

1998-1999-2000-2001

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**INTERACTIVE GAMBLING BILL 2001**

**REVISED EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for  
Communications, Information Technology and the Arts,  
Senator the Honourable Richard Alston)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE  
SENATE TO THE BILL AS INTRODUCED

## **INTERACTIVE GAMBLING BILL 2001**

### **OUTLINE**

The Interactive Gambling Bill 2001 (the Bill) provides for restrictions and complaints in relation to interactive gambling services. The framework in the Bill has three main elements. Firstly it creates an offence of providing an interactive gambling service to customers in Australia. Secondly the Bill establishes a complaints scheme which will enable Australians to make complaints about interactive gambling services on the Internet which are available to Australians. Thirdly the Bill prohibits the advertising of interactive gambling services in Australia.

The Government is concerned that new interactive technology, such as the Internet and datacasting has the potential to greatly increase the accessibility to gambling and exacerbate problem gambling among Australians.

The proposed framework contained in the Bill will limit the development of this newly emerging industry and minimise the scope for problem gambling among Australians. It balances the protection of Australians with a sensible and enforceable regulatory regime. The Government is concerned not to impose unreasonable obligations upon Internet service providers. The proposed regulatory framework in the Bill will give the Australian Broadcasting Authority (ABA) powers to issue notices to Internet service providers aimed at taking reasonable steps to prevent access to prohibited Internet gambling content hosted outside Australia.

The main elements of the proposed framework are:

- an offence provision that makes it an offence for a person to provide interactive gambling services to a customer who is physically present in Australia. The offence provision applies to both Australian-based and overseas interactive gambling service providers;
- an offence provision that makes it an offence for a person to provide Australian-based interactive gambling services to customers in designated countries;
- an industry-based system for responding to complaints in relation to interactive gambling services where the relevant content is available for access on the Internet by Australian customers;
- a complaints mechanism will be established in which a person may complain to the ABA about prohibited Internet gambling content;
- in relation to Internet content hosted in Australia, the ABA must refer the complaint to an Australian police force if the ABA considers that the complaint should be so referred

eg. if it appears from the complaint that a person may be committing an offence of providing an interactive gambling service to Australians;

- in relation to Internet content hosted outside Australia, the ABA must notify the content to the police if it considers that the content should be referred to the police. In addition the ABA will notify the content to Internet service providers so that the providers can deal with the content in accordance with procedures specified in an industry code or standard. In the absence of an industry code or standard the ABA will be given powers to issue a notice to Internet service providers to take reasonable steps to prevent access to the Internet content;
- Internet service providers will be protected from civil proceedings by customers affected by ABA notices;
- a graduated scale of sanctions against Internet service providers for breaching ABA notices or the Bill will apply.

The Government does not propose to mandate any particular technological solutions to filtering overseas sourced material. Rather, the industry will be asked in the first instance to propose appropriate procedures they would follow in preventing access to prohibited sites. These procedures would take account of technical limitations and cost considerations. However, if the industry is unable or unwilling to develop such procedures itself, or if the procedures are deficient, the ABA will have the ability to make a mandatory industry standard. The Minister will also have the ability to direct the ABA to determine an industry standard if an ABA request to a relevant industry body or association to make an industry code is not complied with. In any event, service providers will only be required to prevent access to material available on their service that has been subject to a complaint and when subsequently notified by the ABA.

The Government will continue to work within the Ministerial Council on Gambling for a collaborative national approach on problem gambling. Agreements reached at Council of Australian Governments on 6 November 2000 will result in States and Territories implementing a series of harm minimisation measures immediately. More far-reaching measures and research and public awareness strategies will be developed further under the auspices of the Ministerial Council.

Part 7A of the Bill makes it an offence to advertise interactive gambling services in Australia. The prohibition applies to both on-line and offline advertising of interactive gambling in Australia and the external Territories.

The prohibition in Part 7A is to apply to any person who publishes or broadcasts an advertisement in Australia for any interactive gambling service (whether or not the interactive gambling service has any Australian customers), subject to certain exceptions set out in Part 7A. The prohibition does not extend to advertisements published in overseas media such as magazines published or distributed overseas or Internet sites that are aimed at non-Australian audiences.

