

## Explanatory Statement

### *Interactive Gambling Act 2001*

### Interactive Gambling Regulations 2019

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

#### Purpose

Part 7A of the *Interactive Gambling Act 2001* (the Act) deals with the prohibition of advertising of ‘designated interactive gambling services’. Section 61EA in Part 7A of the Act contains offence and civil penalty provisions relating to the publication of designated interactive gambling service advertisements in Australia.

Section 61BA of the Act sets out the basic meaning of a ‘designated interactive gambling service advertisement’ for the purposes of Part 7A of the Act. Sections 61BB to 61BG set out exceptions to this basic definition. Broadly, a ‘designated interactive gambling service advertisement’ is an advertisement for a designated interactive gambling service. Under section 4, a ‘designated interactive gambling service’ is either a ‘prohibited interactive gambling service’ (as defined by section 5) or an unlicensed regulated interactive gambling service (a service of the kind defined in section 8E – a regulated interactive gambling service –when provided in contravention of subsection 15AA(3)).

Paragraph 70(a) of the *Interactive Gambling Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act. Section 61BGA in Part 7A of the Act provides that the regulations may provide that an advertisement of a kind specified in the regulations is not a designated interactive gambling service advertisement for the purposes of Part 7A.

The purpose of the *Interactive Gambling Regulations 2019* (the Regulations) is to create an additional exception to the meaning of ‘designated interactive gambling service advertisement’. The exception in the Regulations provides that an advertisement that relates to a product or a service that is not a designated interactive gambling service is not a designated interactive gambling service advertisement if it cannot reasonably be regarded as being intended to promote:

- a designated interactive gambling service; or
- designated interactive gambling services in general; or
- a trade mark that is particular to a designated interactive gambling service; or
- a domain name or URL (a website) that relates to a designated interactive gambling service.

The regulations are intended primarily to address scenarios where a gambling operator (either directly or through related companies) provides two different services, where:

- one service is a ‘designated interactive gambling service’ as defined in section 4 of the Act but is provided only to overseas customers in non-designated countries (*the overseas service*);
- the second service is *not* a ‘designated interactive gambling service’ (e.g. a land-based service or a licensed regulated interactive gambling service) and is provided to customers in Australia (*the Australian service*).

Where such services are provided under the same or a similar name or branding, an advertisement for the Australian service may be considered to be giving publicity to or promoting words that are ‘closely associated’ with a designated interactive gambling service (i.e. the overseas service) for the purposes of paragraph 61BA(1)(e). This may mean that advertisements for those land-based or licensed regulated interactive gambling services would themselves be ‘designated interactive gambling service advertisements’.

The regulations are intended to ensure that such advertisements for the Australian service are not unintentionally taken to be designated interactive gambling service advertisements unless they can be reasonably be regarded as being intended to promote such a service, designated interactive gambling services in general, or a trade mark that is particular to or domain name or URL that relates to a designated interactive gambling service.

Details of the accompanying regulations are set out at Attachment 1.

## **Consultation**

An exposure draft of the 2019 Regulations was released for public consultation on 16 July 2019.

The following stakeholders made submissions on the exposure draft:

Australian Communications and Media Authority (ACMA)

Responsible Wagering Australia

Addisons Lawyers

Free TV Australia

## **Regulation Impact Statement**

The Office of Best Practice Regulation has assessed that remaking these instruments without substantial changes is not likely to have more than a minor and/or machinery regulatory impact on business, community organisations and individuals. As such, a RIS is not required.

## **Statement of Compatibility with Human Rights**

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment 2.

## **Attachment 1: Notes on Sections**

### **Section 1—Name**

Section 1 provides that the name of the instrument is the Interactive Gambling Regulations 2019.

### **Section 2—Commencement**

Section 2 provides that the instrument commences on the day after it is registered.

### **Section 3—Authority**

Section 3 provides that this instrument is made under the authority of the Act.

Section 70 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 61BGA of the Act provides that regulations may provide that an advertisement of a kind specified in the regulations is not a designated interactive gambling service advertisement for the purposes of Part 7A of the Act.

### **Section 4—Schedules**

Section 4 provides for each instrument specified in a Schedule to this instrument to be amended or repealed as specified in the Schedule.

### **Section 5—Definitions**

Section 5 provides that for the purposes of this instrument, ‘Act’ means the *Interactive Gambling Act 2001*. It also notes that a number of expressions used in the instrument are defined in the Act, including designated interactive gambling service.

### **Section 6— Designated Interactive gambling service advertisements--exceptions**

Section 6 creates an exception to the meaning of ‘designated interactive gambling service advertisement’, which is set out in section 61BA of the Act.

