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# Loot Box Regulation in Australia — the unsurprising difficulty with regulating surprise mechanics

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## Introduction

“Loot boxes” (also known as “micro-transactions” or “surprise mechanics”) are video game features that enable players to obtain in-game packages containing virtual items which can be used to enhance an individual’s gameplay or experience.<sup>1</sup> The rise of the video game industry has, in recent years, been accompanied by the proliferation of loot boxes. In particular, mechanics allowing for players to earn, or pay real-world money, for randomised virtual content obtained from loot boxes are incredibly common.

Those who have played a video game in the last decade or so are likely to be familiar with these features and the myriad of forms they may take. Given that the contents of certain loot boxes are not known to players in advance, claims that these features may constitute a form of gambling should not come as a surprise.

This article will provide a legal perspective on the regulation of loot boxes and will discuss the various responses of international gambling regulators to the question of whether loot boxes constitute a form of gambling. In Australia, the Environment and Communications References Committee of the Australian Senate (the Senate Committee) completed its inquiry into loot box mechanics in 2018 (the Loot Box Inquiry).

The sole recommendation of the Loot Box Inquiry report (the Report) was that the Australian Government undertake an extensive review of loot box mechanics.<sup>2</sup> In March 2019, the Australian Government responded to the Loot Box Inquiry and declined to approve a formal department review of this nature.<sup>3</sup> As a result, the method of regulation of loot boxes in Australia remains uncertain.

## What is a loot box?

There is no accepted definition of “loot box”. Certain scholars have argued that “the term ‘loot box’ and the phenomena it covers are not sufficiently precise for academic use”.<sup>4</sup> The Report favoured the use of the term “micro-transactions” over loot boxes. Micro-transactions were defined as “any model that provides a

consumer with the option of making small purchases within a game or other application”.<sup>5</sup>

Regardless of which term is used, certain elements underpin a loot box, or a micro-transaction, for randomised content. A player is required to either pay real-world money or advance something of value (ie consideration) which is earned through gameplay, such as in-game points or credits. On the advancement of this consideration, the game will provide the player with the chance to receive a randomised virtual item (ie that is, a reward). Therefore, a loot box is essentially transactional, as the player exchanges something of value for the opportunity to receive something of value.

The virtual items which may be received from loot boxes vary from game to game. Generally, loot boxes contain items which can be used to enhance a player’s gameplay, or purely cosmetic items which do not impact on gameplay but which affect the aesthetics or appearance of certain elements in the game (sometimes known as “skins”). Some popular games even include dedicated marketplaces where users can buy and sell skins which are specific to a single game.

## Are loot boxes gambling?

Under Australian federal law, to fall within the scope of gambling, an activity must involve each of the following elements:

- *Consideration* — the person must advance something of tangible value to enter the activity
- *Prize* — the player is provided with the opportunity to win a prize of tangible value (ie money or money’s worth) and
- *Chance* — the result of the activity involves an element of luck or “chance”<sup>6</sup>

When a player purchases, or otherwise obtains, an opportunity to purchase a virtual item in a loot box using real-world money, the player has provided something of value. The same may be said for in-game currency which can be exchanged for real-world money. If the virtual item can be exchanged for money or something

of tangible value, that virtual item may be considered a prize. Given that virtual items are generated randomly by loot boxes, obtaining a “prize” from a loot box may be considered akin to the notion of chance or luck. As such, it has been claimed that loot boxes amount to gambling.

Regulatory views on loot boxes differ, as each jurisdiction has a different legal definition of gambling and approach to gambling regulation. For instance, in 2017, New Zealand’s Department of Internal Affairs considered that loot boxes did not meet the legal definition of gambling.<sup>7</sup> A similar viewpoint was adopted by the French Gambling Authority, *Autorité de Régulation des Jeux En Ligne*.<sup>8</sup> In contrast, in 2018, regulators in Belgium,<sup>9</sup> Denmark<sup>10</sup> and the Netherlands<sup>11</sup> found that loot boxes involving the payment of real-world money constitute gambling under their respective laws and, as such, are subject to legislative gambling prohibitions.