The prohibition is modelled broadly on the *Tobacco Advertising Prohibition Act 1992* (the Tobacco Act). Part 7A includes transitional provisions modelled on the equivalent provisions in the Tobacco Act to accommodate existing arrangements relating to the advertising of interactive gambling services.

There are two general offences:

- an offence of broadcasting an interactive gambling advertisement in Australia; and
- an offence of publishing an interactive gambling advertisement in Australia.

## **FINANCIAL IMPACT STATEMENT**

The Bill is not expected to have any financial impact on Commonwealth expenditure or revenue.

## **REGULATION IMPACT STATEMENT**

### **INTRODUCTION**

The Government has a general concern about problem gambling in Australia. The Productivity Commission found in 1999 that 2.1% of the adult Australian population or 290,000 people suffer from problem gambling. 130,000 people experience severe problems. For every problem gambler at least seven other people are adversely affected. There is in addition concern that interactive gambling represents a quantum leap in the accessibility of gambling services, and could exacerbate problem gambling in Australia.

Australia already has one of the largest per capita gambling industries in the world. The Productivity Commission found that, on average, adult Australians currently spend at least twice as much on legalised gambling as people in North America and Europe—making Australians among the heaviest gamblers in the world. The negative social impacts associated with the gambling industry affect many Australian families and communities. They also affect the Commonwealth Government in terms of welfare and other support functions provided to victims of problem gambling.

Australia is also at the forefront of the information economy. It is one of the top four nations in terms of homes with Internet connections and the percentage of the population with Internet access. In 1999, six million Australians had access to the Internet, and of these more than 75% accessed it more than once a week. Between November 1998 and November 1999, the number of households with Internet access increased by over 100%. Over the next twelve months this access is expected to continue to grow rapidly and significantly. The percentage of households with Internet access is expected to grow from

25% in November 1999 to 35% by November 2000. This growth in Internet access corresponds to a growth in the accessibility of gambling services. Australians are also becoming increasingly comfortable with conducting electronic transactions online. Over 800,000 people purchased goods or services over the Internet in the year ending November 1999—an increase of 183% on the previous year's figure of 286,000.

Furthermore, the Internet is only one of a growing number of new communications technologies. Within the next year, new interactive broadcasting services and wireless telecommunications services could provide new platforms for gambling.

These factors underlie the concern of both the Commonwealth and the community about the potential for interactive gambling to exacerbate the negative social impacts of excessive gambling. New communications technologies have the potential to enable services equivalent to poker machines, casino games, or bookmakers in every Australian home, 24 hours a day. The Productivity Commission has described this as a 'quantum leap' in accessibility. This could contribute to an associated growth in problem gambling.

Of particular concern is the presence of gambling in the home. Households with children have been early adopters of new interactive technology such as the Internet. Table 1 demonstrates the high level of Internet uptake in households with children.

**Table 1: Internet access at home**

	Nov 1998	Nov 1999
Couples with children	27%	39%
Single parent families	15%	19%
Couples with no children	15%	23%
Single person	9%	10%
Other	22%	25%

Source: *The Current State of Play: Australia and the Information Economy*, National Office for the Information Economy, 2000

While parents may take reasonable precautions to prevent their children from accessing gambling within the home (via the home computer, for example), it is possible that parental gambling within the home may encourage children to learn and rehearse gambling activities and behaviours.

New interactive technology gives content developers the ability to include highly attractive multimedia content in game and site development. Internet gambling sites already offer sophisticated graphics, music, and live broadcasts of events such as horse racing. Improvements in bandwidth, accessibility and processor technology will give developers new opportunities to create new gambling products.

Young people are early adopters of digital technology and may be particularly attracted to using high-tech gambling products. This may create a new population of problem gamblers. Although technology offers new opportunities for verifying the identity and age of a gambler, the Commonwealth is concerned that savvy users—particularly younger, computer-literate users—may still find ways around these measures and access gambling from the home. The growth and impact of the Electronic Gaming Machine (EGM) market in Australia is an example of how new gambling products can attract new gambling populations, and create new problem gambling.

