Interactive Gambling Amendment Bill 2016

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House: House of Representatives
Portfolio: Communications and the Arts
Commencement: Sections 1–3 on Royal Assent; all other provisions on the 28th day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at November 2016.
Interactive Gambling Amendment Bill 2016

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The Bills Digest at a glance

Purpose of the Bill

- The purpose of the Interactive Gambling Amendment Bill 2016 (the Bill) is to amend the *Interactive Gambling Act 2001* (IGA) and the *Australian Communications and Media Authority Act 2005* (ACMA Act) in response to certain recommendations made by the 2015 Review of the impact of illegal offshore wagering to:
  - clarify the law and
  - strengthen enforcement powers of the Australian Communications and Media Authority (ACMA).

Structure of the Bill

- The Bill consists of two Parts:
  - Part 1 amends the IGA to clarify licensing requirements for interactive gambling services in Australia, to introduce a civil penalty regime to be enforced by ACMA and to define prohibited interactive gambling services not to be provided in Australia\(^1\)
  - Part 1 also includes proposed changes to the ACMA Act to strengthen ACMA’s enforcement powers
  - Part 2 contains application and transitional provisions.

Background

- The IGA was introduced by the government in response to concerns about the effects that interactive or online gambling may have on Australians.
- Since its passage, a number of critics of the IGA have noted that the legislation has done little to prevent the spread of interactive gambling. Some have argued that its inherent weaknesses have contributed to the growth of this form of gambling.
- There have been a number of reviews of gambling which have considered changes to the IGA. This Bill reflects recommendations made by the most recent review into the impact of offshore wagering.

Stakeholder concerns

- Stakeholders agree that changes need to be made to make interactive gambling legislation and policy more effective. All appear to agree that a national co-operative strategy for interactive gambling is called for and that it should be accompanied by preventative, educative and counselling measures. There are differences of opinion, however, on the ways that improvements can be achieved. Some favour a degree of legislative liberalisation while others call for tougher legislative requirements.

Key issues

- Proposed prohibition of click to call interactive services has been a key issue of debate. The Bill intends to re-define telephone betting service specifically to exclude the in-play betting options offered by interactive betting services. This has been seen by some as enhancing harm minimisation, while others have argued that the move will be ineffective because of the popularity of in-play betting online. They claim customers will continue to gamble offshore regardless.

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1. Note: the terms interactive and online with reference to gambling are generally interchangeable in gambling literature and will be so used in this Digest.
Purpose of the Bill
The purpose of the Interactive Gambling Amendment Bill 2016 (the Bill) is to amend the Interactive Gambling Act 2001 (the IGA) and the Australian Communications and Media Authority Act 2005 (the ACMA Act) in response to certain recommendations made by a 2015 Review into the impact of illegal offshore wagering to:

- clarify the law regarding illegal offshore gambling and
- strengthen the enforcement powers of the Australian Communications and Media Authority (ACMA).

Structure of the Bill
The Bill consists of two Parts:

- Part 1 amends the IGA to clarify licensing requirements for interactive gambling services in Australia, to introduce a civil penalty regime to be enforced by ACMA and to define prohibited interactive gambling services not to be provided in Australia. It also amends the ACMA Act to strengthen ACMA’s enforcement powers
- Part 2 contains application and transitional provisions.

Background
The regulation of offline gambling in Australia has traditionally been a matter for the states and territories as the Constitution does not give the Federal Government power to legislate in this area. The Federal Government is, however, able to regulate online gambling as section 51(v) of the Constitution, which gives it power to make laws with respect to ‘postal, telegraphic, telephonic, and other like services’, which means that it is able to legislate in the areas of communications services. These include broadcasting, telecommunications and the Internet.

Gambling had been a consistent and prevalent pastime in Australia since the arrival of the First Fleet, but it was not until the late 1990s that the Federal Government directed the Productivity Commission (PC or the Commission) to undertake the first investigation of the overall economic and social impact of gambling in Australia.

Early national analysis
Productivity Commission inquiry
One of the references for the Commission was to investigate the implications of new technologies (such as the Internet) and the effect these technologies would have on traditional government controls on the gambling industries.

The PC’s November 1999 report noted the long-established presence of gambling in Australian society, but added that ‘even by Australian standards’, a recent growth in gambling industries had been ‘remarkable’ and this growth had led to concern about the ‘downsides’ for society. That having been noted, the Commission concluded that Australians generally enjoyed gambling, with over 80 per cent participating recently in some form of gambling. At the same time, around two per cent of Australian adults could be classified as problem gamblers, and one of the rationales for specific regulation of the gambling industries stemmed from reducing the risks and costs of problem gambling. Other rationales for gambling regulation were promoting consumer protection and minimising the potential for criminal and unethical activity.

With regards to the gambling regulatory environment, however, the PC argued that it was less than ideal as policies lacked coherence; they were ‘complex, fragmentated and often inconsistent’. It is interesting that similar

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2. Note: the terms interactive and online with reference to gambling are generally interchangeable in gambling literature and will be so used in this Digest.
5. PC, Australia’s gambling industries, op. cit., p. 1.
6. Ibid., p. 5.
7. Ibid., p. 2.
8. Ibid., p. 3.
assessments of gambling policies continue to be made in 2016. The PC blamed inadequate policymaking processes and strong incentives for governments to derive revenue from gambling industries for deficiencies in the gambling regulatory environment, and it is most likely this is still the case with regards to the states and territories. The PC saw potential gains to many businesses and consumers in the advent of new technologies, but it also believed those technologies posed fresh challenges for regulation. It saw a role for the Federal Government in a ‘managed liberalisation’ of gambling online in co-ordinating a national approach to regulation with the states and territories.

### Senate Select Committee Report on Online Gambling

In 1999 the Senate Select Committee on Information Technologies announced that it would specifically inquire into online gambling in Australia. One of its terms of reference was to consider the need for federal legislation. The Committee concluded that, while it appeared state and territory regulators intended to regulate online gambling by applying uniform standards across jurisdictions, in practice significant differences had emerged in the regulatory models they were introducing to deal with online gambling.

The Committee’s March 2000 report noted that evidence presented to its inquiry suggested that the nature of the relationship between the states and territories impeded the development of a national cooperative model for online gambling and that a lack of collaboration undermined consumer protection. It recommended that governments at all levels ‘work together to develop uniform and strict regulatory controls on online gambling with a particular focus on consumer protection ...

### National Office for the Information Economy (NOIE) report

On 7 July 2000, Senator Richard Alston, the Minister for Communications, Information Technology and the Arts, announced that NOIE would conduct a study into the feasibility and consequences of banning interactive gambling.

The NOIE report concluded that technically it was potentially possible to implement a ban on interactive gambling based on Internet content control but, importantly, NOIE added that no technical solution could be completely effective in preventing every Australian from accessing interactive gambling services.

### Enactment of the IGA

In August 2000 the Government introduced an Interactive Gambling (Moratorium) Bill 2000. There was enough opposition to the Bill that at first it failed to pass the Parliament, but after the Government agreed to amendments to exempt interactive services that were extensions of offline betting services (for example, betting on horse races), the Interactive Gambling (Moratorium) Act 2000 passed and was enacted in December 2000. The statute imposed a 12-month moratorium on further development of the interactive gambling industry by making it an offence for a person to provide an interactive gambling service linked to Australia unless that person was already providing the service when the moratorium commenced.

In March 2001, Senator Alston announced that the Government would introduce legislation to prohibit Australian gambling services from providing online gambling to Australian residents. The Interactive Gambling Amendment Bill 2016 was introduced in the Parliament on 7 March 2016.
Bill 2001 was introduced in April amid protest from the Opposition and groups such as the Internet Industry Association.\textsuperscript{19} The IGA commenced 11 July 2001.

Interactive gambling services were defined in section 5 of the IGA as those provided over the Internet or through broadcasting services. Interactive services were not considered to be online telephone betting, wagering on horse, harness or greyhound races, wagering on sporting events or other events or contingencies, online lotteries, provided they are not scratch lotteries or other instantaneous lotteries; gaming services provided to customers in a public place (such as poker machines in a club or casino) or services that have a designated broadcasting or data-casting link (for example television shows that involve viewers voting in order to win prizes).

