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Department of Families, Housing, Community Services  
and Indigenous Affairs

Dear [REDACTED]

**Measures to address problem gambling — Commonwealth power to legislate**

1. Thank you for asking us, in your email of 26 October 2010, to advise you about the Commonwealth's power to legislate to address issues associated with problem gambling.
2. Your specific question, and our short answer to that question, are set out below, followed by relevant background and further discussion relating to the reasons for our answer.

**QUESTION AND SHORT ANSWER**

**Question**

3. *Having regard to the relevant classes of persons and entities,<sup>1</sup> does the Commonwealth have legislative power under the Constitution to establish a legislative scheme with the following key features:*
  - *in relation to electronic gaming machines (EGMs):*
    - *a full pre-commitment scheme that is uniform across all States and Territories and machines;*
    - *dynamic warnings and cost of play displays; and*
    - *national standards; and*
  - *in relation to automatic teller machines (ATMs) in gaming venues:*
    - *a national daily withdrawal limit?*

*In answering this question, please consider:*

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<sup>1</sup> The relevant classes of persons and entities are those identified in the background at paragraphs 7-8 and, more specifically, in the reasons for our answers in paragraphs 12 (see the table under that paragraph), 19, and 23.

- *whether the Commonwealth has legislative powers to enact regulation in respect of regulating poker machines involving the trade and commerce power, the corporations power and the power with respect to telecommunications; and*
- *whether the Commonwealth has power in respect of the corporations that supply, service and operate poker machines that have trans-State operations.*

**Short answer**

4. Although the Commonwealth does not have specific plenary power to legislate in relation to gambling, there are a number of constitutional heads of power that provide the Commonwealth Parliament with extensive power to legislate for the regulation of relevant classes of persons and entities in relation to these matters. In summary, these heads of power include the powers relating to corporations (in s 51(xx) of the Constitution), trade and commerce (s 51(i)), telecommunications (s 51(v)), banking (s 51(xiii)), currency (s 51(xii)), taxation (s 51(ii)) and territories (s 122).<sup>2</sup>
5. These heads of power can provide, separately or in combination, varying degrees of coverage of the issues and entities you have identified, and different avenues for enforcing compliance. A combination of powers could be relied on to regulate all relevant persons and entities in respect of all matters listed in your question.
6. In brief, the primary options for legislating in these areas are as follows:
  - Option 1: **direct regulation** of most, but possibly not all, of the relevant entities<sup>3</sup> – see below at paragraph 10 onwards;
  - Option 2: a **taxation-based regulatory scheme** covering all of the relevant entities<sup>4</sup> – see below at paragraph 16 onwards; and
  - Option 3: a **combination of taxation and direct regulation**, covering all of the relevant entities – see paragraph 22 onwards.

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<sup>2</sup> An additional head of power could be found in s 51(xxxvii) if the States referred to the Commonwealth power to legislate in relation to gambling, however, this advice focuses on the Commonwealth's power to legislate in relation to gambling independently of any State action.

<sup>3</sup> Relying on s 51(xx) of the Constitution, possibly supplemented by ss 51(v), 51(xiii) and 122.

<sup>4</sup> Relying on s 51(ii).