The Commonwealth is aware of broad community concern about gambling. The Productivity Commission found that while most Australians gamble, around 70% of Australians (including a substantial majority of regular gamblers) consider that gambling does more harm than good to the community. A significant proportion of the submissions made to the Senate Information Technologies Select Committee's inquiry into Internet gambling expressed concern about the potential for interactive gambling to exacerbate problem gambling in Australia.

In early 2000, the Government decided to pursue a 12-month moratorium on new interactive gambling services in order to allow the feasibility and consequences of a permanent ban to be studied. After failing to secure the support of all of the States and Territories for a voluntary moratorium, the Government introduced the *Interactive Gambling (Moratorium) Bill 2000*. The moratorium period commenced on 18 May 2000, and covers interactive gaming and interactive wagering after a sporting event has commenced.

The Government also established a Ministerial Council to provide leadership on problem gambling. It is made up of State and Territory Ministers and is chaired by the Commonwealth Minister for Family and Community Services. The Ministerial Council met for the first time on 19 April 2000, and agreed to aims and objectives towards a national approach to the problem gambling. It also agreed to exchange information on responsible gambling strategies, and to provide a forum for common issues, with the objective of developing suitable regulatory approaches.

In November 2000, the Council of Australian Governments (COAG) considered the issue of problem gambling. It reached agreement on the immediate implementation of a set of harm minimisation measures by State and Territory Governments, mostly focused on electronic gaming machines (EGMs, or 'pokies'), and agreed that the Ministerial Council would consider a number of more far-reaching measures. This agreement will form the basis for the future work of the Ministerial Council. Interactive gambling was not discussed by COAG. The framework agreed in principle at COAG was progressed at an officials' meeting of the Ministerial Council in January 2001. The next Ministerial meeting is scheduled for 20 April 2001.

The National Office for the Information Economy (NOIE) conducted a study into the feasibility and consequences of banning interactive gambling in consultation with the Department of Family and Community Services (FaCS). The report considered the

technical feasibility of banning interactive gambling on the Internet, and the possible economic and social consequences of a ban, and made the following findings:

1. There are several technical methods that could potentially be used to implement a ban on interactive gambling based on Internet content control. These include packet filtering, content filtering, router filtering and detection-response filtering. However:
  - all of these methods can potentially degrade general Internet performance;
  - none would be 100% effective in preventing Australians' access to interactive gambling services; and
  - implementation would take at least six to twelve months and would require consultation with the gambling industry, telecommunications carriers and Internet service providers.

Content control options are only relevant to gambling services provided from overseas. Implementing a ban on domestic interactive gambling service providers or on interactive gambling services delivered via digital broadcasting or mobile telephony would require legislative change only.

2. The Commonwealth has clear constitutional and enforcement powers to ban interactive gambling within Australia. Any banning legislation would probably not involve an acquisition of property requiring the provision of just terms compensation.
3. A ban via financial controls is not feasible.
4. Interactive gambling is a rapidly growing e-commerce industry. However, a ban would be consistent with the Commonwealth's e-commerce strategy, which calls for appropriate legal and regulatory measures to protect consumers.
5. Economic modelling commissioned for the study indicates that a ban may have modest or small economic benefits for Australia in terms of restricting access to a harmful activity and possible aggregate benefits for State and Territory taxation revenue. There is also a need for further regulation impact analysis of the costs and benefits of options for implementing any ban. In particular, the modelling did not factor in potential costs to Government and industry of implementing a ban.
6. The growth of interactive gambling has the potential for negative social consequences in Australia because of increased accessibility of gambling services.
7. A ban would be consistent with Australia's current obligations in the context of the General Agreement on Trade in Services, but would need to take into account the Australia-New Zealand Closer Economic Relations Agreement.

## **ISSUE**

The Government is concerned that new interactive communication services will give interactive gambling service providers (IGSPs) new opportunities to increase the size and accessibility of the gambling industry in Australia. The Productivity Commission has found a

strong link between the accessibility of gambling services and the prevalence of problem gambling in the community. In its report, *Australia's Gambling Industries* (1999), it states that 'there is sufficient evidence from many different sources to suggest a significant connection between greater accessibility ... and the greater prevalence of problem gambling.'

