skill and chance.

Under the Lotteries and Art Unions Act trade promotion lottery games involving some element of chance may be granted a permit provided that certain conditions are met. One of these is that no entry fee is charged. However, making entry to the game or competition conditional upon the purchase of goods at normal retail price will not be considered an entry fee. . [As we have said above, in our view it should be possible to charge an entry free for a game of skill where there is a prize. We suggest that the Lotteries and Art Unions Act should be amended accordingly.

PrePaid / Remotely Stored Value Devices

The Review Consultation Paper suggests that the legislation should perhaps be amended to govern pre-paid/remotely stored value devices which are sold to persons in New South Wales and enable them to access various forms of gambling, including gaming, sports betting and racing.

The Associations note the Report recognised the potential for the use of pre-paid / remotely stored value devices to effectively circumvent the general requirement that only NSW licensed wagering operators be permitted to operate in NSW. The Associations further note the Review found that this matter should be further examined and the possible legislative options explored. (4.2.19).

The Associations welcomes this opportunity to further consult the Government in relation to the implications of prepaid services and stored value devices. The Associations submit that if any such amendment is made to the legislation, it should be drafted carefully so as not to prohibit the playing of lawful games with devices where fees for services are prepaid and to ensure that consumers are able to enjoy the benefits of payment mechanisms that take advantage of mobile devices and data networks.

2. Inconsistency with Commonwealth legislation

The Associations note in the Report that the NSW Government ‘remains opposed to interactive gambling, whilst recognising that it is appropriate for such forms of gambling to be regulated by the Australian Government’. The Associations appreciate that the NSW Government acknowledges the existing federal jurisdiction here, however, we are concerned that the existing wording of the NSW legislation does not adequately reflect this position.

The wide definition of "unlawful game" may ban many interactive games played in New South Wales regardless of the broadcasting, mobile or Internet distribution platform. This ban is inconsistent with the Commonwealth *Interactive Gambling Act 2001* (**Commonwealth Law**). The Commonwealth Law excludes lotteries, wagering on racing and sports events, and broadcasting links. The Commonwealth exception of broadcasting links in particular allows interactive gaming exclusively linked to a broadcast or promotes associated goods and services.

However the NSW Law and its broader definition of 'unlawful' game is likely to ban a number of innocent interactive television games. This remains at odds with the exemptions provided in the Commonwealth legislation.

The inconsistency between the Commonwealth and NSW Laws could drive new business opportunities to other States. The Associations notes the Allen Report produced for the NSW Government in September 2003 stressed the critical importance of retaining and developing digital content industries in NSW.

As stated earlier, there are many organisations based in New South Wales whose businesses rely on the production and distribution of innocent games to multiple distribution platforms.

The Associations recommend that NSW Law be amended to ensure that it does not ban interactive games and innocent gaming permitted by the Commonwealth Law.

3. Discrepancies between New South Wales and other state and territory legislation

Other Australian jurisdictions do not define the term "unlawful game" (or its equivalent) as broadly as the NSW Law does. Accordingly, the prohibitions on conducting unlawful gaming in those jurisdictions are not as far-reaching as in New South Wales. In particular, New South Wales regulates games of skill and games where no wager has been made. The Associations submit that the New South Wales legislation should be consistent with other jurisdictions so that gaming-related commercial activity is not restricted further in New South Wales than in other states.

Additionally, most of the members represented by the Associations offer their services nationally (rather than only state wide), creating compliance difficulties when legislation is inconsistent.

Consistent legislation will create greater certainty and efficiency for digital investment and jobs in NSW and greatly assist in retaining NSW as the digital content industry hub in Australia.

A brief summary of the relevant legislation regulating gaming in other States is set out in the attached Annexure B.

