

# Update on the Australian Interactive Gambling Amendment Bill 2016 – What happens now and what does it mean for offshore online gambling operators looking to Australia?

Date : 9 August 2017

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## Introduction

Australia's reform of the regulatory environment relating to online gambling has been underway for some time. The proposed amendments to the key Federal gambling legislation are in their final stages of review by the Australian Parliament and are likely to be passed in the next Parliamentary session.

## Overview

On 10 November 2016, the *Interactive Gambling Amendment Bill 2016* (the **IGA Amendment Bill**) was introduced into the House of Representatives of the Australian Federal Parliament by the Hon. Alan Tudge MP, Federal Minister for Human Services. The IGA Amendment Bill proposes to amend Australia's key online gambling legislation, the *Interactive Gambling Act 2001* (Cth) (the **IGA**).

The amendments contained in the IGA Amendment Bill follow the Final Report (**Final Report**)<sup>1</sup> of the Review of Illegal Offshore Wagering conducted by the Hon. Barry O'Farrell (**O'Farrell Review**) and reflect the Federal Government's position as set out in its response to the recommendations made in the Final Report (the **Government Response**).<sup>2</sup>

The purpose of the IGA Amendment Bill is to clarify the provisions of the IGA regarding illegal offshore gambling and give greater enforcement powers to the Federal regulator, the Australian Communications and Media Authority (the **ACMA**).

On 8 February 2017, the IGA Amendment Bill was passed by the House of Representatives (the **House**) and introduced to the Senate on 9 February 2017. On 21 March 2017, the Senate approved one substantial amendment to the IGA Amendment Bill to introduce a prohibition on the use of credit in relation to online

betting. On 21 June 2017, the House did not accept the Senate's amendment and proposed a new amendment relating to the credit betting prohibition in its place.

At the time of writing, the Senate is yet to consider the latest version of the IGA Amendment Bill with the House's most recent amendment. It is unlikely to do so until the next time Parliament sits, being the week commencing 8 August 2017. An overview of the key features of the IGA Amendment Bill for offshore gambling operators is set out below.

### 1. Requirement to be licensed in Australia

The IGA Amendment Bill defines "regulated interactive gambling services" and "prohibited interactive gambling services". The principal distinction between these two categories of services is that no party is permitted to provide a prohibited interactive gambling service to persons present in Australia, while regulated interactive gambling services can be provided, but only by operators who are licensed in Australia and authorised to provide the relevant services under the terms of their licence.

Previously, certain services classified under the IGA Amendment Bill (e.g. excluded wagering and lotteries services) were exempt from the definition of a "prohibited interactive gambling service" and, therefore, were not prohibited by the IGA (save in respect of in-play and instantaneous lotteries provided online, both of which will remain prohibited by the IGA).

These "excluded" services (among others) are now classified as "regulated interactive gambling services" subject to being provided by an Australian licensed operator. Hence, the IGA now makes it clear that only those exempt services which are regulated interactive gambling services fall outside the scope of the prohibition in section 15 of the IGA.

The IGA Amendment Bill amends section 15 of the IGA so that, where an operator provides a prohibited interactive gambling service to customers in Australia, that operator

will be subject to both a criminal offence and a civil penalty.

The IGA Amendment Bill introduces a new section 15AA. This will make it an offence to provide to persons present in Australia a regulated interactive gambling service unless the provider of the service holds a licence under the laws of an Australian State or Territory and provides the services in accordance with that licence. In a manner similar to the prohibition in section 15, section 15AA provides that an operator who breaches this prohibition is subject to both a criminal offence and a civil penalty.

Under both sections 15 and 15AA, a person commits a separate offence for each additional day that a contravention occurs. The penalty for contravention by a corporate entity is \$4.5 million for a criminal offence provision and \$6.75 million for a civil offence provision, for each day a contravention takes place.

Accordingly, the IGA Amendment Bill confirms that the supply of online gambling services to persons present in Australia is prohibited unless the operator holds a licence under the laws of an Australian State or Territory. It also affirms the principle that an online gambling service licensed in Australia will not be in breach of the IGA by offering services conducted in accordance with that licence to Australian customers located outside of the State or Territory in which it is licensed. This principle confirms the decision of the High Court of Australia (Australia's highest court) in *Betfair Pty Ltd and Another v Western Australia* (2008) 244 ALR 32.