The concern is thus that the growth in availability of interactive gambling services to the Australian community will lead to an increase in problem gambling.

## **OBJECTIVES**

The Government is concerned that the interactive gambling industry has the potential to expand rapidly in Australia, and that any further expansion of interactive gambling could exacerbate problem gambling in Australia. The Government is also mindful of the need not to place undue burdens on Australia's communications industries. It hence seeks a strategy for restricting Australian's access to interactive gambling while balancing the interests of the information economy.

## **OPTIONS**

Three options can be identified in considering a ban on interactive gambling in Australia:

1. maintaining the status quo by not implementing any sort of ban or restriction;
2. legislating a targeted ban designed to protect Australian consumers while limiting impact on the interactive gambling industry and ISPs; or
3. legislating a comprehensive ban on interactive gambling in Australia that completely eliminates the Australian interactive gambling industry and includes mandatory blocking by ISPs.

*The first option* would allow State and Territory licensing regimes for interactive gambling to operate without Commonwealth intervention. These regimes incorporate harm minimisation measures for interactive gambling, and interact with a developing national approach to interactive gambling regulation. This would also occur in the context of existing initiatives on problem gambling under the strategic framework agreed by COAG and referred for implementation to the Ministerial Council on Gambling.

*The second option* involves the legislation of a ban on the provision of interactive gambling services to persons physically located in Australia by IGSPs with a link to Australia, as well as a complaints-based regime that allows for the filtering of foreign-based IGSPs by Australian Internet users, comparable with existing arrangements for Internet content. The COAG and Ministerial Council initiatives on problem gambling would also apply, as would the harm minimisation measures implemented by States and Territories in the case of



interactive gambling services provided to overseas customers. This option would not restrict the export of interactive gambling services by Australian IGSPs.

*The third option* would be a comprehensive banning strategy that would seek to prohibit the domestic industry entirely, as well as implement content blocking at the ISP level in order to restrict Australians' access to offshore IGSPs. Ministerial Council initiatives for problem gambling would continue to apply, but State and Territory interactive gambling regulation would appear to be superseded under this option.

## **IMPACT ANALYSIS**

### **Impact group identification**

Affected groups would be:

- IGSPs;
- interactive gambling consumers and, in particular, problem gamblers;
- State and Territory Governments;
- the Commonwealth Government;
- welfare and problem gambling agencies;
- communications industries (particularly ISPs); and
- the Australian economy as a whole.

### **Option 1: Status Quo**

The Commonwealth could opt to take no action in relation to a ban on interactive gambling, other than existing program initiatives in the context of the Ministerial Council on Gambling.

#### ***Interactive gambling industry***

Doing nothing is unlikely to slow the growth of this industry in Australia and the accessibility of gambling services online. The licensing and regulatory regime established by the States and Territories appears to promote the growth of the Australian interactive gambling in a global market. The offshore interactive gambling industry will also continue to have full access to the Australian market.

#### ***Interactive gambling consumers and problem gamblers***

If the Commonwealth does not take action to restrict Australians' access to interactive gambling services, a range of Australian-based IGSPs and offshore sites will continue to be

available. Given that Australian States and Territories have already issued a number of interactive gambling licences, it is reasonable to expect that interactive gambling consumers will have access to an increasing choice of domestic providers.

Under this option, potential problem gambling arising from interactive gambling will be unchecked. Ministerial Council initiative will provide some protection in terms of problem gambling programs. Because interactive gambling may appeal to new types of gamblers, it is possible that the types of problems encountered by problem gamblers would also be new and different.

### ***State and Territory Governments***

Under the status quo option, State and Territory Governments will be able to continue to license new interactive gambling service providers. This will enable the licensing authorities to continue to collect fees and will provide ongoing opportunities to generate revenue.

However, an economic study commissioned by NOIE points out that interactive gambling is subject to concessional tax regimes and tax competition between States and Territories. State and Territory revenues may thus be limited by the growth of the interactive gambling industry in relation to other entertainment or comparable industries taxed at normal rates.