Key functions of the IGA have been to:

- prohibit interactive gambling services from being provided to customers in Australia
- prohibit Australia-based interactive gambling services from being provided to customers in designated countries
- establish a complaints-based system to deal with internet gambling services where prohibited Internet gambling content is available for access by customers in Australia and
- prohibit the advertising of interactive gambling services.\textsuperscript{20}

Figure 1 below shows the different types of online gambling and indicates those prohibited by the IGA:

\textbf{Figure 1: types of online gambling}

![Diagram of types of online gambling]

Source: Joint Select Committee on Gambling Reform, \textit{Interactive and online gambling and gambling advertising [and] Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011}, Second report, 8 December 2011, p. 8.\textsuperscript{21}


\textsuperscript{20} Department of Social Services (DSS), \textit{Review of illegal offshore wagering}, (O’Farrell Review), DSS, Canberra, 18 December 2015, p. 35.
**Recent assessments**

Since its passage, a number of critics have noted that the *IGA* has done little to prevent the spread of interactive gambling, and indeed, its weaknesses have contributed to the growth of this form of gambling. In 2010 the PC pointed out that the prohibition in the *IGA*:

... perversely amounts to discriminatory deregulation, ensuring that the Australian online gaming market is exclusively catered to by offshore providers, who operate under a variety of regulatory regimes. This provides inadequate protection to both recreational online gamblers, as well as online gamblers who are at risk of developing a problem.22

In 2012 one critic summed up the views of many that the *IGA*:

... has proven to be a toothless tiger. International casino websites completely ignored the ban and the threat of fines and continued to operate at their leisure; in the ten years since the *IGA* was introduced, not a single fine has been applied. The only impact was that no Australian company could offer online casino gambling ... so all the money lost has gone offshore, and Australian gamblers are taking an even bigger risk by using sites that do not have to comply with Australian laws and regulations.23

**2010—Productivity Commission Inquiry report on gambling**

In 2010, following an earlier request from the Government for it to conduct an investigation into the gambling industry, the PC released a report which updated its previous findings on aspects of gambling, including its assessment of the implications of new technologies for traditional government controls on gambling industries.24

In discussing the prohibition of online gaming under the *IGA*, the PC was of the opinion that given the limited jurisdiction of Australian law over overseas gambling suppliers the *IGA* had effectively prevented companies located in Australia from selling online gaming services to Australians. The PC was less sure of the effect of the *IGA* on Australian consumers, who can legally access internationally based online gaming sites.25 That more evidence had emerged of the relative harm done by online gambling since the earlier reports on gambling (noted above) had been published along with doubts about the analysis underpinning the ban in the first place, suggested a need for a re-evaluation of online gaming policy. The PC considered that the re-evaluation should assess:

- the relative harms and benefits of online gaming compared to venue-based gaming
- the effectiveness of the prohibition, as well as any other additional costs it imposes
- the scope for less restrictive regulation to minimise these harms whilst still allowing some of the benefits of online gaming to be realised.26

In assessing the issues of harms and benefits the Commission noted a number of positive and negative comparative effects. For example, for non-problem gamblers, the use of credit cards for online gambling is unlikely to cause financial harm, but for problem gamblers, it may have the opposite effect. But at the same time, online gambling providers can usually monitor spending patterns better than venue-based providers. The Commission was of the view that risks associated with online gambling could be overstated, but there was some ‘weak’ evidence to suggest gambling online may exacerbate already hazardous behaviour of problem gamblers. Nevertheless, it concluded that careful regulation of the online gambling industry was warranted.27

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23. T Cummings, ‘Online gambling and the review of the interactive gambling act – my analysis’, Cyenne, blog, 1 June 2012.
25. Ibid., p. 15.2.
26. Ibid., pp. 15.6 and 15.7.
27. Ibid., p. 15.15.
The PC estimated that it was probable the prohibition on online gaming—in particular the prohibition on advertising online gaming—had some effect on demand, but the magnitude of that reduction was not clear and ‘Australian consumption of online gaming has grown and will continue to do so, making the prohibition less effective over time’. 28

In terms of easing regulation, the Commission thought there were two alternatives: the IGA could be strengthened to make it more effective in dissuading Australians from online gaming or it could be amended to realise the benefits of online gaming, while minimising its potential harms. 29 Current debates about the regulation of online gambling continue to reflect these views (see the section in this Digest on stakeholder comments).

The magnitude of the costs associated with strengthening the IGA was such that the PC believed ‘the level of harm associated with online gaming would need to be very high, and unavoidable through alternative regulatory responses’ for this approach to be worthy of consideration. In addition:

In the parallel physical gambling world, the Commission does not consider that a ban on [electronic gambling machines such as poker machines] is warranted despite evidence of considerable harm. Rather, the Commission has argued for continued legal supply, but with more stringent consumer safety requirements. 30

The Commission saw, instead, merits in an alternative approach, that of:

… ‘managed liberalisation’, in which suppliers would be licensed to provide online gaming to Australians, subject to strict conditions about probity and harm prevention and minimisation. Managed liberalisation of online gaming would better protect Australians from the risks of online problem gambling, whilst still allowing recreational gamblers the freedom to choose an enjoyable medium. It would also resolve the apparent paradox that the Government allows Australian based firms to sell a product overseas that it deems too dangerous for Australians themselves to consume. 31

The PC saw some risks in the managed liberalism approach and cautioned that its introduction should be gradual, thereby allowing a regulatory agency, feasibly ACMA, to develop regulatory and investigative procedures for online gambling as well as harm minimisation measures to protect consumers.

2010—Joint Select Committee on Gambling Reform investigations

On 30 September 2010 the Parliament agreed that a Joint Select Committee on Gambling Reform (JSCGR) should be appointed to inquire into and report on a number of gambling related issues including the Productivity Commission report on gambling, gambling-related legislation introduced in the Parliament and any other gambling-related matters. 32

In the course of its existence the JSCGR produced a number of reports, one of which is specifically relevant to matters relating to interactive gambling raised in this Bill. This was the Inquiry into Interactive and online gambling and the Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011.

In this report the JCSGR noted the multiplicity of issues posed by the various forms of and platforms for interactive gambling and agreed with previous assessments that the key question to be addressed in dealing with these is whether prohibition or liberalisation is a more effective approach. It agreed with the PC that the IGA had been successful in limiting the provision of interactive gambling services to Australians by Australian-based services, but less effective in limiting services from overseas providers. 33

One difficulty acknowledged by the JSCGR with the IGA was the enforcement process which was complaints-based and subject to reliance on the assistance of foreign authorities. The JSCGR discussed options

28. Ibid., p. 15.18.
29. Ibid., p. 15.21.
30. Ibid., p. 15.22.
31. Ibid., p. 15.29.
32. JSCGR, ‘Information about the Committee’, Committee webpage.
33. JSCGR, Interactive and online gambling and gambling advertising: interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011, Second report, 8 December 2011.
for dealing with this problem, for example, by blocking financial transactions with known overseas gambling providers or blocking online gambling websites by Internet Service Providers. \(^{34}\) It noted however, that the latter option, as the PC had previously concluded, could be seen as ‘draconian’ and unlikely to be wholly successful and endorsed work being undertaken by the AFP and the Department of Broadband, Communications and the Digital Economy to improve enforcement mechanisms. \(^{35}\) The JSCGR was not in favour of setting up a system to monitor and block financial transactions to deter people from accessing overseas-based interactive gambling websites. It believed such a system:

... would never be completely effective, as those customers most determined to circumvent the system would be likely to do so using other methods. The committee also notes the difficulty in gaining cooperation from international financial intermediaries such as PayPal to comply with such a system were it to be introduced under Australian law. \(^{36}\)

