THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERACTIVE GAMBLING AMENDMENT BILL 2016

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Communications
Senator the Honourable Mitch Fifield)
AMENDMENTS TO THE INTERACTIVE GAMBLING AMENDMENT BILL 2016

OUTLINE

The Interactive Gambling Amendment Bill 2016 (the Bill) would amend the Interactive Gambling Act 2001 (the IGA) to implement the Government’s response to recommendations in the 2015 Review of the impact of illegal offshore wagering (the Review).

On 28 April 2016, the Australian Government released its response to the Review and agreed to implement recommendations 6 and 7 to prohibit lines of credit and discourage links between online wagering providers and small amount credit contract organisations (‘pay day’ lenders). The availability of credit presents risks to those individuals who gamble beyond their capacity to pay.

On 27 April 2017, Commonwealth, State and Territory gambling ministers agreed that there should be an exemption for on-course bookmakers to continue to offer credit over the telephone. The vast majority of on-course bookmakers are small businesses who have traditionally provided credit to selected clients who are known to the bookmaker.

The amendments to the Bill will prohibit wagering operators from providing or offering lines of credit either directly, or via a third party, to persons present in Australia. An exemption will be provided to allow on-course bookmakers earning less than $30 million in annual wagering turnover to continue to provide credit via the telephone. The amendments will not affect purely face-to-face operations, which are outside the scope of the IGA.

Specifically, the amendments will insert a new Schedule 2 to the Bill to:

- prohibit wagering operators from providing or offering credit, in connection with certain interactive wagering services, to customers that are physically present in Australia (item 4, new section 15C);
- prohibit wagering operators from promoting or facilitating the provision of credit (other than by way of credit card) via third parties, in connection with such services (the exception for credit cards will not apply in relation to credit cards issued by gambling service providers or by related companies) (item 4, new section 15C);
- provide criminal and civil penalties for contravention of the credit prohibition (item 4, new section 15C);
- provide an exemption for bookmakers earning $30 million or less in annual wagering turnover, and which at least partially conduct their business at an Australian racecourse, to provide credit via the telephone (item 4, new section 15D);
- provide that, where the service provider is part of a group of related companies, the annual wagering turnover of the group (rather than the individual provider) must be below $30 million to attract the exemption (item 4, new section 15D);
- enable the Minister for Communications to determine, by legislative instrument, additional conditions that must be satisfied before a provider may gain the benefit of an exemption (item 4, new sections 15D and 15E);
- provide an exemption enabling wagering operators to conduct ‘business to business’ credit dealings, e.g. offering credit to other gambling service providers to manage risk (item 4, new section 15E); and
- allow a transition period of six months before the prohibition comes into effect to allow wagering operators and consumers to adjust their business and betting practices (a transitional provision will ensure that the new credit prohibition will not prevent a person from recovering debts deferred or incurred before the commencement of the relevant provisions).
The Australian Communications and Media Authority (the ACMA) will be responsible for enforcement of the prohibition. The ACMA will undertake a statutory review after three years from commencement of the new provisions. A report will be tabled in Parliament by the Minister and published on the ACMA website (item 4, new section 15G).

**FINANCIAL IMPACT STATEMENT**

The amendments to the Bill are not expected to have any significant impact on Commonwealth expenditure or revenue.
NOTES ON CLAUSES

Amendment (1)

Amendment 1 would provide for Schedule 2 to the Bill (to be inserted by amendment 2) to commence six months after Royal Assent. This delayed commencement is intended to provide affected gambling service providers and consumers time to prepare for the introduction of the proposed prohibition.

Amendment (2)

Amendment 2 would insert a new Schedule 2 into the Bill, providing for the prohibition of credit betting in certain circumstances.

Interactive Gambling Act 2001

Item 1 – Section 3

Section 3 of the IGA provides a simplified outline of the Act. Item 1 of Schedule 2 to the Bill would amend the simplified outline to reflect the proposed prohibition of credit betting.

Item 2 – Section 4

Item 2 would insert new definitions relevant to the proposed prohibition of credit betting.

The term related company group would refer to a group of two or more bodies corporate, where each member of the group is related to each other member. Whether bodies corporate are related would be determined in the same manner as under the Corporations Act 2001. This definition is relevant to the calculation of a provider’s annual wagering turnover for the exception in proposed section 15D.

