

EXPLANATORY STATEMENT

National Gambling Reforms (Administration of ATM measure) Directions 2014

Summary

The *National Gambling Reforms (Administration of ATM measure) Directions* (Directions) are made under section 110 of the *National Gambling Reform Act 2012* (the Act).

The object of the Directions is to provide regulatory guidance and general requirements in relation to the approach to be taken by the Regulator in the first six months of administering the ATM measure under the Act.

The approach to be taken, will focus on assisting regulated entities understand their obligations under the Act and engaging cooperatively with regulated entities and other relevant persons to facilitate implementation of its first measure.

The Directions gives effect to an educative approach by:

- specifying priorities based on the Regulator's functions relevant to an educative approach – this is intended to inform the Regulator's general administration of the ATM measure;
- prescribing procedural requirements to ensure genuine applications for exemption are settled before responding to potential non-compliance – this will help reduce uncertainty and avoid pursuing action which may become unnecessary; and
- establishing a mandatory process for 'cooperative engagement' which must be followed before responding to any potential non-compliance – this ensures maximum opportunity is afforded to pursuing a cooperative approach.

The Directions also emphasise the priority for 'cooperative engagement' as steps towards achieving compliance and ensuring all reasonable opportunities are afforded to regulated entities to address potential non-compliance.

Background

On 12 December 2012 the Act commenced operation, to provide measures to reduce the harm caused by gaming machines to problem gamblers, and their families and communities. The ATM measure is the first that applies under the Act from 1 February 2014, and requires ATM providers and venues to introduce a \$250 limit to cash withdrawals from ATMs at gaming venues, in any 24 hour period.

The Act also establishes a National Gambling Regulator (Regulator) to administer the measures. In particular the Regulator is given a range of powers to monitor and enforce compliance with the ATM measure, and grant exemptions on the grounds of 'unreasonable inconvenience' under section 43.

Policy background

An educative approach to regulation aims to encourage regulated entities to assume responsibility for their obligations. Formal enforcement action is avoided unless necessary and / or as a last resort. Over time, this ensures that costs are only incurred when necessary, and that the administrative burdens imposed on industry are minimised.

In addition, engaging cooperatively with industry is likely to be more effective in promoting compliance and will help provide practical solutions for responding to non-compliance.

Consultation

An exposure draft was released for public consultation on 23 – 24 January 2014. In addition peak industry bodies and ATM providers who had contact with the Regulator and were impacted by the Direction were also directly invited to provide comment.

Explanation of the provisions

Part 1 – Preliminary

Section 1 - Citation

Section 1 of the Directions states the name of the Directions, which is the *National Gambling Reforms (Administration of ATM measure) Directions 2014*.

Section 2 - Application

Section 2 of the Directions provides that the Directions will cease to have effect after 6 months from their commencement.

Section 3 - Definitions

Section 3 of the Directions defines the terms used in the Directions.

Section 4 - Object of these Directions

Section 4 of the Directions sets out that the object of the Directions is to provide regulatory guidance and general requirements in relation to the approach to be taken by the Regulator in the first 6 months of administering the ATM measure.

The approach to be taken is an educative approach, which seeks to build the capacity of regulated entities to meet their obligations under the Act while encouraging cooperation by regulated entities, rather than a strict enforcement approach of focusing on active monitoring of compliance or use of formal enforcement powers.

Part 2 – Directions

Part 2 of the Directions sets out the Directions the Regulator is required to comply with in the performance of the Regulator's functions and the exercise of the Regulator's powers under the Act.

Section 5 – Regulatory priorities and principles

Section 5 of the Directions sets out the following functions and activities the Regulator must prioritise:

- (a) providing information and advice to regulated entities and the general public about the operation of the ATM measure; and
- (b) cooperating with regulated entities, as well as state and territory governments or other relevant persons, in administering the ATM measure; and
- (c) processing applications for gaming machine premises to be exempt from the operation of the ATM measure (under section 43 of the Act).

Section 6 – General approach to monitoring of compliance with the ATM measure

Section 6 of the Directions provides that rather than engaging in active monitoring of compliance or use of formal enforcement powers, the Regulator is to take an educative approach to the administration of the ATM measure, consistent with the regulatory priorities and principles set out in section 5.

Section 7 – Responding to instances of potential non-compliance (where there is a pending application for an exemption)

Section 7 of the Directions provides that where the Regulator becomes aware of an instance of potential non-compliance and the occupier of the gaming machine premises concerned has made a genuine application, under section 43 of the Act, for an exemption from the operation of the ATM measure, the Regulator must determine the application for an exemption before responding to the potential non-compliance.

Subsection 7(2) applies in relation to both persons who provide ATMs and persons who occupy gaming machine premises.

Examples of circumstances by which the Regulator may become aware of an instance of potential non-compliance include where a complaint has been made by a member of the public, or a regulated entity has made the Regulator aware of its non-compliance.

Section 8 – Responding to instances of potential non-compliance (where no pending application for exemption)

Section 8 of the Directions sets out the approach the Regulator must take in responding to an instance of potential non-compliance of which the Regulator has become aware where no genuine application, under section 43 of the Act, for an exemption from the operation of the ATM measure has been made, or is awaiting decision, in respect of the gaming machine premises concerned.