As the O’Farrell Review has found recently (see discussion below), the JSCGR heard polarised accounts of the potential harm caused by in-play (or in the run) betting online (in-play betting is permitted over the phone). Industry provider Betchoice told the JSCGR that there was no evidence that in-play betting online was riskier than other betting types. \(^{37}\) On the other hand, the lobby group FamilyVoice Australia considered that in-play betting was likely to ‘induce problem gamblers caught up in the excitement of a match [to bet] inappropriate amounts on the spur of the moment’. \(^{38}\)

The JSCGR did not support removal of the online in-play betting ban. Given that in-play betting was permitted via the telephone and in person, the Committee saw the restriction on the online format ‘as striking the right balance’. \(^{39}\)

2011—Department of Broadband, Communications and the Digital Economy Review

On 27 May 2011, the Council of Australian Governments (COAG) announced that the Government had decided to conduct a review of the IGA. \(^{40}\) The final report of this review, undertaken by the Department of Broadband, Communications and the Digital Economy (DBCDE), was clear about what it saw as the problem with the IGA:

The primary objective of the IGA is to reduce harm to problem gamblers and to those at risk of becoming problem gamblers. The evidence since the last review of the IGA suggests that it is making only a very minor contribution to this objective. The IGA may in fact be exacerbating the risk of harm because of the high level of usage by Australians of prohibited services which may not have the same protections that Australian licensed online gambling providers could be required to have. \(^{41}\)

The DBCDE concluded that there could be as many as 2,200 online gambling providers offering services that may be in contravention of the IGA and suggested that Australians may be losing nearly $1.0 billion a year to online gambling service providers that are not licensed in Australia. \(^{42}\)

In light of these findings the DBCDE called for a multi-pronged approach to deal with the problem. Its fundamental recommendation was for a national framework of harm minimisation and consumer protection measures for all forms of permissible online gambling. Harm minimisation measures it recommended included pre-commitment by gamblers, credit restrictions, the provision of warning messages for gamblers and links to gambling helpline services. All online gambling providers who did not apply the national harm minimisation standard were to be prohibited.

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34. Government attempts to block websites have been controversial and attempts to filter pornographic and/or violent materials have been made since Bulletin boards first appeared in the 1990s. For more information on attempts to block Internet sites, see P Pyburne and R Jolly, *Australian Governments and dilemmas in filtering the Internet: juggling freedoms against potential for harm*, Research paper series, 2014–15, Parliamentary Library, Canberra, 8 August 2015.
35. JSCGR, *Interactive and online gambling and gambling advertising*, op. cit., p. 140.
36. Ibid., p. 334.
39. JSCGR, *Interactive and online gambling and gambling advertising*, op. cit., p. 211.
42. Ibid., p. 14.
The DBCDE also recommended providing incentives to encourage online gambling providers to become licensed to operate and for providers who chose not to become licensed to be prohibited from operating in Australia. It called for targeted law enforcement and deterrence measures against online gambling providers who continue to offer services to Australians in contravention of the IGA.43

In addition, the DBCDE Review called for the legalisation of online tournament poker and for changes to online in-play sports betting. With regards to in-play betting, following from the JSCGR’s suggestion that relaxing the ban on in-play betting for online providers may be worth investigating and noting that there was support within the industry and sports bodies for such an approach, the DBCDE proposed an alternative. It recommended allowing simple in-play betting on line, (for example, betting on which team will win a match) but continuing to restrict in-play betting on micro-events (for example, betting on the outcome of the next ball in a cricket match) or discrete contingencies within an event (for example, which player will score the next goal in a football match).44

The PC’s 2010 report had recommended allowing regulated online poker card playing (a subset of online gaming prohibited under the IGA) ‘subject to very strong harm minimisation and probity requirements as a better means of protecting the many Australians who use such services from overseas (that is, prohibited) websites’.45

The JSCGR had identified a range of arguments for and against regulated access and the majority of that Committee supported the prohibition. In his submission to the DBCDE’s interim report of its review Senator Nick Xenophon, a member of the JSCGR, warned of possible parallels between the opening up of access to electronic gaming machines in the early 1990s and allowing regulated provision of online gaming.46 However, the chair of the JSCGR, Andrew Wilkie, supported the PC recommendation for regulated access to online poker card playing. In recommending that a five-year trial of online tournament poker should be instigated, the DBCDE noted arguments from clinical psychologist Dr Sally Gainsbury who considered that ‘due to the fixed costs of tournament poker, this type of online poker appears to have relatively low likelihood of leading to gambling problems’.47

Senator Xenophon criticised what he called the underlying reasoning of the DBCDE Review declaring that simply because people ‘could already access interactive gambling across the online border was not a good enough reason to legalise it’ and argued that, once a type of gambling was sanctioned, the implication was that it was safe. However, according to the Senator, ‘it’s a downhill slide from there. Given how accessible and addictive online gambling is, the risk is just too great’.48 The Government’s response to the DBCDE Review was to announce that it would work with the various state and territory regulatory bodies to establish a consistent national framework for harm minimisation and consumer protection that would address all legal online gambling activities.49

2013—O’Farrell Review

In the lead-up to the 2013 Federal election the Coalition also criticised the approach suggested by the DBCDE and committed to investigating other ways of strengthening the IGA.50 In fulfilling this commitment, in late 2015 the Government commissioned a review of the impact of illegal offshore wagering to be undertaken by former New South Wales Premier, Barry O’Farrell (the O’Farrell Review).

According to the O’Farrell Review, since 2012, online gambling has grown significantly and this is consistent with an economy-wide migration to online service delivery and significant investment in brand awareness by online operators.51 The total amount spent on interactive gambling in Australia was US$2.0 billion in 2013 and

43. Ibid., p. 6.
44. Ibid., pp. 17–19.
46. N Xenophon, Submission on the interim report of the DBCDE Review, pp. 1–2, as cited in the DBCDE Review, op. cit., p. 15.
47. S Gainsbury, Submission on the interim report of the DBCDE Review, p. 4, as cited in the DBCDE Review, op. cit., p. 16.
48. N Xenophon (Independent Senator), Online gambling sell-out: the Government is softening us up to expose more Australians to online gambling, media release, 29 May 2012.
49. S Conroy (Minister for Broadband, communications and the digital Economy), Strengthened consumer protection for online gambling, media release, 12 March 2013.
US$2.2 billion in 2014. These figures included onshore and illegal offshore gambling activities. In 2014, H2 Gambling Capital estimated that in excess of 20 per cent of Australian expenditure on interactive wagering went to offshore providers. It noted the growth of illegal offshore markets and that wagering represents the largest sector of the global internet gambling market.

The O’Farrell Review noted that the major impacts of offshore gambling activities have been assessed as:

- increased risks to consumers as a consequence of reduced consumer protections
- lower harm minimisation standards of some offshore sites
- a potential increase in the threat to the integrity of sport and
- loss of taxation revenue to the Government.

The O’Farrell Review found that the main reasons consumers wagered or gambled offshore were:

- better product choice, specifically the availability of in-play wagering on sporting events
- better product value and
- the ability to bet without the limits imposed by the domestic industry.

According to the O’Farrell Review, if the Government seeks to reduce the size of the illegal offshore wagering market it needs to address these drivers of consumer behaviour.

With regards to the IGA, in the course of its investigations the O’Farrell Review was told of concerns that ‘the provision of services by offshore operators is enabled by the wording of the Act, which therefore increases the size of the offshore wagering market’. This concern was prompted by perceptions that the IGA was unclear about what services are prohibited, it does not directly prohibit the provision of wagering services by offshore providers, the current definitions within the IGA make it difficult to enforce and the legislation does not make it illegal to bet on offshore websites. In addition, enforcement of the IGA is difficult given that offshore providers operate beyond the reach of enforcement agencies in Australia.

It stated what appears to have become a staple view when considering online gambling issues:

... a nationally consistent and robust regulatory framework, including the consistent application of harm minimisation and consumer protection measures, is necessary before consideration is given to expanding products available to consumers under the Act. In addition, the Review considers it important that this nationally consistent regulation be enforced in a manner that disrupts the access of offshore operators to the Australian market.

Recommendation 3 of the O’Farrell Review stated that until a national framework is established and operating, consideration of additional in-play betting products should be deferred and legislative steps taken to respect the original intent of the IGA.