## BACKGROUND

7. The Productivity Commission Inquiry Report into Gambling (23 June 2010) ('the Report') made 48 recommendations to minimise harm from problem gambling, including:
  - a) setting daily withdrawal limits for ATMs in gambling venues;
  - b) making design changes to EGMs, including, in brief:
    - (i) a full 'pre-commitment system', which is offered to all consumers at the beginning of play, and allows players to set spending limits. Once the spending limit is reached, further play will be prohibited for a set period of time. The system should be at least jurisdiction-wide (covering all machines and venues) to reduce opportunities for customers to continue to play EGMs at another venue after the pre-commitment limit has been reached; and
    - (ii) electronic dynamic warnings, which display when the style of play is indicative of significant potential for harm; and
    - (iii) cost of play displays, indicating the 'expected' hourly expenditure and percentage cost of play. Initially this would be signs displaying general 'cost of play' information based on some customary styles of play, with the intention that by 2016 all gaming machines should be required to display electronically the cost of play based on an individual's style of playing and the percentage cost of playing.
8. On 2 September 2010, the Prime Minister, the Hon Julia Gillard MP, and the Member for Denison, Mr Andrew Wilkie, agreed a number of reforms to address problem gambling, as well as a timetable for implementation. In summary, this agreement requires:
  - introduction of a full pre-commitment scheme that is uniform across all States and Territories and machines to commence in 2012, with the full pre-commitment scheme commencing in 2014;
  - supporting the Report recommendations in relation to EGM electronic dynamic warnings and cost of play displays;
  - implementing a daily withdrawal limit of \$250 for ATMs in gaming venues (excluding casinos); and
  - the Commonwealth to commission and receive, no later than 1 February 2011, comprehensive legal advice about the Commonwealth's constitutional competence and prospects for successfully legislating in this area.
9. The discussion below relates to how these proposals may be implemented through legislation enacted by the Commonwealth Parliament.

## DISCUSSION

### **Option 1: direct regulation, based on the corporations power and other constitutional heads of power**

10. A direct regulation approach involves requiring certain behaviour, and imposing sanctions or penalties for non-compliance.
11. The Commonwealth could rely on a range of relevant constitutional heads of power to support direct regulation of issues relating to gambling, most relevantly:
  - the corporations power in s 51(xx), which supports regulation of 'foreign corporations, and trading and financial corporations'. Whether an entity is such a 'constitutional corporation' will depend on whether and where it is incorporated, and (for trading corporations) the nature of its activities. It may be that most (if not all) licensees or operators of larger hotels and casinos would be constitutional corporations, through being either foreign or trading corporations. Clubs that are incorporated and whose trading activities constitute a significant proportion of their overall activities are also likely to be trading, and therefore constitutional, corporations (although this is a matter of fact and degree, to be considered in each case);
  - the trade and commerce power in s 51(i), which supports regulation of 'trade and commerce with other countries, and among the States'. This could encompass regulation of suppliers that import EGMs, or that manufacture or purchase EGMs in one State and sell them on to gaming venues in other States;
  - the telecommunications power in s 51(v), which supports regulation relating to 'postal, telegraphic, telephonic and other like services', including the Internet;
  - the currency power in s 51(xii), which supports regulation of 'currency, coinage, and legal tender'. This could include regulation of non-bank ATMs (or equivalent machines that dispense currency);
  - the banking power in s 51(xiii), which supports regulation of 'banking, other than State banking' that does not extend beyond the limits of the State, and the 'issue of paper money', including through ATMs; and
  - the territories power in s 122, which supports regulation relating to the territories of the Commonwealth (including, most relevantly the Northern Territory and Australian Capital Territory). This could include both regulation of entities located within a territory, and other entities which have commercial dealings with the territory-based entities.

### ***What the scheme could look like***

12. The table below identifies obligations and prohibitions that could be imposed in reliance on the heads of power listed above, and entities on which those obligations and prohibitions could be imposed. The legislation imposing these requirements

could also, in reliance on the heads of power identified in the table, provide for mechanisms for enforcing compliance. Enforcement measures could include, for example, civil and criminal penalties, or injunctions.

<b>Direct regulation of relevant classes of persons and entities</b>		
<b>Entity</b>	<b>Obligation or prohibition</b>	<b>Constitutional head of Commonwealth legislative power</b>
Gaming venue owners or operators that are constitutional corporations	Prohibit the acquisition or making available of EGMs which do not have the required features (in particular, pre-commitment and warnings features) or which have not been approved through an approvals process.	s 51(xx) corporations
Gaming venue owners or operators that are constitutional corporations	Impose requirements relating to implementing gaming standards or policies (such as displaying warnings, connecting to remote systems relating to pre-commitments and warning display, or displaying and adhering to national gaming venue standards <sup>5</sup> ).	s 51(xx) corporations
EGM manufacturers in Australia that are constitutional corporations	Prohibit the manufacture or supply (to specified persons/venues or generally) of EGMs that do not have the required features or approvals.	s 51(xx) corporations
Importers of EGMs in Australia that are constitutional corporations	Prohibit the importation or supply (to specified persons/venues or generally) of EGMs that do not have the required features or approvals.	s 51(i) corporations

<sup>5</sup> These could relate to, for example, cheque-cashing restrictions, shutdown periods for EGMs, staff training, method of payment of EGM prizes, etc..

