

April 26th, 2022

Dr Stephen Kennedy PSM
Secretary to the Treasury
Langton Crescent
PARKES ACT 2600
By email: digitalgames@treasury.gov.au

Dear Dr Kennedy

The following correspondence is a submission from the International Social Games Association (ISGA) to be considered as part of the consultation Treasury is conducting on exposure draft legislation and an accompanying Explanatory Statement for the introduction of a Digital Games Tax Offset (DGTO) in Australia. The ISGA welcomes the opportunity to make a submission.

About the International Social Games Association

The ISGA (www.i-sga.org) is a global non-profit industry association established to develop and communicate best global practices in non-gambling gaming (or social games) in consultation with public policy-makers and regulators around the world. The ISGA represents a full cross-section of social games businesses and about 80 per cent of the social casino games market globally. Members of the ISGA include Playtika, Zynga, PlayStudios, Greentube, SciPlay, Pixel United, IGT, GSN and Huuuge. Since 2012, the ISGA has taken the lead in promoting responsible standards for the social casino sub-sector of social games and, by extension, the social games industry as a whole.

ISGA promotion of safe play by consumers

The ISGA promotes safe play by consumers, in particular through the “Smart Social Gamers” website. This website, www.smartmobilegamers.org, provides guidance, tips and expert advice to help ensure that players of social games have a positive mobile games experience. The ISGA believes passionately in giving gamers and those that care for them the tools and advice they need to have a positive gaming experience. The ISGA partnered with some of the world’s most respected digital safety organisations and experts to create the site, including the (US) Family Online Safety Institute, Childnet International, Project Rockit and Dr Richard Graham, a leading consultant and adolescent psychiatrist.

ISGA Best Practice Principles

Since its formation, the ISGA has had in place a set of Best Practice Principles based upon core values of consumer protection, accountability and transparency. The principles, which are outlined at the end of this submission (below), aim to shape a consistent and complementary global framework for the social games industry. The ISGA is proud to be taking the lead in promoting responsible standards for the sector and we are committed to continued review as research and understanding develop. The latest version of the ISGA Best Practice Principles is Version 5.0 and it was publicly released in February 2022.

The full text of the ISGA Best Practice Principles can be downloaded by clicking [here](#). We have also attached a copy to accompany this letter.

The ISGA is proud that our Best Practice Principles have been endorsed by the Australian Government:

“The International Social Games Association (ISGA), the global industry body for social games companies (including simulated gambling games) specifically discourages its members from promoting simulated gambling products to users under the age of 18 years. The ISGA also provides an online resource called ‘Smart Mobile Gamers’ to give guidance, tips and advice on topics such as parental controls and managing in-game spending. It has partnered with digital safety organisations and experts to create this website.”¹

Other ISGA industry-leading initiatives

Several ISGA members have participated in the World Health Organisation #PlayApartTogether campaign during the coronavirus pandemic.

The ISGA is committed to working with policy-makers in researching the online games sector and has invested in and published independent research, based on real player data (www.isga.org/research/).

ISGA supports the DGTO

ISGA members support the introduction of the DGTO and therefore, the Association is keen to work co-operatively with the Treasury and other government (and industry) stakeholders to ensure the DGTO is legislated in a timely and effective way. As Treasury is aware, the DGTO will strengthen Australia’s digital games industry by, among other things, expanding employment opportunities in the industry and make Australia a more attractive place for foreign investment in the industry.

The ISGA acknowledges the policy intent of government that a game “which contains gambling elements” or “gambling-like practices” should not be eligible for the DGTO and that this policy is intended to “exclude digital games that substantially comprise, have reliance on or give prominence to certain types of ‘loot boxes’”.

The ISGA also notes that if the legislation is passed in its current form, the Arts Minister will issue guidance “to assist taxpayers to understand how the definition of ‘substantially comprises gambling elements’ including in relation to loot boxes will be applied in practice”.

The ISGA’s comments on the exposure draft legislation and Explanatory Statement are designed to enhance the legislation by future-proofing the wording.

No social games in the Australian market constitute gambling

When the Australian Government and other public policy-makers are considering regulation of social games, it should be recognised that there are no social games in the Australian market that constitute gambling. According to Australia’s Interactive Gambling Act 2001,

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https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Online_ageverification/Government_Response

there are three elements which define a gambling game – consideration, chance and prize. A game which is classified as gambling is:

- A game which is played for money or anything else of value;
- A game of chance or of mixed chance and skill; and
- A game where a customer of the service (i.e. the game) agrees to give consideration to play or enter the game.