Recommendation 17 of the Review called for amendments to the IGA to:

- improve and simplify the definition of prohibited activities
- extend the ambit of enforcement to affiliates, agents and the like

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52. Interactive Gambling Dataset 2015, Gibraltar Betting and Gaming Association, Isle of Man in O’Farrell, Review of illegal offshore wagering, op. cit., p. 44.
56. Ibid., p. 96.
57. Ibid.
58. Ibid., p. 107.
59. Ibid.
60. Ibid., p. 21.
61. Ibid., p. 23.
• include the use of name and shame lists published online to detail illegal sites and their directors and principals and to include the use of other Commonwealth instruments to disrupt travel to Australia by those named

• allow ACMA, where appropriate, to notify in writing any relevant international regulator in the jurisdiction where the site is licensed

• allow ACMA to implement new (civil) penalties as proposed by the 2012 DBCDE Review and

• include a provision that restricts an operator providing illegal services to Australian consumers from obtaining a licence in any Australian jurisdiction for a specified future time period (see all recommendations at Appendix A).  

The Government response to the O’Farrell Review noted recommendation 3 and added that it did not intend to expand the Australian gambling market by enabling online in-play betting as it was:

... of the view that the Australian online wagering agencies offering ‘click-to-call’ type in-play betting services are breaching the provisions and intent of the IGA. The Government will introduce legislation as soon as possible to give effect to the intent of the IGA.  

With regards to recommendation 17 the Government agreed to introduce legislative amendments to provide greater clarity around the legality of services, strengthen the enforcement of the IGA and deliver improved enforcement outcomes. It committed to introducing the mechanisms outlined in the recommendation.  

On 25 November 2016 the Government reached agreement with state and territory gambling ministers to establish a National Consumer Protection Framework for online wagering. Ministers gave in-principle agreement to key aspects of the Government’s response to the O’Farrell Review including setting up a national self-exclusion register for online wagering, a voluntary pre-commitment scheme for online wagering and prohibition of lines of credit being offered by wagering providers. 

Committee consideration

Selection of Bills Committee

On 9 November 2016 the Selection of Bills Committee noted that ‘contingent upon its introduction in the House of Representatives’ that this Bill would be ‘referred immediately’ to the Environment and Communications Legislation Committee for inquiry and report by 30 November 2016. The reasons stated for referral were:

• concerns about enforcement of penalties on offshore gambling providers in problematic jurisdictions and

• whether the legislation will prevent offshore wagering in a meaningful way.  

Details of the inquiry are at the inquiry homepage. At the time of writing this Bills Digest, 23 submissions had been received by the Committee.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills considered the Bill but had no comment to make in relation to it.

Policy position of non-government parties/independents

Senator Nick Xenophon has consistently called for tighter gambling legislation. In his comments in the JSCGR Inquiry report on the Interactive Gambling and Broadcasting Amendment (Online Transactions and Other

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64. Ibid.
65. A Tudge (Minister for Human Services), Gambling Ministers agree to consumer protection framework for online wagering, media release, 25 November 2016.
Measures) Bill in 2011, the Senator argued for the strengthening of the IGA to improve its effectiveness. The Senator argued further that he supported additional measures to deter people from using overseas websites to gamble, such as a government-maintained 'blacklist' of merchant identification numbers to enable financial institutions to prohibit transactions to certain vendors (this was discussed in the 2011 JSCGR Report). In separate comments in the JSCGR Report, Chair of the JSCGR, Independent Member of Parliament Andrew Wilkie also considered that the possible introduction of a blacklist should be investigated.

In his submission to the O’Farrell Review, Senator Xenophon expressed concern that its terms of reference were ‘too narrow and ambiguous’ given the devastation caused to individuals and their families from legal onshore online gambling sites authorised under the IGA. The Senator considered that these legal sites should also be examined.

Specifically in relation to the IGA Senator Xenophon called for more power to be allocated to ACMA to make determinations about prohibited gambling services and noted the problems ACMA had faced after referring the licensed operator William Hill’s click to call betting practices to the Australian Federal Police (AFP) (see Box 1).

Box 1: click to call complaints

William Hill’s click to call product allows its customers to place bets without having to make a traditional phone call. By using an automated voice technology customers can place bets with the click of their mouse, the only requirement being that the microphones on their computers or mobile devices are switched on.

ACMA received a complaint about this practice in 2015 and referred the matter to the AFP. The AFP, however, declined to investigate the complaint.

ACMA continued to be concerned that the click to call practice falls under the prohibited provisions of the IGA and referred the SportsBet operator’s Bet Live product to the AFP in July 2016. Both William Hill and SportsBet maintained their products were wholly compliant with the existing legislation.

The Australian Greens have been consistent in calls for the reform of gambling policy and legislation. For example, in April 2016, they released a policy which would ban all gambling advertising in sport. To date, the Greens have made no specific comment on this Bill, however.

It has been reported that the Australian Labor Party (ALP/Labor) is ‘unlikely’ to oppose the changes in this Bill although Labor’s spokesperson on gambling, Julie Collins, has said the party would make a final decision once it had seen the text of the Bill, but no further comment has been made since the Bill was introduced.

At the time of writing this Bills Digest it appears that no other Parliamentarians have commented on this Bill.

Position of major interest groups

All stakeholders appeared keen for changes to be made to the IGA. One group wanted more liberalisation, primarily with regards to relaxing the prohibition on in-play wagering and adopting what it labelled a platform neutral regime. This group saw the lifting of restrictions as delivering more protections for consumers and greater protections for sports integrity. Another group of stakeholders supported a more cautious approach arguing that in-play betting simply opened up more opportunities for corruption in sport. Yet other comments argued for change, but did not specifically address the in-play wagering debate.

For example, Clubs Australia called for the stronger enforcement of the provisions within the IGA, appropriate resourcing of regulatory and enforcement agencies and incorporation of greater standards of consumer protection and harm minimisation. This organisation felt providing ACMA with more power would improve legislative effectiveness. It listed allowing ACMA to issue civil penalties, including infringement notices, take-
down notices and the ability to apply to the Federal Court if a gambling service provider fails to comply with a notice as examples of such powers.\textsuperscript{77}

Digital Industry Group Incorporated (DIGI— a group consisting of Google, Facebook, Twitter, Microsoft and Yahoo!) considered the integrity of racing and sports in Australia could be better maintained with stronger enforcement of existing laws. These companies were firmly against any proposal that would involve Internet filtering.\textsuperscript{78} The Communications Alliance agreed. It insisted that industry level website blocking can be easily circumvented, and as such it is not a realistic and practical alternative to the development of coherent and internationally competitive industry policy.\textsuperscript{79}

\textit{In-play supporters}

In its submission to the O’Farrell Review the Australian Wagering Council argued that a new interactive gambling regime was needed to respond to changes in the Australian wagering market which have occurred since the introduction of the IGA.