EGM suppliers that import EGMs (whether or not they are constitutional corporations)	Prohibit the importation, and the initial sale after import, of EGMs that do not have the required features or approvals.	s 51(i) trade and commerce
EGM suppliers that supply EGMs across State or Territory borders	Prohibit the making of inter-state sales of EGMs that do not have the required features or approvals.	s 51(i) trade and commerce
Suppliers, owners or operators of ATMs in gambling venues	Impose daily withdrawal limits on ATMs in gaming venues.	s 51(xx) corporations s 51(xii) currency s 51(xiii) banking
Gaming venues located in the Territories (such as NT or ACT)	Impose requirements in relation to owners or operators of, or suppliers or manufacturers of items to, Territory-based gaming venues. For example, owners or operators of Territory-based venues could be prohibited from acquiring or making available non-compliant EGMs.	s 122 territories
Owners or operators of EGMs that are connected to the Internet	Impose requirements relating to the use of Internet services, for example, to utilise the remotely-operated warnings and cost of play systems. Owners and operators of EGMs that are constitutional corporations, or which are located in a Territory, could also be required to connect an EGM to the internet if it was not already connected. <sup>6</sup>	s 51(v) telecommunications
Entities that service EGMs and which are constitutional corporations	Impose requirements relating to the servicing activities, for example, prohibiting the entities from servicing unapproved EGMs.	s 51(xx) corporations

<sup>6</sup> Relying on the corporations power or territories power, as relevant.

**Features of direct regulation**

13. A significant benefit of the direct regulation approach is that the types of direct and incidental obligations and requirements that can be imposed directly can be very broad, provided that there is a relevant nexus with the head of constitutional power being relied on. Further, the Parliament can prescribe a range of penalty and compliance mechanisms, such as civil penalties, criminal penalties and injunctions. (These features can be contrasted with those of the taxation approach in Option 2.)
14. However, as noted above, the Commonwealth's power to directly regulate in respect of gambling is not plenary. However, if there are entities that the Commonwealth wishes to regulate that fall outside of the scope of the heads of power identified above,<sup>7</sup> the Commonwealth could also rely on the taxation power<sup>8</sup> to regulate those entities using a taxation based scheme. A taxation based regulation approach could be used as a basis for the entire regulatory scheme (see Option 2 below), or alternatively to supplement a direct regulation scheme (see Option 3 below).
15. We note for completeness that there are some general constitutional limitations, which will apply in relation to any legislative scheme. These are summarised below at paragraph 24.

**Option 2: taxation-based regulation**

16. A taxation-based scheme, enacted in reliance on s 51(ii) of the Constitution, could provide comprehensive coverage of the persons and entities that operate in the gaming industry, by requiring all relevant entities to meet certain standards or conditions in order to avoid having to pay a tax. Section 51(ii) allows the Commonwealth to make laws with respect to 'taxation, but so as not to discriminate between States or parts of States'.
17. This approach operates by imposing a tax burden on all relevant entities to encourage compliance with relevant requirements. This can be contrasted with the civil or criminal penalties (for example) that may be imposed as part of a direct regulation scheme.

**What a tax-based scheme would look like**

18. The primary features of a tax-based regulatory scheme are:
  - the legislation imposes an obligation to pay a tax (or taxes) on defined liable entities (which may be any legal entities); and

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<sup>7</sup> For example, owners or operators of gambling venues that are not constitutional corporations or located in a Territory.

<sup>8</sup> s 51(ii) of the Constitution.