### ***Commonwealth Government***

There is no direct financial impact on the Commonwealth under the status quo. The Commonwealth has agreed in principle to jointly fund initiatives agreed at the COAG meeting of November 2000, but these relate to all gambling rather than just interactive gambling.

An indirect impact may stem from a greater demand for Commonwealth social services resulting from problem gambling associated with interactive gambling services that would otherwise have been restricted.

### ***Welfare and problem gambling agencies***

There is a reasonable expectation that problem gambling and the demand for problem gambling support services in Australia will continue to grow if the Commonwealth does nothing to restrict Australian's access to interactive gambling services. Moreover, because interactive gambling may attract new players, there is a chance that problem gambling support agencies may need to adapt to deal with growing numbers of problem interactive gamblers.

### ***Communications industries***

Under the status quo, no obligations are imposed on ISPs or other sectors of the communications industry by the Commonwealth to take any measures to restrict access to interactive gambling services.

### *The Australian economy as a whole*

Under the status quo option, the Australian economy as a whole would not benefit from any measures that might limit problem gamblers' requirements for social services. The Australian interactive gambling industry would remain a moderate earner of export revenue, as well as a moderate source of revenue for States and Territories. However, economic modelling suggests that this option may not maximise such benefits.

### **Option 2: A Targeted Ban**

The Commonwealth could ban the provision of interactive gambling services by Australian operators to users in Australia. It could also give Australian users the capacity to filter out these services from offshore providers.

### ***Interactive gambling industry***

A distinction needs to be made between gaming, wagering and lotteries as different types of gambling in assessing the impact of the proposed legislation on the interactive gambling industry.

Imposing such a ban is likely to have a moderate effect on the Australian-based interactive gaming industry and its employees. This is because the interactive gaming industry in Australia is primarily focused on offshore markets. For example, only about 5% of Lasseters Online players are Australian, and only a subset of these play for money. Australian users make up only a tiny proportion of interactive gaming providers' clientele, and this pattern is likely to be followed by new entrants into the market. This option would hence not significantly limit the capacity of Australian interactive gaming providers from competing in a global market.

Interactive wagering and lotteries are different. The market for some of these services is primarily domestic. The restriction of interactive wagering and lottery services may therefore have significant negative commercial consequences for segments of the industry that are focused on a domestic market.

The legislation would not limit or restrict in any way the capacity of State and Territory Governments to renew existing interactive gambling licences or approvals, or to issue further licences or approvals. The primary regulatory hurdle for new Australian entrants into the international interactive gambling market is obtaining authority from the relevant State or Territory Government.

### ***State and Territory Governments***

Research commissioned by NOIE suggests that a ban on the provision of interactive gambling services by Australian operators to Australians may have a moderately beneficial aggregate impact on State and Territory revenues. This is because the interactive gambling industry is currently subject to taxation incentives and taxation competition between States and Territories. The consultant's proposition is that a restriction on Australians' access to this industry would result in increased patronage of entertainment activities that are taxed at a higher rate than interactive gambling, with a corresponding increase in State and Territory revenue.

### ***Commonwealth Government***

The cost of the Government's monitoring role under the legislation has been estimated at around \$1.5m in 2001-02 for start up, and then \$0.75m for each of the forward years. These costs should be absorbed.

There may be a reduction in demand for Commonwealth social services that would have been required as a consequence of problem gambling associated with prohibited interactive gambling services.

### *Interactive gambling consumers and problem gamblers*

A restriction on the range of interactive gambling services available to consumers would reduce consumer choice. However, consumers, and in particular problem gamblers, would have some protection from interactive gambling services, which, in the Government's view, have the potential to exacerbate problem gambling.

### *Welfare and problem gambling agencies*

Pressure on welfare and problem gambling agencies would potentially be reduced by a restriction on Australians' access to interactive gambling services.