Social games - including casino-style social games - have chance and may have consideration, but never have a prize. Therefore, they cannot be classified as gambling.

Key definitions in an evolving area

The following is designed to assist Treasury's understanding in relation to key definitions directly relating to social games.

Social or casual games are part of the broad media landscape that includes movies, TV, video-on-demand, social and console video games. The social element involves people playing with or against their friends, participating in leader-boards or sharing and comparing their progress via a social network. The growth of social games has been fuelled by the broader consumer move towards mobile devices and online social platforms, and changes in the way people access, play and pay for games.

The optional pay-to-play or "freemium" model was developed in the earlier days of the internet in response to fraudulent software and the fact that consumers do not pay up-front for online content (e.g. [Video games embrace China's freemium model to beat piracy](#))². Social games are generally based on this monetisation model, meaning that access and play is free, with certain additional and special features available for a fee (via in-game purchases). "Virtual goods" (items such as extra lives, tools or maps that a player can win, earn or buy using real money during gameplay) are used to enhance in-game experience, and have no use or value outside of the game. The freemium monetisation model is such that the vast majority of social gamers (95-99 per cent) spend no money whatsoever³.

"Social casino" or "casino-style" games are a sub-genre within social games. They take inspiration from well-known chance-based games that are often found in real-money casinos (such as slot machines) and deliver them in the innovative way in terms of social mechanics, design and gameplay that is typical of social games. As a casual game, they are typically played in short time bursts, on the move, rather than heavy-time periods that can be characteristic of hyper-immersive massively multi-player online role-playing games.

The model for these games (e.g. social games slot machines) is the same as it is for other freemium games. Games are free to download and enjoy, and rely on in-game advertising and in-game purchases to achieve revenue. As is typical across all types of social games, the vast majority of social casino game-players never make an in-game purchase. It is not

² <https://www.bbc.co.uk/news/technology-20899165>

³ The Freemium Monetization Model Revenue Split; Information Provided by the Casual Game Association (2012)

possible to win money in any legitimate genre when playing causal games, whether they are match 3 games, card games, social casino games or otherwise.

Comments – exposure draft legislation/Explanatory Statement

The wording in the exposure draft legislation and Explanatory Statement, which includes examples of games with gambling elements that are intended and are not intended to be eligible for the DGTO, introduces for the first time in Australia (and globally), a legislative definition of social games which have gambling elements. This, in turn, has significant consequences beyond eligibility for the DGTO. The ISGA believes it will establish a negative, unintended precedent in a fast-moving and rapidly-changing area of technology and enterprise.

The ISGA, respectfully, suggests that the draft legislation and Explanatory Statement as currently worded will cause market uncertainty and risks defeating the intention of the DGTO, which, as we understand it, aims to make Australia a more attractive, competitive environment for global game developers.

ISGA's three primary concerns

1 – Risks with using legislation to segment social games

Over the past 10 years, in Australia and globally, a series of government and parliamentary inquiries have considered incorporating a definition of social games into gambling legislation. These efforts have all failed to progress.

Throughout, a major factor has been the lack of evidence of harm and applicability of a pre-existing patchwork of broad-based consumer protection law⁴. Still representative are the findings of the 2015 UK Gambling Commission landmark scoping review of social gaming, which found “no compelling reason...to impose additional regulation on the social gaming sector given that it is already subject to extensive consumer protection legislation”⁵.

They have also encountered significant definitional and enforcement difficulties. Below are two examples from Australia, where attempts to segment casino-style social games by way of primary legislative instrument have failed.

In 2013, the Interactive Gambling Amendment (Virtual Credits) Bill sought to incorporate virtual items and currency into a definition of money's worth under the Gambling Act⁶. The bill was referred to the Joint Select Committee on Gambling Reform (JSCGR) for inquiry. In recommending that the bill not be passed, the JSCGR extensively referenced observations from then Department of Communications, Broadband and the Digital economy (DCBDE), including that:

⁴ In 2015, the UK Gambling Commission concluded its landmark scoping review of the social games sector, finding: ‘

⁵ <https://cliftondavies.com/wp-content/uploads/2015/02/Social-gaming-January-2015.pdf>

⁶ <https://www.lexology.com/library/detail.aspx?g=11bf1a4f-55d6-493f-9b6c-8f5de99af3cd>

- Games played with virtual currency do not fall under the definition of gambling under the Interactive Gambling Act as virtual currency is not redeemable for real money or anything else of value;
- Consumers can choose to purchase virtual chips, but it is possible to play many of these games without making these purchases;
- A key difficulty in attempting to prohibit gambling-like applications that allow the purchase of virtual currency with real money would be defining such games in a way that did not inadvertently capture other games that contain some gambling elements;
- Australian consumers benefit from strong legal and regulatory protections under the Australian Consumer Law; and
- Research is “at an embryonic stage”.