According to the Wagering Council, consumers are not gambling more, but they have changed their gambling preferences from onshore to online. Yet increasingly popular forms of wagering, such as in-sport betting, are not allowed online. As a result Australians wanting to wager in-play have been obliged to use ‘traditional, less convenient means, or have recourse to offshore wagering providers who offer these products’. The Wagering Council argued this was detrimental to Australian licensed wagering providers who cannot offer a product that is in demand.\textsuperscript{80}

The Institute of Public Affairs (IPA) also called for a more liberal approach to online gambling. The IGA was in need of reform for the reason that it placed too many restrictions on gambling practices. As for in-play betting, smartphones had made restrictions on this practice obsolete; in-play betting offered consumers ‘more choice, greater participation in spectator sport, and the opportunity to manage betting risk more responsibility’.\textsuperscript{81}

Bet365 also argued for the removal of the online in-play sports-betting prohibition. The world’s largest online wagering company claimed that illegal offshore wagering by Australians was ‘largely the direct result’ of the prohibition of in-play sports betting. Bet365 considered it was not possible to minimise the incidence of problem gambling while so much of it is conducted offshore, nor was it possible to control criminal elements. In addition, it was to Australia’s economic advantage to reap the benefits of relaxing the in-play prohibition.\textsuperscript{82}

Sportsbet suggested an overall reform package of five measures:

- make it a legal requirement to be licensed in Australia in order to be permitted to offer wagering services to Australian consumers
- adopt a platform-neutral approach to in-play betting by removing the in-play restriction
- strengthen the deterrence measures deployed by ACMA
- increase education and awareness among Australians of the dangers of transacting with illegal offshore wagering operators
- introduce mandatory responsible gambling initiatives:
  - voluntary pre-commitment
  - reduced time period for age verification of account holders
  - mandatory self-exclusion and national self-exclusion database
  - wagering operators making appropriate de-identified wagering information available to support research into wagering and appropriate public policy.\textsuperscript{83}

\textsuperscript{77} Clubs Australia, Submission to DSS, Inquiry into the impact of illegal offshore wagering, November 2015.
\textsuperscript{78} Digital Industry Group, Submission to DSS, Inquiry into the impact of illegal offshore wagering, 17 November 2015, pp. 1–2.
\textsuperscript{79} Communications Alliance, Submission to DSS, Inquiry into the impact of illegal offshore wagering, November 2015, p. 3.
\textsuperscript{80} Australian Wagering Council, Submission to DSS, Inquiry into the impact of illegal offshore wagering, November 2015.
\textsuperscript{81} Institute of Public Affairs, Submission to DSS, Inquiry into the impact of illegal offshore wagering, December 2015, p. 4.
\textsuperscript{82} Bet365, Submission to DSS, Inquiry into the impact of illegal offshore wagering, 15 November 2015.
\textsuperscript{83} Sportsbet, Submission to DSS, Inquiry into the impact of illegal offshore wagering, November 2015, p. 3.
Sportsbet pointed out that removing the in-play restriction also has the support of Australia’s major sporting bodies citing the Australian Football League, the National Rugby League and Cricket Australia as well as the Coalition of Major Professional and Participation Sports (COMPPS) who recognise that in-play betting is the product Australians are using offshore, which has significant consequences for the integrity of their codes.84

**In-play opponents**

Racing Australia’s submission to the O’Farrell Review considered illegal offshore wagering ‘an unacceptable threat to the integrity of racing and sport’. It was clearly in favour of changing the legislation to make it legal for a wagering operator to provide wagering services to an Australian customer where the wagering operator either holds a state or territory wagering licence or approval to operate with respect to a particular sporting event.85

Among other measures, Racing Australia supported amending the IGA so ACMA could issue infringement notices to illegal gambling services hosted in Australia and inform illegal offshore wagering operators of their breach of Australian law. In addition, it considered the legislation should mandate that financial institutions must block financial transactions between Australian customers and illegal offshore wagering operators who have been placed on an ACMA register of illegal offshore wagering operators. Legislation should require Internet Service Providers (ISPs) to block access by Australian customers to illegal wagering sites that are operated by, or on behalf of, any illegal offshore wagering operator who has been placed on the ACMA register of illegal offshore wagering operators.86

But it did not support in-play betting. Racing Australia considered that allowing this to occur would open up avenues for collusion between jockeys and punters in order to enhance the value of a bet or to increase the chances of a wager being successful. It considered:

> ... the Government of the day had good and cogent reasons for prohibiting online in-play betting on sporting events. Those reasons are just as valid today as they were when the legislation was drafted and it would be negligent if they were repealed merely because illegal operators were offering the in-play product. To do so could be seen as the Government transferring its regulatory role to overseas operators.87

Canberra Greyhound Racing Club agreed that there should be a national approach, that licensing of operators was essential and that the in-play betting ban should continue. This stakeholder was frank in noting that, if the ban was lifted, racing betters will move to online products and this will exacerbate loss of revenue for the racing industry.88

In mounting a similar argument, the New South Wales Trainers’ Association remarked:

> Live betting or ‘in the run betting’ [that is, in-play betting] for thoroughbred horse racing poses another threat to the integrity of racing. Jockeys and Trainers are under enough pressure as it is without having to deal with accusations brought about by from ‘live in the run betting’. It creates a difficult environment for racing and opens the door for integrity issues which are obviously amplified with live sports that last for much longer than 90 seconds. Furthermore industry research suggests that the racing industry and venues that support it, could lose millions in revenue due to migration. Evidence suggests that betting agencies are likely to emphasise ‘live in the run betting’ products on sports such as Rugby League, AFL, Soccer etc that run for over an hour, to generate intensified betting. This could result in further losses to the racing industry where each individual race is usually over in less than 2/3 minutes. Therefore ‘live in the run betting’ provides a further risk for the integrity a racing and a reduction in funds.89

The Victorian Responsible Gambling Foundation agreed with Senator Xenophon that risks to Australians arising explicitly from offshore online wagering should be seen in the context of the general issues that arise in relation to all online wagering. It called for legislative changes including maintaining and extending prohibitions on in-play betting as well as for a nationally consistent approach to interactive gambling which dealt with issues such

84. Ibid., p. 6.
85. Racing Australia, Submission to DSS, Inquiry into the impact of illegal offshore wagering, 16 November 2015, p. 3.
86. Ibid., p. 12.
87. Ibid., p. 13.
as inducements to customers offered by gambling sites, advertising in sports programs and requiring all providers to participate in a pre-commitment scheme.90

Box 2: a media view

In anticipating the introduction of this Bill Bernard Keane, writing in the online journal Crikey was in favour of liberalisation. Keane stated:

The gambling industry is rightly unpopular, partly because of its intrusive and annoying advertising techniques, but Australians enjoy gambling, and the IGA has produced perverse and self-defeating outcomes, particularly in driving gamblers to poor-quality offshore sites. Rather than admit the logic that prohibition has failed, the government, in true nanny-state style, is now looking to double down with attempts to compel offshore regulators to obey Australians law and try to convince ISPs and banks to co-operate in banning access to offshore sites.91

Comments to the Environment and Communications Committee Inquiry into this Bill

In its submission to the Senate Environment and Communications committee, eCommerce on-line Gaming Regulation and Assurance (eCOGRA), a London-based organisation which administers self-regulation for members of the on-line gambling industry, echoed what stakeholders had been saying consistently about online gambling. eCOGRA argued that if the measures in this Bill are to be effective then they need to be complemented by the introduction of a national licensing scheme and national supervision of licence holders and by national harm minimisation measures and consumer protection arrangements.92

eCOGRA contended that there were a number of weaknesses in this Bill. Some of these were related to the introduction of the licensing requirement. One problem for eCOGRA was that licences will be state or territory based and as such, because state and territory laws are inconsistent, licence conditions will inevitably be inconsistent. So the list of prohibited, unlicensed gambling services proposed in the Bill will also vary according to the criteria used for licensing in each state and territory.93 In addition, consumer protection in the area of credit or deferred settlement will also be subject to state laws and therefore not implemented uniformly or consistently.