The term wagering service would refer to a service covered by paragraph (a) or (b) of the definition of gambling service in the IGA (in section 4). This is a service that: (a) is for the placing, making, receiving or acceptance of bets; or (b) the sole or dominant purpose of which is to introduce individuals who wish to make or place bets to individuals who are willing to receive or accept those bets. Only these types of gambling services are wagering services that would be subject to the proposed prohibition of credit betting. A person who provides a wagering service would be a wagering service provider.

The term wagering turnover, of a person for a financial year, would refer to the part of the turnover of the person for the financial year that is attributable to the provision of wagering services. This definition is central to the exception in proposed subsection 15D(1) which is assessed, inter alia, on the basis of a provider’s annual wagering turnover. The phrase wagering turnover is synonymous with gross wagering revenue. It is intended to capture all amounts bet by customers of wagering service providers, less any refunds. It is not intended to refer to bets received less expenses or winnings paid to customers (i.e net revenue). It is also not intended to capture revenue arising from sources unrelated to the provision of wagering services.
Item 3 – After section 11

Item 3 would insert proposed new section 11A, setting out the circumstances in which credit is provided by a creditor to a debtor under a contract, arrangement or understanding. For the purposes of the Act, credit will be provided where payment of a debt owed by the debtor to the creditor is deferred; or where the debtor incurs a deferred debt to the creditor.

Item 4 – After Part 2A

Item 4 would insert a new Part 2B into the Act, prohibiting credit from being provided to customers of certain interactive wagering services, and requiring the Australian Communications and Media Authority (ACMA) to conduct a statutory review of the operation of the proposed new Part 2B and related provisions.

Prohibition of credit

Proposed new section 15C would prohibit providers of regulated interactive gambling services that are wagering services from providing (or offering to provide) credit, or from facilitating or promoting the provision of credit by a third party in connection with such services (other than by way of an independently-issued credit card). The prohibition would be subject to offence and civil penalty provisions, outlined below.

Subsection 15C(1) would provide that a person commits an offence if the person intentionally provides a regulated interactive gambling service that is a wagering service; and either:

- provides, or offers to provide, credit in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia; or
- facilitates or promotes the provision of credit (other than by way of an independently-issued credit card), by a third person, in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia.

The maximum penalty for commission of the offence would be 500 penalty units. Subsection 15C(2) would provide that a person who contravenes subsection 15C(1) commits a separate offence in respect of each day during which the contravention continues (i.e. a continuing offence).

Subsection 15C(3) would provide for a corresponding civil penalty provision, with a maximum penalty of 750 penalty units. Subsection 15C(4) would provide that a person who contravenes subsection (3) commits a separate contravention in respect of each day during which the contravention continues. The higher penalty amount in subsection 15C(3) recognises the effect or stigma of the conviction that would arise if a person were found guilty of committing an offence against subsection 15C(1), in addition to the pecuniary penalty.

The maximum penalty for the offence and civil penalty provisions would be 5 times higher for a body corporate, due to the operation of subsection 4B(3) of the Crimes Act 1914 and subsection 82(5) of the Regulatory Powers (Standard Provisions) Act 2014 respectively.

It is important to note that the credit prohibition applies only to persons who provide a ‘regulated interactive gambling service’ (within the meaning of proposed section 8E) that is a ‘wagering service’ (within the meaning of section 4). It would not apply to regulated interactive gambling services falling within paragraphs (c) – (f) of the definition of “gambling service” in the IGA, such as a service for the conduct of a lottery or for the conduct of a game
of mixed chance and skill. It would also not apply to face-to-face betting, which is outside the scope of the IGA.

Proposed subsection 15C(5) would provide that subsections 15C(1) and (3) do not apply if the person did not know and could not, with reasonable diligence, have ascertained that the customer or prospective customer in question was physically present in Australia. The note to this subsection clarifies that, in proceedings for an offence against subsection 15C(1), the defendant would bear the burden of adducing evidence in relation to the matters in subsection 15C(5) (the evidential burden), in line with subsection 13.3(3) of the Criminal Code (contained in the Schedule to the Criminal Code Act 1995). In proceedings for breach of the equivalent civil penalty provision, in 15C(3), a person seeking to rely on the exception in 15C(5) would bear an evidential burden in relation to that matter in accordance with section 96 of the Regulatory Powers (Standard Provisions) Act 2014.