4. Third party liability for offences and the Racing Administration Act.

The IIA has actively worked with government to ensure that the policy objectives of the RAA, and other gambling legislation that seeks to achieve similar objectives, such as the Commonwealth Act, are achieved to the fullest extent practicable. However, as legislation of this type which seeks to prohibit unlawful gambling activity is often drafted in a manner which covers intermediaries (such as ISP's) that cause the relevant material to reach persons being protected by the relevant legislation, there has been developed a "safe harbour" principle which is entrenched as exceptions to relevant offence provisions.

The exemption in the RAA is contained specifically in Section 30(4) and Regulation 5 of the Racing Administration Regulations and provides a defence to members of the IIA to prosecutions brought for contravention of Section 30(3) provided that they are bound by the IIA Code of Practice at <http://www.ii.net.au/contentcode.html> - which provides for the takedown of sites which are in contravention of the NSW legislation. Similarly, the IIA

developed the Interactive Gambling Code of Practice <http://www.iaa.net.au/gamblingcode.html> for the purposes of Part 3 of the Commonwealth Act.

This work addresses issues such as inappropriate the access by minors to gambling sites and provides player protections to the extent that families wish to implement self-exclusion. We note that the policy objectives as restated in the Review traverse the same areas and we have been pleased to advance the delivery of these objectives through the empowerment and co-operative approaches embodied in our industry Codes.

It is noted that the Department is giving an expansive interpretation to the concept of “publish” in section 27 of the RAA and considers that material is deemed to have been published in NSW if it is capable of being viewed by a person present in NSW. “Publish” is defined broadly in Section 27 and may cover broadcasts or displays of webpages that are capable of being viewed in NSW.

The effect of this interpretation is that many of the members of the Associations may inadvertently be considered to be a publisher of material which falls within one or more of the prohibitions in Part 4 of the RAA. This risk is likely to be the accentuated as a result of legislation being enacted in the accordance with the Recommendation in paragraph 6.3.1.

The accordingly, we would seek to enter into discussions with the Department to ensure that “safe harbour” principles are enacted which grant exemptions to relevant members of the Associations. In other words, it is submitted that:

- The exemption contained in Section 30(3) and Regulation 5 should be extended to all possible contraventions of the prohibitions contained in Part 4 of the RAA which might apply to members of the Associations, including any extension to the prohibitions in the RAA and any new prohibitions introduced in the accordance with the Report; and
- That exemption should apply to all members of the Associations making this submission.

There is little analysis in the Report on the matters referred to in paragraph 6.2.11 and 6.2.12 and the Recommendation in 6.3.1. This issue, particularly in connection with spam, has been the subject of extensive review at the Federal level and is the subject of Federal legislation. As a result, the Associations submit that the Federal Spam Act is the means by which spamming should be regulated and that separate provisions should not be included in the RAA. To do so would lead to “double-regulation” and may result in the issue being addressed in an inconsistent manner. In addition, it would mean that NSW has an added level of regulation not existing in the laws of other states and territories and therefore result in a disincentive for members of the Associations to conduct business in NSW.

In our submission, the advent of the Internet, national mobile coverage and a substantial reduction in the cost of communication generally makes it inevitable that persons located in any one State will contact and use services located in other States. We respectfully submit that legislation which attempts to prevent users and/or services from communicating within Australia may be open to constitutional challenge and is likely to be difficult if not impossible to enforce.

There may also be practical difficulties with the proposed law in that an email address does not disclose and is not connected to any geographic location of the addressee. Many email sent to persons normally located outside the State are received and read within the State

The Associations makes no additional comment with regard to the Review at this time, but seeks the opportunity to comment on any proposed legislative amendments that may arise from the Review.

Further, the Associations requests an opportunity to further discuss this submission and to demonstrate many of the innocent games which are potentially caught by the New South Wales legislation.

The Associations would like to acknowledge the assistance of Patrick Fair of Baker & McKenzie and Jamie Nettleton of Addisons in preparing this submission.