In conclusion, JSOGR recommended:

“Given the definitional and enforcement difficulties, the committee supports addressing the issue through the provision of better information to parents, targeted research and enlisting the cooperation of the relevant stakeholders.”⁷

In 2020, the Interactive Gambling Amendment Bill⁸ sought to ban social casino games in Australia sought to amend the Interactive Gambling Act to include the term “prohibited social casino service” as a “designated interactive gambling service”. A legal test for “prohibited social casino service” was proposed.

Certain criticisms of the bill, which progressed to a house committee before dropping from the Notice Paper, are outlined in the [Scrutiny Digest 8 of 2020](#). We, respectfully, suggest that the bill would have encountered comparable definitional and enforcement difficulties to those raised by JSOGR when examining the Interactive Gambling Amendment (Virtual Credits) Bill 2013, as outlined above, not least because virtual currency is ubiquitous and that a balance of skill and chance informs virtually all causal games and, more fundamentally, because both bills work on a misplaced presumption that social games can be conceptually separated from the wider industry.

By cross-regulatory comparison, a report from October 2019 into loot-boxes and other gambling-like features in games, the Swedish Consumer Protection Agency cited both a lack of causal evidence of harm and legislative complexity in favouring self-regulatory solutions based upon an existing framework of consumer protection law:

The International Social Games Association (ISGA) has published “Best Practice Principles” ... The Swedish Consumer Agency welcomes measures through self-regulation that can

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/gamblingreform/completedinquires/2010-13/virtualcredits/report/index

⁸ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6558

contribute to better consumer information and better consumer protection, without having to go through a time-consuming legislative process⁹.

2 – Limited research into potential gaming/gambling crossover effects

Uncertainty as to the application of the DGTO non-eligibility criteria is accentuated by fact that gaming/gambling crossover as an arena of study is relatively nascent, fluid and poorly defined. This is illustrated by a peer-reviewed study published in 2021, “The gamblification of digital games”: <https://journals.sagepub.com/doi/full/10.1177/1469540521993904>. It states:

“Even the simplest digital games tend to be orders of magnitude more complex in design than pre-digital gambling forms, this observation shows the need for a more critical and interdisciplinary approach if gaming-gambling phenomena are to be usefully understood. The work presented in this issue highlights a range of concerns that factor often heavily into gamblified digital gameplay and the nuances and ambiguities often present at the rapidly moving intersection of gaming and gambling.”

Previous attempts to enshrine a specific categorisation of social games with “gambling elements” or “gambling-like practices” have not succeeded. In 2015, in research titled “Distinguishing between gaming and gambling activities in addiction research” (<https://pubmed.ncbi.nlm.nih.gov/26690615/>), Professor Sally Gainsbury of the University of Sydney (and others) concluded that “using category-based nomenclature (e.g., “gambling-like game”) may be too vague or cumbersome to adequately organise our understanding of new gaming/gambling hybrid activities”.

Instead, Professor Gainsbury and her research team attempted to come up with a check-list for conceptualising gambling and gambling-like features in gaming activities. However, the fact that academic interest has since extended to loot-boxes, as a form of randomised in-app purchase, rather than casino-style games, means this 2015 typology could now be outdated.

In “Predatory Monetisation? A Categorisation of Unfair, Misleading and Aggressive Monetisation Techniques in Digital Games from the Player Perspective (2021)” (<https://doi.org/10.1007/s10551-021-04970-6>), Dr David Zendle identifies no fewer than 35 separate forms of monetisation as unfair, misleading, or aggressive, noting that facets, such as immersive property, design to encourage spending and information asymmetry, are all possible symptoms of the convergence of video games and gambling.

In, “Gaming-Gambling Convergence, Research, Regulation and Reactions (2019)”, (<http://doi.org/10.1089/glr2.2019.2323>) Professor Gainsbury notes a series of shortcomings in existing research, including an absence of longitudinal research, the fact that overlap (i.e between playing video games and gambling) is not the same as causation, that self recruited and self reported samples are non-representative and likely to be “wildly inaccurate” and,

⁹ Mapping of consumer protection in the event of lottery or casino-like elements in computer games.