It is appropriate for the evidential burden to lie with the defendant in relation to this exception, as the matters are peculiarly within the knowledge of the defendant (i.e. what the defendant actually knew or could have ascertained, in their circumstances, with reasonable diligence).

Proposed subsection 15C(6) would provide further guidance to the Court on how it would be determined (for the purposes of proposed subsection 15C(5)) whether the person could, with reasonable diligence, have ascertained that the customer or prospective customer was physically present in Australia. The subsection would require the following matters to be taken into account:

- whether the customer (or prospective customer) was informed that Australian law prohibits the provision of credit to customers who are physically present in Australia;
- whether the person required customers to provide personal details and, if so, whether those details suggested that the customer was not physically present in Australia;
- whether the person has network data that indicates that customers were physically present outside Australia when the relevant customer account was opened and throughout the period when the service was provided to the customer;
- any other relevant matters.

Proposed subsection 15C(7) would define the phrase “independently-issued credit card” for the purposes of the application of subsections (1) and (3) to a person who provides a regulated interactive gambling service. This is intended to ensure that the exception for credit cards will not apply in relation to credit cards issued by gambling service providers or by related companies. The phrase “independently-issued credit card” would mean:

- if the person is not a member of a related company group—a credit card issued by another person; or
- if the person is a member of a related company group—a credit card issued by another person who is not a member of the related company group.

Proposed subsection 15C(8) would provide that section 15.4 of the Criminal Code (extended geographical jurisdiction – category D) applies to an offence against subsection 15C(1). Section 15.4 is an extension of the standard geographical jurisdiction set on in section 14.1 of the Criminal Code, which would otherwise apply to the offence. Section 15.4 of the Criminal Code applies the offence provision to an offence whether or not the conduct, or a result of the conduct, constituting the alleged offence occurs in Australia. Because it would be possible for offshore gambling service providers to commit the conduct constituting the offence in section
15C(1) wholly in a foreign country where there may not be a corresponding offence in force, this extension of jurisdiction is necessary to ensure the effectiveness of the offence.

**Exception - provider’s annual wagering turnover less than $30 million**

Proposed section 15D would provide an exception to the prohibition of credit betting in section 15C. It would provide that the offence and civil penalty provisions in subsections 15C(1) and (3) do not apply to conduct engaged in by a person at a particular time in a financial year in relation to a regulated interactive gambling service if certain conditions are met. The conditions relate to the type of service; the manner of dealings with customers; the annual wagering turnover of the provider (including whether the person is a member of a related company group); the location of the wagering services; and any additional conditions determined by the Minister.

Proposed paragraphs 15D(1)(a) and (b) would set out the following conditions relating to the type of service and the manner of the provider’s dealings with customers:

- the service is a telephone betting service (within the meaning of proposed section 8AA, as per paragraph 15D(1)(a));
- the conduct involves providing, or offering to provide, credit in connection with the service, and dealings with the customer or prospective customer in relation to the provision or offer are wholly by way of one or more voice calls (paragraph 15D(1)(b)).

These conditions are intended to ensure that the exemption is targeted appropriately and available only in relation to credit provided by telephone (rather than online).

Proposed paragraphs 15D(1)(c) – (f) would set out conditions imposing a maximum wagering threshold for access to the exemption. One of these four possible conditions would apply, based on whether the person was a member of a related company group at the relevant time, and whether the person was a wagering service provider throughout the last financial year.

In relation to a person who **is not** a member of a related company group at the relevant time:

- if the person **was** a wagering service provider throughout the last financial year—the wagering turnover of the person for that financial year was less than $30 million (paragraph 15D(1)(c));
- if the person **was not** a wagering service provider throughout the last financial year—it is reasonably likely that the wagering turnover of the person for the current financial year will be less than $30 million (paragraph 15D(1)(d)).

In relation to a person who **is** a member of a related company group at the relevant time:

- if the person **was** a wagering service provider throughout the last financial year that ended before the relevant time—the total wagering turnover of the members of the group for that financial year was less than $30 million (paragraph 15D(1)(e));
- if the person **was not** a wagering service provider throughout the last financial year that ended before the relevant time—it is reasonably likely that the total wagering turnover of the members of the group for the current financial year will be less than $30 million (paragraph 15D(1)(f)).
Proposed paragraphs 15D(1)(d) and (f) are intended to ensure that any new entrants to the wagering market will not be able to gain the benefit of the exemption if it is reasonably likely that the wagering turnover of the person/group would exceed the $30 million threshold.