### *Communications industries*

Under a targeted ban, the ISP industry would have the option of contributing to the development of a code by a representative industry body that would provide for approved content filters to be made available to Australian Internet users. In this regard, the legislation is modelled on the online content scheme implemented in 1999 by Schedule 5 of the *Broadcasting Services Act 1992*. Under Schedule 5, the Internet Industry Association (IIA) registered a code with the Australian Broadcasting Authority (ABA). The code provided for the industry to respond to community complaints against content that had been upheld by the ABA by notifying the manufacturers of approved filters about the offending sites. It also provided for ISPs to furnish their users with information about the online content scheme and access to approved filtering software. In practice, the obligations of an ISP are discharged by providing hyperlinks to information on the ABA website and the websites of approved filter providers. This regulatory impact could be described as minimal.

The fact that the current legislation is modelled on the online content scheme also means that setup and compliance costs for the industry would be marginal in nature.

There would also be no impact on general Internet performance. The installation of filtering software on end users' computers is entirely voluntary on the part of the user. Even where a user chooses to install the software, the effect would be so small as to be difficult to measure, and would only affect that user's computer, and not general Internet performance. The speed of a user's computer processor and Internet connection are far more significant factors in determining the performance of the Internet from the perspective of that user.

The installation of filtering technology at any level of the Internet hierarchy would not be mandated under this option. The mandating of such technologies would have a deleterious

effect on general Internet performance, either by slowing down data transfer speeds, or by unintentionally blocking access to legitimate online services.

There is also evidence that the interactive gambling industry contributes to the development of Australia's information industries. Spin-off benefits in the form of expertise and infrastructure would continue to accrue in some degree under this option.

### ***The Australian economy as a whole***

Economic modelling suggests that there is likely to be no benefit to national economic welfare from including exports in a ban on interactive gambling. This is because exports of interactive gambling do not impose any domestic social costs. Hence, under the criterion of maximising national economic welfare, if interactive gambling is to be banned, the ban should cover interactive gambling supplied to people located in Australia, but not people outside Australia.

This modelling also suggests that the economic benefit derived from a ban does not differ dramatically between a partial ban and a comprehensive ban.

### **Option 3: A Comprehensive Ban**

Under the third option, a banning strategy would be comprehensively applied to both domestic and foreign IGSPs. This would involve complete prohibition of Australian IGSPs, regardless of whether they provide gambling services to Australians or offshore residents, as well as an aggressive strategy to prevent Australians' access to offshore interactive gambling services via blocking measures at the ISP level.

### ***Interactive gambling industry***

The domestic interactive gambling industry would be eliminated by this option. A substantial reduction in employment in the gambling industry would result.

### ***State and Territory Governments***

As is the case with a targeted ban, a comprehensive ban may have a moderately beneficial impact on State and Territory revenues, according to economic research commissioned for the study into the feasibility and consequences of banning interactive gambling. This is because a restriction on the interactive gambling industry would be likely to result in increased patronage of entertainment activities that are taxed at a higher rate than interactive gambling.

### ***Commonwealth Government***

A comprehensive ban would require considerably greater resources than those estimated in relation to option 2 for both administration of a content regulation scheme and police enforcement of offences. There is no precise estimate.

There may be a reduction in demand for Commonwealth social services that would have been required as a consequence of problem gambling associated with prohibited interactive gambling services.

### ***Interactive gambling consumers and problem gamblers***

Consumers' choice would be restricted, with a corresponding diminution in the value of the interactive gambling industry as a whole. However, there would also be protection from the possible harmful social effects of interactive gambling.

### ***Welfare and problem gambling services***

Welfare and problem gambling support services would benefit by not having to provide increasing levels of service to those impacted by problem gambling related to interactive gambling.

### ***Communications industries***

A comprehensive ban would involve the mandatory installation of content blocking technologies by ISPs. There are several technical methods that could potentially be used, but all can degrade general Internet performance, and none would be 100% effective in preventing Australians' access to interactive gambling services. Such a strategy would

involve significant industry-wide costs, ranging from \$200,000 to \$6 million for implementation, and \$200,000 to \$2.6 million annually (rising uncapped) for maintenance. Inferior Internet performance would have flow-on effects for the entire information economy in Australia.