Accessible from:

<https://www.konsumentverket.se/contentassets/83509d8dffff48559d44de6546ecc362/kartlaggning-av-konsumentskyddet-vid-lotteri--eller-kasinoliknande-inslag-i-datorspel-fi-2019-01630-ko.pdf> Published by Consumer Works in September 2019

that, migration from social casino to real money gambling is not supported by prevalence studies which show gambling participation has remained relatively unchanged.

3 – Fluidity of social game features creates likelihood of legal uncertainty

Crossover effects of social games/gambling is a relatively nascent, contested and rapidly evolving area. From the perspective of industry critics, arguments exist that almost any casual games – casual, massively multi-player online role-playing games or otherwise – could be “substantially comprised of gambling or gambling-like practices”. This is even more compelling given a balance of skill and chance informs virtually all causal games and their enjoyability is often contingent upon their interplay, from match 3 games like Candy Crush¹⁰ ([No one is actually good at Candy Crush](https://www.gamesindustry.biz/articles/2015-11-11-no-one-is-actually-good-at-candy-crush-divnich), Gamesindustry.biz, November 2015) to sports simulation games and racing games like Mario Kart Tour¹¹ ([Arms at length: The big Nintendo Interview](https://www.eurogamer.net/articles/2017-07-21-arms-yabuki-mario-kart-nintendo-interview-birdoplease), EuroGamer, July 2017).

It may be of interest that in Singapore, as part of the country’s drive to strike a “balance between entertainment and safeguarding against gambling inducement”, a consolidated Gambling Control Act recently passed parliament. In his wrapping-up speech, Singapore’s Minister of Home Affairs re-stated the relevance of the [IMDA 2015 Clarification](#) on the status of social games¹² (Infocomm Media Development Authority), which strives to give the sector certainty.

Case studies: challenging eligibility for the DGTO

An example of a social game where legal uncertainty over the eligibility of the game for the DGTO under the current proposed wording in the exposure draft legislation and Explanatory Statement is “Mario Kart Tour”.

Mario Kart Tour is the mobile version of Nintendo’s hugely popular Mario Kart franchise. It is one of the top-ranking apps in the world and has been consistently ranked at the top of Australian app stores.

Object of the game: gameplay consists of racing against other players on the platform around varying tracks to win an overall cup. The higher you rank in the race, the more points you receive. Points can be increased by realising specific moves or jumps and through using special items that you collect around the track, such as banana skins for your opponents to slip on.

There are two principle forms of virtual currency: coins and rubies. The more points you win, the more coins you get. Coins can be used to purchase skins, karts and other virtual items. Rubies are the in-game premium currency. They can be earned or purchased with real

¹⁰ See product development specialist, Jessie Divnich, explain the centrality of randomness to Candy Crush: <https://www.gamesindustry.biz/articles/2015-11-11-no-one-is-actually-good-at-candy-crush-divnich>

¹¹ See Nintendo developer Kosuke Yabuki explain the centrality of random Blue Shells to Mario Kart: <https://www.eurogamer.net/articles/2017-07-21-arms-yabuki-mario-kart-nintendo-interview-birdoplease>

¹² <https://www.mha.gov.sg/mediaroom/parliamentary/gambling-control-bill-and-gambling-regulatory-authority-of-singapore-bill-wrap-up-speech>

money. They appear as large red gems. Rubies are used to purchase pipes (see loot boxes, below).



Figure 1: An example of how points are accumulated and converted to coins



Figure 2: A range of ruby packs available to purchase

The game is a game of chance or of mixed chance and skill.

Rubies – the game’s premium currency – facilitate access the loot-box mechanism, known as a pipe. This shoots out a random driver, kart or glider which have a respective level of rarity.

A randomised balancing loop – the blue shell – is integral to the game. A homing missile – the blue shell – targets the player in first place, giving an opportunity for players caught behind to catch up. The player in the front does not know when it is going to be launched.

It is variously referred to as the “ultimate race leveller” or the “random element with harsh consequences” and the “cruel tax of gaming, the welfare queen of kart racing”. For the academic and video games designer Ian Bogost, it is the “most profoundly existentialist element of the Mario canon”, bringing real-world “chaos, unfairness, injustice” into the game¹³. In an interview with Eurogamer, Nintendo developer Kosuke Yabuki, emphasised the centrality of Blue Shells and hence, randomised balancing loops to the game¹⁴.