In criticising the online in-play betting prohibition, eCOGRA observed that while the rationale for allowing telephone in-play betting is that contact with an operator is likely to inhibit betting more than through a computer terminal, common sense ‘would indicate that there is little commercial interest in telephone operators for major domestic gambling service providers dissuading potential clients from placing in-play bets’.94 According to the eCOGRA assessment, a focus in the Bill on prohibition and enforcement will also mean:

... harm minimisation measures utilised worldwide are not satisfactorily addressed. These include managing of deposits limits, control of deposit frequency, enforced break periods, reality checks and voluntary session suspension ...95

Finally, eCOGRA believed the Bill’s enforcement powers will continue to prove ineffective because of the difficulty in enforcing judgments outside Australia.96

The Australian Psychological Society made little comment on the actual provisions of this Bill but called the proposed measure to prohibit ‘click to call’ in-play betting services by tightening the definition of a telephone betting service ‘a good example of disruption of ready accessibility as a harm minimisation measure’.97

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90. Victorian Responsible Gambling Foundation, Submission to DSS, Inquiry into the impact of illegal offshore wagering, 16 November 2015.
92. eCommerce on-line Gaming Regulation and Assurance (eCOGRA), Submission, no. 1, to the Senate Standing Committee on Environment and Communications Legislation, Inquiry into the Interactive Gambling Amendment Bill 2016, 2016, p .2.
93. Ibid., pp. 4–5.
94. Ibid., pp. 5–6.
95. Ibid.
96. Ibid., p. 6.
The Synod of Victoria and Tasmania, Uniting Church in Australia, and Uniting Communities submission to the Senate Committee was supportive of the proposed measures in this Bill, particularly the proposals to prohibit click to call betting.98

Bet365 iterating its earlier call to the O’Farrell Review for removal of the online in-play sports betting prohibition and registered its opposition to the proposed measures in the Bill which relate to place-based betting services. The proposal would allow for electronic terminals to continue to operate in places such as hotels, clubs or casinos where providers are licensed under state or territory law to provide such services. Bet365 sees no justification for allowing this exemption and considers it:

... will specifically allow for a very rapid expansion – especially by TAB outlets – of tablet/iPad-style devices with in-play sports-betting functionality into many more locations, including public locations such as Martin Place (Sydney), Federation Square (Melbourne) and major sporting grounds such as the Melbourne Cricket Ground.99

The Crownbet and Betfair submission also raised the issue of the place-based betting proposals, remarking that the government’s arguments about the interaction factor which makes in-play telephone betting acceptable are undermined if hotels, clubs and the like are allowed:

... to offer in-play betting services that are identical, in terms of the high speed of bet placement, as an online wagering service. There is further no interaction required whatsoever with an operator, and no human supervision, unlike electronic betting terminals, which are permitted only in designated wagering areas and required to be staffed at all times.

This proposed provision therefore undermines the primary reasons that the Government has not sought to prohibit retail or telephone in-play wagering. This is an anomaly that undermines the principles of platform neutrality and the perceived protections that the Government considers consumers receive when engaging in retail or telephone based wagering.100

Crownbet/Betfair express concern that the sporting event proposal in this Bill effectively prevents betting from taking place for events which take place over a number of days once the first day of those events has commenced. They argue it is ‘nonsensical’ to prohibit, for example, wagering prior to the various days’ play in a golf tournament. They suggest that this anomaly could, however, be addressed by amending this provision to introduce the concept of a ‘scheduled extended play break’ which could be defined ‘to include any hiatus in play which extends overnight, or for more than a prescribed period’.101

Financial implications
According to the Explanatory Memorandum, it is not expected that this Bill will have ‘any significant impact on Commonwealth expenditure or revenue’.102 There will be some cost for ACMA in establishing and administering the proposed new enforcement processes. The Explanatory Memorandum estimates these will be a one-off capital cost of $500,000 and ongoing costs of $2.0 million per annum, but it stresses these costings are estimates only.103

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. According to the assessment in the Explanatory Memorandum to the

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98. Synod of Victoria and Tasmania, Uniting Church in Australia and Uniting Communities, Submission, no. 4, to the Senate Standing Committee on Environment and Communications Legislation, Inquiry into the Interactive Gambling Amendment Bill 2016, 21 November 2016.
100. Crownbet and Betfair, Submission, no. 8, to the Senate Standing Committee on Environment and Communications Legislation, Inquiry into the Interactive Gambling Amendment Bill 2016, November 2016, p. 4.
101. Ibid., pp. 5–6.
103. Ibid., p. 37.
Bill some of its provisions may engage human rights as defined in Articles 14 and 17 of the International Covenant on Civil and Political Rights.\textsuperscript{104}

For example, item 39 proposes that proposed section 15AA of the Bill would create new criminal and civil penalties for those who intentionally provide a regulated interactive gambling which has an Australian link and for which they do not hold a licence to authorise operation of that service in Australia. The Bill provides for an exception to this rule (subsection15AA(5)), where a person is not aware that a service has an Australian customer link and could not ‘with reasonable diligence’ have ascertained that the service has such a link. At the same time, proposed subsection 15AA(5) notes that the defendant needs to prove that he or she had no knowledge of the Australian link. This may be considered to limit the rights in Article 14(2) of the Convention, which states that persons charged with criminal offences have the right to be presumed innocent until proven guilty.

Further, items 3 and 4 of the Bill engage the right to protection against arbitrary or unlawful interference with privacy under Article 17(1) of the Convention. These items amend the list of authorities in the ACMA Act to whom information about a prohibited or registered interactive gambling service may be disclosed.\textsuperscript{105}

These issues are discussed comprehensively in the Explanatory Memorandum to the Bill. The Government considers that the Bill is compatible with the International Covenant on Civil and Political Rights because any limitations it imposes on human rights ‘are reasonable, necessary and proportionate’.\textsuperscript{106}

**Parliamentary Joint Committee on Human Rights**
The Parliamentary Joint Committee on Human Rights considered that the Bill did not raise human rights concerns.\textsuperscript{107}

**Key issues and provisions**
This section does not discuss all provisions in this Bill. For a detailed analysis of all provisions, see the Explanatory Memorandum.

**ACMA Act**
Items 1–5 of the Bill amend the ACMA Act which, amongst other things, establishes ACMA and sets out its functions and powers.\textsuperscript{108} Currently Part 7A of the ACMA Act sets out the circumstances in which authorised disclosure information may be disclosed and to whom it may be disclosed.\textsuperscript{109} Item 1 of the Bill amends the definition of authorised disclosure information in section 3 of the ACMA Act to include information gathered under the complaints handling systems contained in Parts 3, 4 and 5 of the IGA.

Within Part 7A, section 59D provides for the disclosure of authorised disclosure information to certain authorities. Items 3 and 4 amend subsection 59D(1) of the ACMA Act to expand the list of authorities to whom authorised disclosure information about gambling services may be provided to include:

- the Secretary of the Department administered by the Minister who administers the Migration Act 1958 or employees in the Department whose duties relate to that Act
- an authority of a foreign country responsible for regulating matters relating to the provisions of gambling services (note: item 2 will insert a definition foreign country).

Item 5 inserts proposed subsection 59(1A), to ensure that only information that relates to a prohibited interactive gambling service or a regulated interactive gambling service (and not any other information that ACMA may collect) may be disclosed to the Department of Immigration and Border Protection or foreign regulators.

According to the Explanatory Memorandum to the Bill, these amendments:

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106. The Statement of Compatibility with Human Rights can be found at pages 6–12 of the Explanatory Memorandum to the Bill.


108. Australian Communications and Media Authority Act 2005 (ACMA Act).

109. The detailed definition of the term authorised disclosure information is contained in section 3 of the ACMA Act.
... are intended to promote effective enforcement of the IGA by enabling the ACMA to notify international regulators and the Department of Immigration and Border Protection of information relating to prohibited or regulated interactive gambling services.  

**IGA**

**Items 6 to 143** amend the IGA.

**New definitions**

The Bill inserts a number of new and important definitions into the IGA.

**Prohibited interactive gambling service**

Currently the IGA identifies various types of interactive gambling service and creates the offence of providing an interactive gambling service to customers in Australia. **Item 8** of the Bill repeals the definition of interactive gambling service. **Item 9** of the Bill inserts the definition of **prohibited interactive gambling service**. **Items 19–22** of the Bill operate so that references in the IGA to an interactive gambling service become references to a prohibited interactive gambling service; further, these items signpost the introduction of civil penalty provisions which will be in addition to existing criminal penalty provisions.