Subsections 8(2) to (5) set out the following process of cooperative engagement the Regulator must comply with.

- The Regulator must ensure the regulated entity concerned is contacted in relation to the potential non-compliance of which the Regulator has become aware.
- The Regulator must then ensure the regulated entity is given a reasonable period of time, which will generally be at least 6 weeks, before steps are taken to confirm the non-compliance. Steps which might be taken to confirm the non-compliance could include requesting information or visiting the gaming machine premises.
- If, after taking steps to confirm non-compliance, the Regulator (or other authorised person) is of the view that there is an instance of non-compliance, the Regulator must ensure assistance is offered to the regulated entity to help them understand their obligations under the Act.
- Following the provision of assistance to a regulated entity as required by subsection 8(4) of the Directions, the Regulator must ensure the regulated

entity is given a reasonable period of time, which will generally be at least 2 months, to rectify any non-compliance before any further action is taken.

Subsections 8(6) to (9) set out the following process the Regulator must comply with in relation to any formal enforcement action.

- The Regulator must generally ensure that formal enforcement powers are only exercised in cases of serious non-compliance and only after the cooperative process set out under subsections 8(2) to (5) of the Directions has been completed.
- In determining whether there is serious non-compliance, the Regulator must consider (or ensure a relevant authorised person considers):
 - whether it is a 'first time' breach of the ATM measure;
 - whether the breach is deliberate; and
 - any other relevant factors.
- If, following consideration of the factors under subsection 8(6) of the Directions, it is intended that formal enforcement powers be exercised, the Regulator must ensure the regulated entity concerned is notified of the intention to do so and given a reasonable period, generally at least 1 month, to respond to this notification before any powers are exercised.
- Where formal enforcement powers are to be exercised, the Regulator must generally ensure a graduated and escalating approach to non-compliance.

Regulation Impact Statement

A Regulation Impact Statement was not required for because the Direction does not impose regulation in addition to the Act. This Direction only facilitates the administration of existing functions and powers under the Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Directions

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The approach to be taken will focus on assisting regulated entities understand their obligations under the Act and engaging cooperatively with regulated entities and other relevant persons to facilitate implementation of the ATM measure.

The Directions give effect to an educative approach by:

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- establishing a mandatory process for 'cooperative engagement' before responding to any potential non-compliance – this ensures maximum opportunity is afforded to pursuing a cooperative approach.

The Directions also emphasise the priority of 'cooperative engagement' as steps towards achieving compliance and ensuring all reasonable opportunities are afforded to address potential non-compliance.

Human rights implications

The Directions relate solely to the approach adopted to administer the functions, powers and duties of the Regulator under the Act. In particular, the Directions provide for processes for administration of the ATM measure which remain consistent with the Act.

Although the Act engages human rights, the Act contemplates that these functions or powers may only be exercised in furtherance of a legitimate objective. The Act also imposes a range of constraints to ensure these powers are reasonable, necessary and proportionate to these objectives. These rights are set out below.

Right to Privacy and Reputation

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with a person's privacy and reputation.

The Act involves the collection, storage, security, use and disclosure of personal information.

The collection and use of personal information is necessary to achieve the objectives of the Act, including the ATM measure. The Act protects personal information by restricting what can be done with collected information and providing offences for unauthorised disclosure or use of protected information.

The Directions set out processes which are consistent with the Act.

Presumption of Innocence

Article 14 of the ICCPR protects the right to be presumed innocent until proven guilty when charged with a criminal offence. The presumption of innocence is a fundamental principle of common law and imposes a burden on the prosecution of proving the charge. Accordingly, where the evidential burden is placed on a defendant the law may be considered to be inconsistent with human rights.

The Act provides for a number of civil penalty and criminal offences. In a number of the provisions the evidential burden is reversed. The reversal of onus shifts the burden of proof to the respondent requiring the respondent to show that there is a reasonable likelihood that the matters on which they rely are true. Under international human rights law, a reverse onus provision does not necessarily violate the resumption of innocence, provided that the law is not unreasonable in the circumstances. Reverse onus provisions may be justified where the particular offence makes it very difficult for the prosecution to prove each element, or it is easier for the respondent to prove a fact than for the prosecution to disprove it.

All of the provisions in the Act with a reverse burden of proof are civil penalty provisions. None of the criminal offence provisions in the Act involves a reversal of the evidential burden. Each of the provisions that require a respondent to bear the evidential burden involves the respondent seeking to rely on a defence, the material facts of which are peculiarly within the knowledge of the respondent. In each case it

is clearly more practical for the respondent to prove the facts relied upon than for the prosecution to disprove those facts.

The Directions set out processes which are consistent with the Act and which are to be implemented prior to any enforcement of applicable civil penalty provisions under the Act.

Conclusion

The Direction is compatible with human rights because to the limited extent it may impact on human rights, those impacts are reasonable, necessary and proportionate.

The Hon Kevin Andrews, Minister for Social Services