Figure 3: Green pipes unlocked with rubies randomly award a normally rare item



Figure 4: Gold pipes unlocked with rubies randomly award an item with rare or higher rarity

¹³ The Blue Shell and its Discontents. Accessible from: https://www.gamasutra.com/view/feature/218696/the_blue_shell_and_its_discontents.php. Published by Gamasutra, May 2013

¹⁴ Arms at length: The big Nintendo interview. Accessible from: <https://www.eurogamer.net/articles/2017-07-21-arms-yabuki-mario-kart-nintendo-interview-birdoplease>. Published by Eurogamer, July 2017

In-app purchases options are extensive. The game is available on the Google Play and Apple app stores.

It is unclear if this game would be eligible for the DGTO.

Additional examples where uncertainty around eligibility for the DGTO exist include “Day Repeat Day”, a match-3 game regarded by Kotaku Australia as one of 2021’s best games (<https://www.kotaku.com.au/2021/09/one-of-2021s-best-games-is-a-match-3/>) or “Empires & Puzzles”, a new take on match-3 puzzle games, combining role-playing elements, which, at the time of writing, is rated Australia’s 18th top-grossing app on iOS¹⁵. Another is “Sliding Seas”, billed as a “clever twist” on the match-3 game format by Australian based developer Mugshot Games¹⁶.

It is well-known that this genre exemplifies the application of randomness to video games through the “landscape” function of chance¹⁷. Additionally, *Larche et al*, have claimed that certain in-app purchase techniques deployed in match 3 games are structurally akin to gambling.¹⁸

Legal uncertainty could result in games unintentionally being excluded from being eligible for the DGTO. It may also cause developers, uneasy about subjecting their games to a discretionary judgement whose parameters are unclear, to self-exclude, rather than risk having their product negatively stigmatised.

Principal ISGA recommendation: remove legislative reference to gambling elements in favour of a guidance-based approach

It is the submission of the ISGA that if the exposure draft legislation and Explanatory Statement pass Parliament in their current form, then this would be problematic. The reason for this is there is a risk that very few, if any, digital games will be eligible for the DGTO. This is because the wording in both the exposure draft legislation and Explanatory Statement will – unintentionally – exclude many digital games. This is because the relevant sections of the exposure draft legislation and Explanatory Statement will be vulnerable to legal challenges which, if successful, would result in very few, if any, digital games being eligible for the DGTO.

The most efficient and effective way for the Australian Government to avoid this risk is to remove any references to gambling elements in social games from both the exposure draft legislation and the Explanatory Statement.

¹⁵ <https://app.sensortower.com/ios/rankings/top/iphone/australia/games?date=2022-04-20>

¹⁶ <https://www.gamespress.com/pl/Sliding-Seas-a-new-Match-3-puzzle-game-from-the-developers-of-Digfende>

¹⁷ For example, acclaimed video games designer, Chris Bateman, explains how the “landscape function” of chance is brought front and centre in match 3 games, defined as “the use of random numbers to generate unique playfields within which the player takes action to sustain a process or achieve a goal (or both)” (Chris Bateman, *Beyond Game Design: Nine Steps Toward Creating Better Videogames* (2009).

¹⁸ The Candy Crush Sweet Tooth: How ‘Near-Misses’ In Candy Crush Increase Frustration, And The Urge To Continue Gameplay. Accessible from DOI: 10.1007/s10899-016-9633-7. Published by the Journal of Gambling Studies, 2017.

Any wording which references gambling elements in social games should be confined to the guidance that will be issued by the Minister. Further, the wording should be consistent with globally accepted standards.

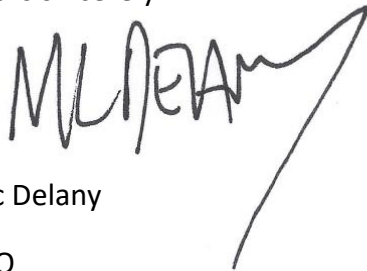
The ISGA respectfully suggests that a guidance-based approach would also enable the DGTO to flexibly address in its eligibility criteria a wider array of policy issues affecting online games, from secondary markets and skins to pay-to-win mechanics, and concerns surrounding data practices (dark patterns) or aggressive marketing practices involving direct exhortations to children, among other potential harms.

A guidance-based approach will mean that the DGTO remains fit for purpose not just now, but in the future when the industry may have innovated and other areas of concern are the focus of policy discussions. That way, the DGTO can stay relevant in time against the backdrop of a dynamic industry that is continuing to evolve.

Next step

The ISGA would be pleased to meet with Treasury officials to discuss the content of this submission. The best point of contact for the ISGA is our Canberra-based government relations advisor, Mr Hamish Arthur of MCM Strategic Communications (+61 406 510 083, hamish.arthur@mcmssc.com.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'ML DELANY', with a long, sweeping flourish extending to the right.

Luc Delany

CEO