**Regulated interactive gambling service**

**Item 28** inserts **proposed section 8E** into the IGA to define the term **regulated interactive gambling service**. It is proposed that a regulated interactive gambling service will be defined as:

- a telephone betting service — being a gambling service that is provided ‘on the basis that dealings with customers are wholly by way of voice calls made using a carriage service’ (**proposed subsection 8AA(1)** at **item 25**). A voice call is defined in **proposed subsection 8AA(3)** as one that consists wholly of a spoken conversation between individuals or, in the case of customers with a disability, a call that is equivalent. **Proposed subsection 8AA(8)** provides that, despite subsection 8AA(1), a gambling service that provides that certain information, such as the selection of a bet or the nomination of a bet amount, can be provided by a customer otherwise than by way of a voice call, will not be a telephone betting service for the purposes of the IGA. In its submission to the current inquiry into this Bill Tabcorp sought clarification of whether the list in **proposed subsection 8AA(8)** is intended to include customer account information (such that customers would need to provide identifying information by voice in order for a service to be considered to be a telephone betting service)**111**

- an excluded wagering service — being a service which relates to betting on horse, harness or greyhound racing. In addition, an excluded wagering service is one that relates to betting on sporting events or other events or contingencies — provided that the service is not an in-play betting service (**proposed section 8A** at **item 26**). Consistent with this section, **proposed section 10A** (at **item 32**) impacts on how the term **sporting event** is defined for the purposes of the IGA. The section will empower the Minister to declare if a ‘specified thing’ is, or is not, a sporting event. **Proposed subsection 10A(4)** provides examples of ‘things’ that may be specified in a Ministerial determination as a sporting event (or specified as not being a sporting event). They include a match, a race, a tournament or a round. Further, **proposed section 10B** operates so that a gambling service is an **in-play betting service** to the extent to which it relates to betting on the outcome of a sporting event or on a contingency that may or may not happen in the course of a sporting event, where the bets are placed, made, received or accepted after the beginning of the event. Free TV Australia has commented that this provision which ‘leaves a core regulatory obligation to be determined by the Minister, creates significant uncertainty regarding the impact of the Bill and exposes regulated parties to potentially significant regulatory change on short notice’. Free TV considers that the Bill should be amended to include a definition of sporting event or alternatively, the proposed legislative instrument should accompany the Bill**112**

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• an excluded gaming service — being a service for the conduct of certain games provided to customers at a particular place, using electronic equipment which is available to all customers at that place (proposed subsection 8B at item 27)

• a place-based betting service — being a service for the placing, making, receiving or acceptance of bets, or which introduces people wishing to make bets with people willing to accept bets, which is provided to customers at a particular place using electronic equipment which is available to all customers at that place (proposed section 8BA at item 27). Under proposed paragraph 8BA(1)(c) the provider of the service needs to hold a licence under state or territory law to authorise the service to be provided. Tabcorp has suggested that this proposed section could be made clearer by stating that customers must be at the place at the time the service is provided and that the licence required under proposed paragraph 8BA(1)(c) be a licence issued by the state or territory in which the service is provided.

• a service that has a designated broadcasting link under existing section 8C

• a service that has a designated datacasting link under existing section 8C

• an excluded lottery service under existing section 8D

• an exempt service.

These services must be provided in the course of carrying on a business and be delivered by either an Internet carriage service or any other listed carriage service, a broadcasting service, any other content service or by a datacasting service (proposed paragraph 8E(1)(j)).

Proposed paragraph 8E(1)(k) adds that in the case of an exempt service, a Ministerial determination under proposed subsection 8E(2) must be in force in relation to the service.

**Designated interactive gambling service**

**Item 7** of the Bill inserts the term **designated interactive gambling service**, being either a prohibited interactive gambling service or an unlicensed regulated interactive gambling service, into section 4 of the **IGA**.

**Prohibited internet gambling content**

Proposed section 8F of the IGA (at item 28) provides that internet content is **prohibited internet gambling content** if end-users in Australia can access the internet content and an ordinary reasonable person would conclude that the sole or primary purpose of that internet content is to enable a person to be a customer of either one or more illegal interactive gambling services or one or more unlicensed regulated interactive gambling services, or both.

**New offence and increased penalties**

**Item 33** repeals and replaces the heading of Part 2 of the IGA — **Designated interactive gambling services not to be provided to customers in Australia** — to reflect its content more accurately.

Currently, section 15 of the IGA (which is the only provision in Part 2) states that a person commits an offence if the person intentionally provides an interactive gambling service which has an Australian-customer link — the maximum penalty for this is 2,000 penalty units (being equivalent to $360,000).

**Items 35 and 35A** operate to increase the existing maximum criminal penalty for intentionally providing a prohibited interactive gambling service with an Australian customer link to 5,000 penalty units (being equivalent to $900,000).

**Item 39** of the Bill inserts **proposed section 15AA** which provides that a person commits a criminal offence if the person intentionally provides a regulated interactive gambling service which has an Australian customer link and the person does not hold a licence under a law of the state or territory that authorises the provision of that kind

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113. The relevant games are those covered by paragraph (e) of the definition of **gaming service** in section 4 of the IGA. That is, games of chance or of mixed chance and skill played for money (or anything else of value), where the customer pays to enter or play the game.

114. Tabcorp Holdings Limited, Submission to the Senate Standing Committee on Environment and Communications Legislation, op. cit., p. 2.

115. The Minister will make a determination by legislative instrument. Section 42 of the **Legislation Act 2003** provides that a legislative instrument is subject to disallowance if either a Senator or Member of the House of Representatives moves a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled.
of service. The maximum penalty is 5,000 penalty units, being equivalent to $900,000. However, it is a defence if the person did not know and could not, with reasonable diligence, have ascertained that the service had an Australian customer link.\(^{116}\) The defendant will bear the evidential burden of establishing this.

The new civil penalty provisions are contained in:

- **proposed subsections 15(2A) and (2B)** which operate so that a person must not provide a prohibited interactive gambling service that has an Australian-customer link. The maximum civil penalty is 7,500 penalty units, being equivalent to $1,350,000. Where a person contravenes the prohibition he, or she, commits a separate contravention in respect of each day during which the contravention occurs.

- **proposed subsections 15AA(3) and (4)** which operate so that a person must not provide a regulated interactive gambling service if the service has an Australian customer link and the person does not hold a licence under a law of the state or territory that authorises the provision of that kind of service. The maximum civil penalty is 7,500 penalty units, being equivalent to $1,350,000. Where a person contravenes the prohibition he, or she, commits a separate contravention in respect of each day during which the contravention occurs and

- **proposed subsections 15A(2A) and (2B)** which operate so that a person must not provide a prohibited interactive gambling service that has a designated country-customer link. The maximum civil penalty is 7,500 penalty units. Where a person contravenes the prohibition he, or she, commits a separate contravention in respect of each day during which the contravention occurs.

**Key issue—penalty amounts**

Under the current IGA, offences which arise from contravening conduct are criminal offences. The standard of proof in a criminal case is ‘beyond a reasonable doubt’. However, the offence will not be committed if the defendant establishes that he, or she, did not know and could not, with reasonable diligence, have ascertained that the service had an Australian-customer-link.\(^ {117}\) The existing offences, if proven, allow for financial penalties to be paid rather than imposing a term of imprisonment.

The Bill provides for existing offence provisions to also be civil penalty provisions so that ACMA can apply to the court for a civil penalty order against a person who has contravened a civil penalty provision.\(^ {118}\) In addition, it provides ACMA with powers to issue infringement notices,\(^ {119}\) issue formal warnings\(^ {120}\) and to apply to the court for injunctions, including injunctions to undertake, or to cease from undertaking, certain actions.\(^ {121}\) Civil penalties, infringement notices and injunctions will be enforced under the *Regulatory Powers (Standard Provisions) Act 2014*, which contains a standard suite of provisions containing investigative, compliance monitoring and enforcement powers which can be applied to individual pieces of Commonwealth regulatory legislation.\(^ {122}\)

Essentially, the Bill (and the current Act) prohibits certain conduct. That conduct may give rise to a criminal offence as well as being a civil penalty provision. There appears to be no difference in the conduct involved or in the rationale of the provisions—the differences are the increased penalties to which a person is subject in civil penalty proceedings, the lesser standard of proof that is required, and differing procedural requirements and guarantees. The choice of which type of proceedings takes place appears to be at the discretion of ACMA.