For further information, please contact Mandy Pattinson: ph 9342 9719, or the respective industry associations represented by the Associations as follows:

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IIA:	Peter Coroneos:	CEO IIA	<u>026 232-6900</u>

Annexure A

Members of the Industry Associations Represented in this Submission

AIMIA

<http://www.aimia.com.au/i-cms?page=782>

AMTA

AMTA members are listed on page 28 of the Annual Report available from:

<http://www.amta.org.au/default.asp?id=369>

ASTRA

<http://www.astra.org.au/members.asp>

Free TV Australia

<http://www.ctva.com.au/control.cfm?page=factsmember&pageID=122&menucat=1.2.106.122&Level=3>

IIA

<http://www.ia.net.au/members.html>

Annexure B

Regulation Of Unlawful Games In States Other Than In New South Wales

1. Australian Capital Territory – Unlawful Games Act 1984

Games unlawful in the ACT are games of chance, and any other game of skill or chance, or of mixed skill and chance, in which money or any other valuable thing is staked or risked on an event or contingency. Where no valuable thing is staked on a contingency, then a person is free to conduct, operate or promote a game of skill or a game of mixed skill and chance.

The Interactive Gambling Act 1998 is also in force in the ACT. This Act provides a scheme for licensing the commercial supply of interactive games where the winner of a prize is decided wholly or partly by chance or by Skill.

2. Northern Territory – Gaming Control Act 1993

An unlawful game includes:

- (a) games of chance, and games partly of skill and partly of chance, where money or goods are gained or disposed of; and
- (b) games in which a person derives a percentage, part or share of the amount or amounts wagered, staked or played for or for which a charge is made.

A person is free to conduct all games (including games of chance) as long as no property is disposed of by way of the game and there is no associated wagering.

3. Queensland – Vagrants, Gaming and Other Offences Act 1931

It is an offence in Queensland to give or sell a chance in an unlawful game in Queensland. An "unlawful game" is defined to include:

- (a) the disposal of money or other property by lottery or chance or by mixed chance and skill; and
- (b) all games with cards, dice, or other instruments from which a person derives a percentage of the amount wagered or bet.

Games of skill and games that do not involve an element of wagering or disposal of property can be freely conducted in Queensland.

The Interactive Gambling (Player Protection) ACT 1998 is also in force in the Queensland. This Act provides a scheme for licensing the commercial supply of interactive games where the winner of a prize is decided wholly or partly by chance or by skill.

4. South Australia – Lottery and Gaming Act 1936

The South Australian legislation prohibits carrying on unlawful gaming. Unlawful gaming includes playing any game with cards or other instruments, or with money, in which any person derives (other than in his capacity as a player) any part or percentage of any money or thing played for, staked or wagered.

Where no property is disposed by way of the game and there is no associated wagering, then a person is free to conduct games of chance and games of skill.

5. **Tasmania – Gaming Control Act 1993**

Offences relating to conducting gaming as a business only apply to "gaming." "Gaming" means wagering in a contingency relating to a game. In the absence of any associated wagering, a person is free to conduct a games business in Tasmania.

6. **Victoria – Gambling Regulation Act 2003**

In Victoria, the term "unlawful game" includes any game in which the chances are not equally favourable to all players (including the person operating the game), and any game with cards or other instruments of gaming from which a person derives a share of the amounts wagered. Games of skill are therefore lawful, provided that there is no wagering on the game. Games of chance and games of mixed skill and chance are also lawful, provided that the chances are equally favourable to all players, and there is no wagering on the game.

7. **Western Australia – Gaming and Wagering Commission Act 1987**

In Western Australia, it is an offence to conduct thimblorig, unauthorised two-up, casino games (as authorised to be played in casinos but not elsewhere), poker machines, or any game similar to those games where the chances in that game are not equally favourable to all of the players. Any game of chance at a public place, or any game of chance to which the public have or are permitted to have access, will also be considered an unlawful game. However, there is no prohibition on conducting games of chance in private, or on conducting games of mixed chance and skill in public or private.

Annexure B

Examples of the games offered by the digital content industry are best displayed live and we would be delighted to demonstrate them at an appropriate time.