In September 2019, a UK House of Commons committee recommended that loot boxes which can be bought with real-world money should be regulated under the Gambling Act 2005 (UK).<sup>12</sup> More recently, in a report into the impact of video games on children, the Children’s Commissioner for England also called for further legislative and policy measures to be introduced to address harms associated with loot boxes and advocated for the definition of “gaming” in the Gambling Act to be amended to classify loot boxes as gambling.<sup>13</sup>

On a broader note, American and European gambling regulators such as the Malta Gaming Authority, the Isle of Man Gambling Supervision Commission and the Gambling Division of the Government of Gibraltar entered into a joint declaration, published on 17 September 2018, which concerned the blurring of lines between gambling and forms of digital entertainment such as video games.<sup>14</sup>

## Australia and the Loot Box Inquiry

Loot boxes and randomised micro-transactions have been considered both by the Australian Government and state and territory governments. Most notably, in 2013, former South Australian Senator Nick Xenophon introduced a Bill into the Australian Senate which sought to expand the definition of “gambling service” under Australian federal law to cover activities within games involving the purchase of virtual items with real-world money and “gambling” with these virtual items.<sup>15</sup> Ultimately, the Bill did not pass the Australian Senate.

In the 2018 Loot Box Inquiry, the Senate Committee considered the extent, if any, to which loot boxes may be harmful. Particular reference was made to whether the purchase of randomised items, along with the ability to monetise these items on third-party platforms, constitutes a form of gambling.<sup>16</sup> The Senate Committee also

contemplated whether loot boxes met the legal and psychological definitions of gambling.<sup>17</sup> The Senate Committee refrained from making definitive statements regarding loot boxes, given the diversity of features in modern video games which may be considered loot box mechanics.<sup>18</sup>

However, the Senate Committee did acknowledge a broad consensus that, where real-world money is exchanged either through the direct purchasing of loot boxes, or the sale and purchase of virtual items, those loot boxes most closely meet the legal and psychological definitions of gambling.<sup>19</sup> In light of this, the Senate Committee noted that players may be exposed to risks when playing video games that contain loot box mechanics, including the risk that loot boxes may cause gambling-related harm.

Further, the Senate Committee noted that certain groups are particularly vulnerable to these kinds of risks, including children and people with mental health issues.<sup>20</sup>

The Report recommended that the Australian Government undertake a comprehensive review of loot boxes in video games.<sup>21</sup> In March 2019, the Australian Government released its response to the Report, which ultimately declined to follow the recommendation of the Senate Committee. In support of its decision, the government cited the paucity of research into gambling-related harms as a result of loot boxes, and stated “that developing an evidence-based regulatory approach to mitigate against any harms is challenging until further research is complete”.<sup>22</sup> As such, unlike other jurisdictions referred to above, Australia has not taken a definitive approach to the issue of loot boxes.

The issue was most recently addressed in the Australian Standing Committee on Social Policy and Legal Affairs’ report on online age verification in February 2020. This report also recommended that the Office of the eSafety Commissioner, or other relevant department, report to the Australian Government on options for restricting access to loot boxes and other simulated gambling elements in video games, including through the use of age verification.<sup>23</sup> In particular, the report noted that there was concern in Australia about children and young people being exposed to simulated gambling through video game loot boxes and noted that there was “the potential for loot boxes to act as a gateway to problem gambling and associated harms later in life.”<sup>24</sup>

## The current regulatory framework

Currently, Australian legislation does not expressly regulate loot boxes, nor is there any specific regulatory framework in Australia targeted at loot boxes. Generally,

video games, or “computer games”, are subject to the National Classification Scheme, which is administered under the Classification (Publications, Films and Computer Games) Act 1995 (Cth) and a cooperative agreement between the Commonwealth, state and territory governments. However, this classification scheme does not address loot boxes directly and instead deals with gambling more broadly.<sup>25</sup>

The Senate Committee examined several regulatory options, such as the introduction of a Mature Accompanied (MA15+) or Restricted (R18+) rating for video games containing loot boxes, mandatory wording on all video games containing loot boxes, controls on interactions with loot boxes, disclosure of odds associated with loot boxes and a complete prohibition on loot boxes.<sup>26</sup> However, on the basis of the evidence before it, the Senate Committee opted not to recommend any of these options.