The Bill provides for ACMA to apply to a civil court for an order that a person pay to the Commonwealth a pecuniary penalty. The maximum pecuniary penalty is 50 per cent greater than the amount payable as a fine were the conduct prosecuted as a criminal offence. According to the Explanatory Memorandum:

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\(^{116}\) *IGA, proposed subsection 15AA(5).*

\(^{117}\) *IGA, subsection 15(3). The defendant bears an ’evidential burden’ in relation to these matters. That is, he or she has ’the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’ (section 13.3 of the *Criminal Code Act 1995.* If the evidential burden is discharged the prosecution is required to discharge its legal burden to negate the exception beyond reasonable doubt.)*

\(^{118}\) *IGA, proposed section 64B, at item 139.*

\(^{119}\) *IGA, proposed section 64C.*

\(^{120}\) *IGA, proposed section 64A.*

\(^{121}\) *IGA, proposed section 64D.*

To reduce the adverse effects [of gambling] the penalty amounts for contraventions of the IGA need to be high, in particular for major offences including the provision of prohibited interactive gambling services and unlicensed regulated interactive gambling services, to deter offshore global entities from providing services to the Australian market.123

In addition, whilst the civil penalties deal with the same conduct, ‘the penalty for the civil offence is higher, given that the criminal offence also carries with it the stigma of a criminal conviction’.124

**Items 51 to 66** amend Part 3 of the IGA, to set out the new processes under which persons may complain to ACMA about interactive gambling services that should not be provided to Australian customers, or by Australian companies to consumers in designated countries. **Item 53** proposes to increase ACMA’s powers of investigation in this area. It allows for ACMA ‘to handle the entire complaints and investigation process from the receipt of a complaint to enforcement’.125

**Item 82** of the Bill renames the heading for Part 7A of the IGA to **Prohibition of advertising of designated interactive gambling services**. Within Part 7A, section 61BA as amended by **items 87 to 91** will define a **designated interactive gambling service advertisement** as any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of two or more of those things, that gives publicity to, or otherwise promotes or is intended to promote:

- a designated interactive gambling service or
- designated interactive gambling services in general or
- the whole or part of a trade mark in respect of a designated interactive gambling service or
- a domain name or URL that relates to a designated interactive gambling service; or
- any words that are closely associated with a designated interactive gambling service (whether also closely associated with other kinds of services or products).

**Items 92–98, 100–104** and **107–114** of the Bill then amend references to an **interactive gambling service advertisement** to a reference to a **designated interactive gambling service advertisement**. The effect of the amendments is to extend the prohibition on advertising in the IGA to include the types of services that are **unlicensed regulated interactive gambling services**. Currently section 61DA of the IGA provides for two criminal offences:

- **first**, a person commits an offence if the person broadcasts or datacasts an interactive gambling service advertisement in Australia and the broadcast or datacast is not permitted by section 61DB (which permits accidental or incidental broadcast or datacast) or by section 61DC (which permits broadcast or datacast of advertisements during flights of aircraft)126
- **second**, a person commits an offence if the person authorises or causes such a broadcast or datacast.127 In either case, the maximum penalty for contravention is 120 penalty units, being equivalent to $21,600.

**Item 117** of the Bill updates the reference to a gambling service advertisement to a reference to a **designated interactive gambling service advertisement**. **Items 118 and 121** of the Bill insert **proposed subsections 61DA(1A) and (3)** respectively into the IGA to create civil penalty provisions that parallel the existing criminal offences in that section. Where the civil penalty provisions are contravened the maximum penalty is 180 penalty units being equivalent to $32,400.

Currently section 61EA of the IGA provides for two criminal offences:

- **first**, a person commits an offence if the person publishes an interactive gambling service advertisement in Australia and the publication is not permitted by section 61EB (which permits the publication of periodicals distributed outside Australia); section 61ED (which permits accidental or incidental publication); section 61EE

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125. Ibid., p. 64.
126. IGA, subsection 61DA(1).
127. IGA, subsection 61DA(2).
(which permits publication by person not receiving any benefit); and section 61EF (which permits publication of advertisements during flights of aircraft)\textsuperscript{128}

- second, a person commits an offence if the person authorises or causes such an advertisement to be published in Australia.\textsuperscript{129} In either case, the penalty for contravention is 120 penalty units, being equivalent to $21,600.

Item 126 of the Bill updates the reference from an interactive gambling service advertisement to a reference to a \textit{designated interactive gambling service advertisement}. Items 127 and 129 of the Bill insert \textit{proposed subsections} 61EA(1A) and (2A) respectively into the IGA to create civil penalty provisions that parallel the existing criminal offences in that section. Where the civil penalty provisions are contravened the maximum penalty is 180 penalty units being equivalent to $32,400.

\textsuperscript{128} IGA, subsection 61EA(1).
\textsuperscript{129} IGA, subsection 61EA(2).
Appendix A: Recommendations of the O’Farrell Review

Recommendation 1: Commonwealth, State and Territory governments should recommit to Gambling Research Australia to ensure that research funds are directed towards maximising the information available to policy makers, academics, the community and industry about the nature, prevalence and impact of gambling across Australia.

Recommendation 2: A national policy framework, comprising agreed minimum standards, be established to provide consistency in the regulation of online wagering and to improve the effectiveness of consumer protection and harm minimisation measures across the nation.

Recommendation 3: Until the proposed national framework is established and operating, consideration of additional in-play betting products should be deferred and legislative steps taken to respect the original intent of the Interactive Gambling Act 2001.

Recommendation 4: A national self-exclusion register that applies across all online operators should be developed, either by an expansion of the Northern Territory register or through a new national system. The costs associated with such a register should be borne by online operators.

Recommendation 5: Operators should be required to offer customers an opportunity to set voluntary limits on their wagering activities. Consumers should be prompted about setting or reviewing limits on a regular basis.

Recommendation 6: Operators should be required to apply additional consumer protections where ‘credit’ or deferred settlement betting is available.

Recommendation 7: Links between online wagering operators and payday and other lenders should be discouraged.

Recommendation 8: Users should be regularly sent online statements detailing their wagering activity including total wagered, winnings and losses. These statements should also be readily accessible through the operator’s website.

Recommendation 9: As part of the national policy framework, the current 90 day verification period should be reduced to at least 45 days.

Recommendation 10: All staff involved with online users must undertake appropriate training in the responsible conduct of gambling – provided through an accredited provider.

Recommendation 11: That the national policy framework include consistent, enforceable rules about advertising of online gambling.

Recommendation 12: The national policy framework should ensure that advertising of online services using social or digital media platforms is subject to similar regulatory controls as other media.

Recommendation 13: The national policy framework should introduce a system to allow for the development and use of nationally consistent and standardised messaging to assist efforts to ensure responsible gambling.

Recommendation 14: The current single national telephone number and web portal – Gambling Help Online – should be refocused to operate more consistently across all States and Territories, and provide a stronger pathway to other support services for problem gamblers and their families.

Recommendation 15: Further research should be undertaken on the impact of betting restrictions on illegal offshore wagering and the identification of options to improve the situation.

Recommendation 16: A national policy framework that leverages off existing Commonwealth, State and Territory agencies should be implemented and enforced in a similar vein to the National Policy on Match-Fixing in Sport.

Recommendation 17: The Act should be amended to:

• improve and simplify the definition of prohibited activities
• extend the ambit of enforcement to affiliates, agents and the like
• include the use of name and shame lists published online to detail illegal sites and their directors and principals and to include the use of other Commonwealth instruments to disrupt travel to Australia by those named
• allow ACMA, where appropriate, to notify in writing any relevant international regulator in the jurisdiction where the site is licensed

• allow ACMA to implement new (civil) penalties as proposed by the 2012 DBCDE Review and

• include a provision that restricts an operator providing illegal services to Australian consumers from obtaining a licence in any Australian jurisdiction for a specified future time period.

Recommendation 18: Treasury and other relevant agencies should work with banks and credit card providers to identify potential payment blocking strategies to disrupt illegal offshore wagering. Additionally, the recommendation from the 2012 DBCDE Review of the Interactive Gambling Act 2001 relating to ‘safe harbour’ provisions be adopted to support these efforts.

Recommendation 19: ACMA should seek to pursue voluntary agreements with ISP and/or content providers to block identified sites fostering illegal wagering activity within Australia. Failing this, consideration should be given to legislative options for applying website blocking to disrupt the use of offshore operators.