Paragraph 61BA(1)(e) provides that a ‘designated interactive gambling service advertisement’ includes any writing, still or moving picture, sign, symbol or other visual image, or any audible message, or any combination of 2 or more of those things, that gives publicity to, or otherwise promotes or is intended to promote, any words that are closely associated with a ‘designated interactive gambling service’ (whether also closely associated with other kinds of services or products). The definition is subject to certain exceptions specified in sections 61BB, 61BC, 61BD, 61BE, 61BF, 61BG and 61BGA. This Regulation is created for the purposes of section 61BGA.

A ‘designated interactive gambling service’ is defined in section 4 of the Act and means a prohibited interactive gambling service or an unlicensed regulated interactive gambling service. A ‘prohibited interactive gambling service’ is defined in section 5 of the Act as a ‘gambling service’ (see definition in section 4) that is provided in the course of carrying on a business and is provided to customers using a number of specified services (including an internet carriage service and any other listed carriage services). A number of gambling services are excluded from the definition of ‘prohibited interactive gambling service’. These excluded services are set

out in subsection 5(3) of the Act. A number of these services are specified to be ‘regulated interactive gambling services’ under section 8E. It is not the intent of the Act to prohibit the advertising of these services as long as they are not provided in contravention of section 15AA.

Section 15 of the Act prohibits the intentional provision of prohibited interactive gambling services to customers in Australia. Section 15AA prohibits the provision of regulated interactive gambling services to customers in Australia by a person that does not hold a licence under a law of a State or Territory that authorises the provision of that kind of service in the State or Territory. Section 15A prohibits the intentional provision of Australian-based prohibited interactive gambling services to customers in countries designated under section 9A of the Act.

Section 61BGA of the Act provides that advertisements of a kind prescribed in the regulations are not ‘designated interactive gambling service advertisements’ for the purpose of section 61BA of the Act.

The Regulations provide that an advertisement that relates to a product or a service that is not a designated interactive gambling service is not prohibited by the Act, if it cannot reasonably be regarded as intended to promote:

- a designated interactive gambling service; or
- designated interactive gambling services in general; or
- a trade mark that is particular to a designated interactive gambling service; or
- a domain name or URL (a website) that relates to a designated interactive gambling service.

The reference to ‘a trade mark that is particular to a designated interactive gambling service’ in subparagraph 6(2)(b)(iii) of the Regulations is intended to refer to a trade mark that is particular *only* to a designated interactive gambling service, and is not intended to refer to a trade mark that is *common* to both a designated interactive gambling service, and a service that is not a designated interactive gambling service. That is, if a designated interactive gambling service, and a non-designated interactive gambling service (either a land-based service or a licensed regulated interactive gambling service) share a trademark, subparagraph 6(2)(b)(iii) is not intended to operate to prohibit advertisements that promote that trade mark as it pertains to the non-designated interactive gambling service. Such a trade-mark would not be *particular* to the designated interactive gambling service.

The regulations are intended primarily to deal with situations where a gambling operator (either directly or through related companies) provides two different services, where:

- one service is a ‘designated interactive gambling service’ as defined in section 4 of the Act but is provided only to overseas customers in non-designated countries (*the overseas service*);
- the second service is *not* a ‘designated interactive gambling service’ (e.g. a land-based service or a licensed regulated interactive gambling service) and is provided to customers in Australia (*the Australian service*).

For example, a gambling operator may provide a legal, land-based gambling service in Australia (e.g. a land-based casino), or a regulated interactive gambling service (as defined in section 8E of the Act) that is not an unlicensed interactive gambling service to Australian customers (*the Australian service*). That gambling operator (either directly or through a related entity) may also provide an interactive gambling service wholly to customers outside Australia who are not in designated countries (*the overseas service*).

The Australian service would not be in contravention of the Act as land-based services are not regulated by the Act, and regulated interactive gambling services are permitted to be provided to

Australian customers where they are not unlicensed regulated interactive gambling services (i.e. the person providing the service holds a State or Territory licence that authorises the provision of that kind of service in the State or Territory).

The overseas service would also not technically be in contravention of the Act, as long as it does not have any Australian or designated country customers (see sections 8, 9A, 15 and 15A). However, the overseas service may still be considered a ‘prohibited interactive gambling service’ under section 5 of the Act. This is because section 5 of the Act defines a prohibited interactive gambling service as a gambling service (other than a service of the type listed in subsection 5(3), which includes regulated interactive gambling services) that is provided:

- (a) in the course of carrying on a business; and
- (b) using one of the kinds of communications services listed in paragraph 5(1)(b) of the Act (which includes internet carriage services and other listed carriage services).