## 2. ACMA – the new civil penalty regime and enforcement capabilities

### ACMA Enforcement Tools

The IGA Amendment Bill grants the ACMA greater powers to enforce the IGA. These powers arise from:

- a) a more stringent civil penalty regime. The ACMA will have a range of enforcement tools at its disposal including the right to issue formal warnings and infringement notices, to impose civil penalties and to seek injunctions; and
- b) the creation of a process which enables complaints to be made to the ACMA about the supply and promotion of any unlicensed or prohibited interactive gambling services, and a procedure enabling the ACMA to conduct investigations in relation to these complaints.

### ACMA Register

The IGA Amendment Bill compels the ACMA to set up a register of legitimate or “eligible interactive gambling services” (broadly, gambling services which are not in breach of the prohibition in section 15AA). This register will be capable of access by the public on the ACMA website. Accordingly, the register will not include those online gaming operators such as online poker or casino games operators which cannot obtain an Australian licence to provide services to Australian customers.

### ACMA Notification Powers

The IGA Amendment Bill also amends the *Australian Communications and Media Authority Act 2005* (Cth) (the **ACMA Act**). This will enable the ACMA to disclose information relating to prohibited or regulated interactive gambling services to:

- a) the Department of Immigration and Border Protection who may place the names of executive officers of organisations who contravene the IGA on a “Movement Alert List” with the aim of restricting their travel to, or from, Australia; and
- b) international regulators of operators licensed by that regulator who may be in breach of the IGA through supplying interactive gambling services to persons present in Australia. The objective is to raise global awareness of the IGA and encourage foreign regulators to provide enforcement assistance.

## What does this mean for offshore gambling operators?

The amendments strengthen the prohibitions in the IGA which target the supply of online gambling services by offshore gambling operators to persons present in Australia. This is demonstrated by the significant penalties that have been introduced and the enhanced powers and enforcement tools granted to the ACMA in respect of contraventions of the IGA.

The immediate impact of these amendments is to clarify to offshore gambling operators that the supply of online gaming services (including online casino games and online poker services) to persons present in Australia without a licence granted under the laws of an Australian State or Territory, is prohibited by Australian law. Currently, no gambling regulator in any Australian State or Territory will grant a licence to enable these kinds of online gaming services to be provided to persons located in Australia. Accordingly, if passed, the IGA Amendment Bill will confirm that the provision of those online gambling services to persons present in Australia is prohibited.

Importantly, the Australian government has indicated that the prohibitions have always been in force and the amendments enacted by the the IGA Amendment Bill merely clarify the position. On 20 March 2017, during debate in the Senate, Senator Fifield (the Minister for Communications) made it clear that the IGA Amendment Bill was “not expanding the range of gambling products in Australia. The [IGA Amendment] Bill is simply clarifying the services that are currently permitted under Commonwealth, State and Territory laws.”<sup>3</sup> Hence, in the Minister’s words, the amendments will simply “maintain the status quo and uphold the original intent of the Interactive Gambling Act.”<sup>4</sup>

## Proposed Amendment to the IGA Amendment Bill

On 21 June 2017, the House of Representatives disagreed with the amendment proposed by Senator Xenophon of the Nick Xenophon Team and passed by the Senate in March 2017 which sought to ban the provision of credit betting to Australian consumers (the **NXT Amendment**). In place of the NXT Amendment, the Government proposed an amendment to introduce the ban on the provision of credit betting to Australian consumers, but with two exceptions (the **Government Amendment**).

The Government Amendment introduces an exemption to the ban on the provision of credit for gambling service providers with an annual wagering turnover of less than AUD \$30 million. If a provider belongs to a corporate group, the annual online wagering turnover globally of the entire corporate group (including holding companies and subsidiaries) will be taken into account in determining whether the provider has an annual wagering turnover of less than AUD \$30 million. This means that the majority of Australian gambling service providers will still fall outside the exemption, as the global wagering turnover of a related corporate group is likely to exceed \$30 million.

Accordingly, it is likely that most Australian online gambling service providers will be prohibited from providing credit to customers. As indicated by Minister Tudge in brief discussions of the Government Amendment by the House, this exemption is intended to apply to “trackside bookmakers”<sup>5</sup>

Any company which contravenes this prohibition may be found to have committed a fault-based offence or a civil penalty offence. A penalty of \$90,000 (500 penalty units) or a civil penalty of \$135,000 (750 units) can be imposed if such offences are committed.

## The National Consumer Protection Framework

In parallel with the progress of the IGA Amendment Bill in Parliament, the Australian government is currently conducting a consultation process with the aim of establishing a National Consumer Protection Framework (NCPF) to afford greater protection to those consumers of online gambling services who may be vulnerable to problem gambling. The NCPF will focus on responsible gambling measures including self-exclusion and voluntary pre-commitment mechanisms.