- the legislation also provides that a liable entity will not be liable to pay the tax if they meet specified conditions, or undertake specified actions.
19. For example, the scheme could operate so that:
- any **supplier of EGMs** must pay an amount to the Commonwealth, by way of a tax, if it manufactures or supplies EGMs that do not have the specified features (such as pre-commitment scheme programming or dynamic warning programming and display screens) or if the EGM has not been 'approved' through a prescribed process;
  - any **importer of EGMs** must pay a tax to the Commonwealth for importing or supplying EGMs without the specified features;
  - any **owner or operator of a gaming venue**:
    - must pay a tax for acquiring EGMs without the specified features for use in the venues (or which are not 'approved'), or for making such an EGM available for use;
    - must pay a tax if the venue does not display and implement specified national standards for gaming venues; and
  - any **supplier of ATMs to gambling venues** must pay a tax in respect of any ATM in a gambling venue that does not meet prescribed daily limit programming requirements.
20. Under this type of scheme, the rate of the taxes would be set at levels which would create incentives for the relevant entities to avoid the tax (by complying with the prescribed requirements). The rate could be varied according to relevant characteristics of the liable entities - for example, the rate of the tax could be set according to the amount of revenue generated by EGMs at the venue. There is scope under the taxation power to impose a relatively high rate of taxation.

***Features of a tax-based scheme***

21. The primary benefit of the taxation approach is that it can apply to *any* legal entity, including individuals, corporations, and unincorporated associations. The taxation power can therefore support comprehensive coverage of relevant persons and entities. Alternatively, the taxation approach can be used to supplement the scope of the Commonwealth's direct regulation powers — see Option 3.

**Option 3: a combination of tax-based regulation and direct regulation**

22. A third approach would be to combine the tax-based approach with direct regulation that falls within the scope of the corporations and banking powers. For example, this approach could operate so that:
- direct regulation is used to implement aspects of the scheme where a head of power is able to provide appropriate coverage of the relevant entities; and

- the tax-avoidance incentive approach is used where direct regulation is not able to be comprehensive.
23. For example, if the Department concludes that there is a significant number of gaming venue operators that cannot be directly regulated (because they are not constitutional corporations):
- the banking power, and associated other powers, could be relied on to directly regulate daily withdrawal limits on ATMs at gaming venues (as described in Option 1);
  - the corporations power could be relied on to directly prohibit the manufacture or sale by constitutional corporations of EGMs that do not contain mandatory pre-commitment programs and/or pass prescribed approval processes (as described in Option 1);<sup>9</sup> and
  - a tax could be imposed on gaming venue owners or operators that do not implement prescribed national standards, or meet other prescribed conditions relating to the operation of the venue (as described in Option 2). Alternatively, a tax could be imposed on any unincorporated entity that operates a gaming venue to encourage venue operators to incorporate. As (likely) constitutional corporations, they could then be directly regulated in accordance with s 51(xx).

#### **Other general constitutional requirements**

24. Other constitutional requirements may be relevant to any legislative scheme, including:
- the requirement, in s 51(xxxi), that Commonwealth legislation not compulsorily acquire property otherwise than on just terms;
  - requirements in relation to legislation imposing taxation (s 55), including that legislation imposing taxation deal only with one subject matter of taxation, and not deal with matters other than matters relating to the imposition of the tax;
  - the preservation of free trade between the States (s 92); and
  - the requirement that laws relating to trade, commerce and revenue must not give preference to one State (or part of a State) over another State (or part of a State) (s 99).
25. It would be possible to regulate the matters you have identified in a manner consistent with these requirements. Consequently, these requirements are unlikely to impact significantly on these proposals. We, in conjunction with the Office of Parliamentary Counsel (OPC), can further advise on developing any

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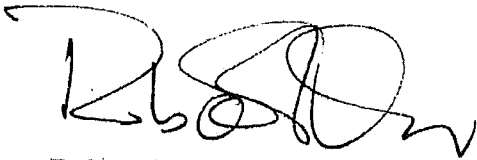
<sup>9</sup> This assumes that most, if not all, manufacturers and importers of EGMs would be constitutional corporations. If the Department concludes that this is not likely to be the case, a tax-based approach may be useful here as well.

Commonwealth legislation in accordance with these requirements, if and when a Commonwealth scheme for regulation of gambling is developed.

**FURTHER ASSISTANCE**

26. Please contact any of us if you would like to discuss this advice or if we can provide further assistance.

Yours sincerely



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