In January 2020, the Australian Government opened the consultation process for its review of Australian classification regulation. The subject matter of this review is whether the classifications for films and video games in Australia are still appropriate and useful and whether the classification guidelines relating to depictions of gambling and simulated gambling in films and video games are in need of amendment. Although the Loot Box Inquiry is mentioned in the consultation paper, whether the outcome of this review will impact the regulation of loot boxes in Australia remains to be seen.<sup>27</sup> The reporting of this consultation has been extended due to COVID-19’s unprecedented effects on communities and industries across Australia.<sup>28</sup>

An indirect avenue of loot box regulation may be found in the Australian Consumer Law (ACL).<sup>29</sup> For instance, when a loot box does not disclose the likelihood of winning specific virtual items or classes of items, this may be considered misleading or deceptive conduct within the meaning of the relevant provisions of the ACL. Although the use of existing laws, such as the ACL, may assist with the regulation of loot boxes, the introduction of a targeted regulatory framework may be more suitable, as it would ideally be tailored to loot boxes and their specific characteristics.

## The future

Given the absence of formal regulation of loot boxes, certain industry bodies have indicated a move towards “self-regulation”. For instance, certain video game developers have removed or altered the loot boxes they offer, and will continue to do so.<sup>30</sup> Further, in April 2020, the Entertainment Software Rating Board (ESRB), the self-regulatory video games industry organisation responsible for assigning age and content video game classification in North America, announced that specific notices would

be assigned to video games that contained randomised virtual content which is able to be purchased in-game with real-world money (or in-game currency which can itself be purchased with real-world money). Notably, this new classification regime is not limited expressly to loot boxes, but is intended to capture any video game transactions containing randomised elements, such as item packs and mystery awards.<sup>31</sup>

In the same month, Pan European Game Information (PEGI), a European video games rating board which implements an age rating system developed by industry, confirmed that any video games containing paid random items must be accompanied by a notice stating that the game contains such items, both on physical packaging and on digital storefronts.<sup>32</sup> It is unclear whether the Australian video games industry intends to follow the particular approach to self-regulation taken by its counterparts in Europe and North America.

Following the Australian Government’s response to the Report, it seemed unlikely that the government would take any further action with respect to the regulation of loot boxes. However, the recent Senate Committee recommendations and the review of Australian classification regulation in early 2020 indicate that the issue of loot box regulation may still be the subject of future Australian regulatory review. Regardless, for the moment, self-regulation remains the default position in Australia.

Nevertheless, both the emerging body of research on loot boxes and developments overseas and domestically may cause the Australian Government, or the Australian video games industry, to reconsider their respective positions on loot boxes. A continued lack of regulation of surprise mechanics in the years to come might therefore be a surprising outcome indeed.