On 28 April 2017, the Gambling Ministers of the Commonwealth, the States and the Territories of Australia agreed in-principle to eleven measures to enhance the protection of Australian consumers engaged in online gambling.

For further information about the National Consumer Protection Framework and the Government's consultation process, please see our Focus Paper: [The National Consumer Protection Framework: An analysis of the Regulatory Impact Statement](#).

## Inquiry into Online Poker

Separately to the debate in relation to the IGA Amendment Bill, on 13 June 2017, Senators Leyonhjelm and Bernadi moved a Notice of Motion in the Senate to convene an inquiry into online poker in Australia (the **Motion**). The Motion proposes that the Senate's Environment and Communications Reference Committee (the **Committee**) conduct an inquiry into:

- a) the participation of Australians in online poker;
- b) the nature and extent of any person or social harms and benefits arising from participation in online poker; and
- c) whether the current regulatory approach, in particular, the recently amended *Interactive Gambling Act 2001* (Cth), is a reasonable and proportionate response to those harms and benefits.

Perhaps surprisingly, there was no debate on the Motion in the Senate and the Motion was passed with the support of the Greens, the Nick Xenophon Team and the Australian Government (although the Motion was opposed by the opposition, the Australian Labor Party).

Accordingly, the matters specified in the Motion were referred to the Committee for inquiry (the **Inquiry**). The Committee is due to report on its Inquiry on 14 September 2017 and held a public hearing in Sydney on 1 August 2017.

It is unclear at this stage what, if any, impact the Inquiry will have in respect of the progress of the IGA Amendment Bill or whether the Inquiry may give rise to further proposed amendments, separate to those already proposed in the IGA Amendment Bill.

## Next Steps - What Happens Now?

On 21 June 2017, the House returned the amended version of the IGA Amendment Bill (which incorporated the Government Amendment) to the Senate for further consideration. While the Senate has acknowledged that the House has made an alternative amendment to the IGA Amendment Bill relating to credit betting, the Senate has not commenced debate on this amended version of the IGA Amendment Bill and it will not sit again until 8 August 2017.

During this next sitting period, the Senate may accept, reject or modify the amended IGA Amendment Bill. However, it is unlikely that this version of the IGA Amendment Bill will be the subject of significant debate or further amendments in the Senate, as it was passed by the House without any opposition and with support from the two leading parties, being the Government and the Labor Opposition. On the basis that each party acts in a consistent manner when the IGA Amendment Bill is considered by the Senate and the Senate does not make any further amendments, the IGA Amendment Bill will be passed by both Houses of Parliament and will progress to Royal Assent.

If this occurs, the majority of the amendments in the IGA Amendment Bill will come into effect 28 days after it receives Royal Assent. The prohibition on providing credit betting to Australian consumers will come into effect 6 months after the IGA Amendment Bill receives Royal Assent to give companies and consumers the opportunity to implement the prohibition. Effectively, companies will have 6 months to ensure that they no longer offer credit betting to consumers.

However, in the unlikely event that the Senate does not agree with this version of the IGA Amendment Bill (which contains the Government Amendment), it is likely that there will be further debate until both Houses agree to an identical version of the IGA Amendment Bill.

While it appears likely that the IGA Amendment Bill will be passed in some form soon, the timing is uncertain at this stage. What is clear is that the debate relating to the manner of regulation of online gambling in Australia is far from over. It is this uncertainty with which gambling companies will need to grapple in the years to come.

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<sup>1</sup> A copy of the Final Report can be accessed at <https://www.dss.gov.au/communities-and-vulnerable-people/programmes-services/gambling/review-of-illegal-offshore-wagering>.

<sup>2</sup> A copy of the Government's Response can be accessed at: <https://www.dss.gov.au/communities-and-vulnerable-people/programmes-services/gambling/government-response-to-the-2015-review-of-the-impact-of-illegal-offshore-wagering>. For further detail, please see our Focus Paper on the O'Farrell Review and the Government Response: <http://bit.ly/2cQVd33>.

<sup>3</sup> Commonwealth, Parliamentary Debates, Senate, 20 March 2017, 108 (Mitch Fifield).

<sup>4</sup> Commonwealth, Parliamentary Debates, Senate, 21 March 2017, 108 (Mitch Fifield).

<sup>5</sup> Commonwealth, Parliamentary Debates, House of Representatives, 22 June 2017, 40 (Alan Tudge).