Proposed paragraphs 15D(1)(g) and (h) set out additional conditions related to the location of the relevant wagering services:

- if, during the whole or a part of the last financial year, the person had one or more employees whose duties involved the provision of wagering services—during the whole or a part of that financial year, at least one of those employees performed those duties at a racecourse in Australia (paragraph 15D(1)(g));
- if the person is an individual; and did not, during the last financial year, have any employees whose duties involved the provision of wagering services—during the whole or a part of that financial year, the person provided wagering services at a racecourse in Australia (paragraph 15D(1)(h)).

Proposed paragraphs 15D(1)(g) and (h) are intended to ensure that the exemption is only available to gambling service providers with an on-course presence and not, for example, to providers which are solely online. The conditions also recognise that a significant number of on-course bookmakers are small businesses or sole traders.

Proposed paragraph 15D(1)(i) and subsection 15D(2) would allow the Minister to determine, by legislative instrument, additional conditions that must be satisfied before a provider may gain the benefit of an exemption. This would allow the Minister to intervene in the event that the proposed exemption was being misused or abused.

Exception—customer is a gambling service provider

Proposed section 15E would provide a second exemption to the prohibition on credit betting, in certain circumstances where the customer is a provider of a gambling service.

The offence and civil penalty provisions in 15C(1) and (3) would not apply in circumstances where the customer, or prospective customer, of an interactive gambling service was themselves a gambling service provider. This exemption is intended to permit wagering operators to conduct business-to-business credit dealings, for example by offering credit to other wagering companies to offset risk.

Proposed paragraph 15E(1)(b) and subsection 15E(2) would again allow the Minister to determine, by legislative instrument, additional conditions that must be satisfied before a provider may gain the benefit of the exemption.

The note to this subsection clarifies that, in proceedings for an offence against subsection 15C(1), the defendant would bear the burden of adducing evidence in relation to the matters in subsection 15E(1) (the evidential burden), in line with subsection 13.3(3) of the Criminal Code. It is appropriate for the evidential burden to lie with the defendant in relation to this defence, as the matters are peculiarly within the knowledge of the defendant (i.e. what the defendant actually knew or could have ascertained with reasonable diligence).

Acquisition of property

Proposed subsection 15F(1) is a constitutional saving provision, which would provide that the credit betting prohibition in section 15C has no effect to the extent (if any) to which its
operation would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms.

Proposed subsection 15F(2) is a transitional provision designed to ensure that the new credit prohibition will not prevent gambling service providers from recovering debts deferred or incurred before the commencement of the relevant provisions.

Statutory review

Proposed section 15G would require the ACMA to conduct a review of the operation of Part 2B of the IGA (and the remaining provisions of the IGA, so far as they relate to that Part). The review would need to be conducted after the end of the 3-year period beginning from the commencement of section 15E, and must provide for public consultation.

The ACMA would be required to give the Minister for Communications a report of the review within 6 months and, as soon as practicable afterward, publish it on the ACMA’s website. The Minister would be required to cause copies of the report to be tabled in each House of the Parliament within 15 sitting days.

Item 5 – After paragraph 16(b)
Item 6 – After subparagraph 21(1)(a)(ii)

Items 5 and 6 would make consequential amendments to section 16 and paragraph 21(1)(a) of the IGA, respectively, to expand the types of matters about which persons may make complaints to the ACMA, and matters about which the ACMA may investigate, to include whether a person has contravened Part 2B (the prohibition of credit betting).

Item 7 – After paragraph 64A(c)
Item 8 – After paragraph 64C(1)(c)
Item 9 – After paragraph 64D(1)(c)

Item 7 – 9 would make consequential amendments to proposed sections 64A, 64C and 64D of the IGA to enable the ACMA to enforce the proposed civil penalty provision in subsection 15C(3). The amendments would enable the ACMA to issue a formal warning, issue an infringement notice, and seek an injunction in relation to the contravention of subsection 15C(3). Proposed section 64B of the IGA would, without further amendment, enable the ACMA to seek a civil penalty order requiring the payment of a pecuniary penalty in relation to the contravention of subsection 15C(3).