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## Footnotes

1. For more on the concept of loot boxes, see B Scott “Loot Boxes drawing regulatory attention” (2018) 21(7) *INTLB* 124; S Gainsbury “Gaming-Gambling Convergence: Research, Regulation, and Reactions” (2019) 23(2) *GLR* 80; E Hong “Loot Boxes: Gambling for the Next Generation” (2019) 46(1) *WSLR* 61.
2. Environment and Communications References Committee *Gaming Micro-transactions for Chance-Based Items* (November 2018) 73 [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Gamingmicro-transactions/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Gamingmicro-transactions/Report).
3. Australian Government *Australian Government Response to the Senate Environment and Communications References Committee Report: Gaming Micro-transactions for Chance-Based Items* (March 2019) [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Gamingmicro-transactions/Government\\_Response](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Gamingmicro-transactions/Government_Response).
4. R Nielsen and P Grabarczyk “Are Loot Boxes Gambling? Random Reward Mechanisms in Video Games” (2019) 4(3) *ToDIGRA* 171 at 171–2.
5. Above n 2, at 2.
6. Interactive Gambling Act 2001 (Cth), s 4 (definition of “Gambling Service”) (IGA).
7. See eg K Cross, New Zealand says lootboxes ‘do not meet the legal definition for gambling’, 11 December 2017, [www.gamasutra.com/view/news/311463/New\\_Zealand\\_says\\_lootboxes\\_do\\_not\\_meet\\_the\\_legal\\_definition\\_for\\_gambling.php](http://www.gamasutra.com/view/news/311463/New_Zealand_says_lootboxes_do_not_meet_the_legal_definition_for_gambling.php).
8. See generally S Fogel “French Regulator Criticizes Loot Boxes but Says They’re Not Gambling” *Variety* 5 July 2018 [www.variety.com/2018/gaming/news/france-loot-boxes-1202865706/](http://www.variety.com/2018/gaming/news/france-loot-boxes-1202865706/).
9. See generally Newsbeat “Gaming loot boxes: What happened when Belgium banned them?” *BBC News* 12 September 2019 [www.bbc.com/news/newsbeat-49674333](http://www.bbc.com/news/newsbeat-49674333).
10. Danish Gambling Authority, Statement about loot boxes / loot crates, 29 November 2017, [www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates](http://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates).
11. Netherlands Gambling Authority “A study by the Netherlands Gaming Authority has shown: Certain loot boxes contravene gaming laws” media release (19 April 2018) [www.kansspelautoriteit.nl/english/loot-boxes/](http://www.kansspelautoriteit.nl/english/loot-boxes/).
12. House of Commons: Digital, Culture, Media and Sport Committee *Immersive and Addictive Technologies: Fifteenth Report of Session 2017–19* (12 September 2019) [www.publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/1846.pdf](http://www.publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/1846.pdf).
13. Children’s Commissioner for England *Gaming the System* (October 2019) [www.childrenscommissioner.gov.uk/wp-content/uploads/2019/10/CCO-Gaming-the-System-2019.pdf](http://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/10/CCO-Gaming-the-System-2019.pdf).
14. *Declaration of Gambling Regulators on Their Concerns Related to the Blurring of Lines Between Gambling and Gaming* (17 September 2018) [www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf](http://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf).
15. Interactive Gambling Amendment (Virtual Credits) Bill 2013 (Cth).
16. Above n 2, at 1.
17. Above n 2, at chs 2–3.
18. Above n 2, at 71–2.
19. Above n 2, at 72.
20. Above n 2, at 72.
21. Above n 2, at 73.
22. Above n 3.
23. Parliament of the Commonwealth of Australia *Protecting the Age of Innocence: Report of the Inquiry into Age Verification for Online Wagering and Online Pornography* (February 2020) [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024436/toc\\_pdf/Protectingtheageofinnocence.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024436/toc_pdf/Protectingtheageofinnocence.pdf;fileType=application%2Fpdf).
24. Above, at 89.
25. M Dickens and A Thomas *Is it Gambling or a Game?: Simulated Gambling Games: Their Use and Regulation* (April 2016) 13.
26. Above n 2, at 53–68.
27. Department of Communications and the Arts *Review of Australian Classification Regulation* (8 January 2020) [www.communications.gov.au/have-your-say/review-australian-classification-regulation](http://www.communications.gov.au/have-your-say/review-australian-classification-regulation).
28. Department of Infrastructure, Transport, Regional Development and Communications, Classification Review extended due to COVID-19, 15 April 2020, [www.classification.gov.au/about-us/media-and-news/news/classification-review-extended-due-covid-19](http://www.classification.gov.au/about-us/media-and-news/news/classification-review-extended-due-covid-19).
29. Competition and Consumer Act 2010 (Cth), Sch 2 (Australian Consumer Law).
30. See generally A Goslin, PUBG is finally ditching random locked loot boxes, 19 November 2019 [www.polygon.com/2019/11/19/20972315/pubg-paid-loot-box-system-patch](http://www.polygon.com/2019/11/19/20972315/pubg-paid-loot-box-system-patch); K Orland, So long, supply drops: Call of Duty gets rid of randomized loot boxes, 18 October 2019, [www.arstechnica.com/gaming/2019/10/so-long-supply-drops-call-of-duty-gets-rid-of-randomized-loot-boxes/](http://www.arstechnica.com/gaming/2019/10/so-long-supply-drops-call-of-duty-gets-rid-of-randomized-loot-boxes/).

31. Entertainment Software Rating Board, Introducing a New Interactive Element: In-Game Purchases (Includes Random Items), 13 April 2020, [www.esrb.org/blog/in-game-purchases-includes-random-items/](http://www.esrb.org/blog/in-game-purchases-includes-random-items/).
32. Pan European Game Information, PEGI Introduces Notice to Inform About Presence of Paid Random Items, 13 April 2020, [www.pegi.info/news/pegi-introduces-feature-notice](http://www.pegi.info/news/pegi-introduces-feature-notice).