If the overseas service met the definition in subsection 5(1), and were not providing a service of a type listed in subsection 5(3), such a service would be a ‘designated interactive gambling service’ for the purposes of the definition in section 4 of the Act. For example, if the overseas service were an interactive casino-type gaming service that met the requirements of subsection 5(1), it would most likely be a prohibited interactive gambling service because it would likely not qualify as a service of the kind listed in subsection 5(3).

If the gambling operator gives the same or a similar name and/or branding to both its Australian service and the overseas service, there is a risk advertisements for the Australian service could be seen to be promoting or giving publicity to words that are ‘closely associated with’ the overseas service (which is a designated interactive gambling service) for the purposes of paragraph 61BA(1)(e) of the Act. Accordingly, advertisements for the Australian services could be designated interactive gambling service advertisements in contravention of Part 7A of the Act.

The regulations clarify that, in this situation the advertisements for the Australian service are not in themselves designated interactive gambling service advertisements unless they can reasonably be regarded as being intended to promote the overseas service (or another designated interactive gambling service), other designated interactive gambling services in general, a trade mark particular to the overseas service (or another designated interactive gambling service), or a domain name or URL that relates to the overseas service (or another designated interactive gambling service).

## **Schedule 1—Repeals**

Schedule 1 provides for the repeal of the *Interactive Gambling Regulations 2001* .

### **Part 1—The whole of the instrument**

Part 1 provides for the repeal of the *Interactive Gambling Regulations 2001*.

## Attachment 2: Statement of Compatibility with Human Rights

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

### Interactive Gambling Regulations 2019

This Disallowable 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 Disallowable Legislative Instrument

Part 7A of the *Interactive Gambling Act 2001* (the Act) deals with the prohibition of advertising of ‘designated interactive gambling services.’ Section 61EA in Part 7A of the Act contains offence and civil penalty provisions relating to the publication of designated interactive gambling service advertisements in Australia.

Section 61BA of the Act sets out the basic meaning of a ‘designated interactive gambling service advertisement’ for the purposes of Part 7A of the Act. Sections 61BB to 61BG set out exceptions to this basic definition. Broadly, a ‘designated interactive gambling service advertisement’ is an advertisement for a designated interactive gambling service. Under section 4, a ‘designated interactive gambling service’ is either a ‘prohibited interactive gambling service’ (as defined by section 5) or an unlicensed regulated interactive gambling service (a service of the kind defined in section 8E, when provided in contravention of subsection 15AA(3)).

Section 61BGA in Part 7A of the Act provides that the regulations may provide that an advertisement of a kind specified in the regulations is not a designated interactive gambling service advertisement for the purposes of Part 7A.

The purpose of the *Interactive Gambling Regulations 2019* (the Regulations) is to create an additional exception to the meaning of ‘designated interactive gambling service advertisement.’ The exception in the Regulations provides that an advertisement that relates to a product or a service that is not a designated interactive gambling service is not a designated interactive gambling service advertisement if it cannot reasonably be regarded as being intended to promote:

- a designated interactive gambling service; or
- designated interactive gambling services in general; or
- a trade mark that is particular to a designated interactive gambling service; or
- a domain name or URL (a website) that relates to a designated interactive gambling service.

The exception under this instrument allows Australian-licensed land-based gambling services who provide designated interactive gambling services wholly to customers outside of Australia, the ability to advertise their legitimate Australian-licensed land-based gambling services in Australia.

The existence of this instrument provides continued certainty and clarity regarding designated interactive gambling service advertisements.

## **Human Rights Implications**

This Disallowable Legislative Instrument may engage the following right:

- Right to freedom of opinion and expression contained in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR)

### Right to Freedom of Opinion and Expression

The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception or restriction.

The right to freedom of expression extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right is not absolute. It carries with it special responsibilities, and may be restricted on several grounds.

This instrument may engage the right to freedom of opinion and expression as it regulates commercial advertising. The instrument clarifies what is regarded as a designated interactive gambling service advertisement and therefore regulates what can and cannot be advertised.

The right to freedom of opinion and expression is positively impacted by this instrument as it provides an exception to the offence of publishing a designated interactive gambling service advertisement. The instrument permits the publication of an advertisement that is not a designated interactive gambling service advertisement for the purposes of Part 7A of the Act. It therefore allows individuals and businesses to promote their licensed gambling services in Australia without the restrictions of Part 7A of the Interactive Gambling Act 2001.

## **Conclusion**

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of the right to freedom of opinion and expression.