### ***The Australian economy as a whole***

Like a targeted ban, economic modelling suggests that a comprehensive ban could have moderate benefits for the Australian economy as a whole. However, these benefits are somewhat limited compared to a targeted ban because of the limitation on consumer choice and the corresponding dip in the value of the interactive gambling industry. The decrease in export revenue resulting from the restriction on exports of interactive gambling services would also deprive the Australian economy of some benefit.

## **CONCLUSION AND RECOMMENDED OPTION**

The recommended option:

- focuses a ban to the provision of service by Australian operators to Australians;
- does not restrict the capacity of Australian IGSPs to compete in the international market;
- may have moderate benefits for State and Territory revenues and the economy as a whole, according to one economic model; and
- would have a minimal impact on the Internet service industry.

The option would be complemented by initiatives underway in the context of the Ministerial Council on Gambling to deal with problem gambling.

This is preferable to the maintenance of the status quo, which may exacerbate problem gambling through an increase in access to gambling services. It is also preferable to a comprehensive ban, which would impose unreasonable obligations on ISPs and would completely eliminate the interactive gambling industry in Australia.

## **OTHER ISSUES**

### ***Restriction on competition***

The recommended option does not restrict the potential of the Australian interactive gambling industry to compete in an international market. It restricts the access of offshore providers to the Australian market, but only to the extent that Australian users choose to take advantage of the complaints-based content regime to filter these services from their systems.





*Effects on small business*

IGSPs that are small businesses may have to modify their services to comply with the recommended strategy. Specifically, such small businesses may have to take steps to restrict Australians' access to interactive gambling services. However, small IGSPs would continue to have access to the international market.

ISPs that are small businesses may have to contribute to the development of an industry code to provide for user-level filtering of offshore services identified under the complaints-based regime. They would also need to ensure that such filtering software is made available to Australian users. These compliance costs would be minimal since this is largely commensurate with provisions already made under the *Broadcasting Services Act 1992* for Internet content regulation.

*Effects on regional Australian jobs*

The recommended option would have some impact on employment in regional Australia, to the extent that elements of the interactive gambling industry most severely impacted by the restrictions may be located in regional Australia. These include interactive wagering and lottery providers. Jobs in the interactive gaming and Internet service industries in regional Australia will experience a more moderate impact.

*Trade Impact Analysis*

Given the global market for interactive gambling services is largely untapped, the Australian interactive gambling industry has the potential to generate export revenue. The Australian industry is relatively new and small. As at early June 2000 there were approximately 15 providers operating. States and Territories had issued 25 interactive gambling licences. Evidence provided to the Senate Select Committee on Information Technologies' 1999 inquiry into Internet gambling indicates that, although new, a number of providers have had rapid growth and are generating export revenue. The recommended option will not prevent existing and prospective IGSPs from competing internationally for business.

**CONSULTATION**

In the course of completing the study into the feasibility and consequences of banning interactive gambling, the Government undertook wide industry and community consultation, including:

- a round of written public submissions in July and August 2000, during which 59 submissions were received;

- an interactive gambling forum hosted by NOIE in Melbourne in October 2000, attended by representatives from the interactive gambling industry, community groups and academia; and
- a telephone survey of community attitudes commissioned by FaCS.

The Government also accepted numerous written and oral representations from industry and community bodies on the topic of a ban on interactive gambling during the moratorium period, and commissioned expert studies on the economic and technical impacts of a possible ban.

The recommended option has been developed to respond to strong community concern about the potential of interactive gambling to exacerbate problem gambling, in a way that balances the concerns of the interactive gambling industry and communications industries. Views expressed in consultation have been incorporated into the recommended option in the following ways:

1. It responds to community concern about interactive gambling by restricting Australian's access to these services. Submissions from individuals and community groups, as well as the survey of community attitudes commissioned by FaCS, indicated a high level of community support for strong restrictions on access to such services. The Interchurch Gambling Task Force, the Salvation Army, the Wesley Community Legal Service, as well as two-thirds of the respondents to the community survey, are among those who voiced concern in this respect.
2. It avoids mandatory online content blocking at the ISP level. The submission from the ISP industry peak body, the Internet Industry Association, as well as the technical study commissioned by NOIE, indicated that mandatory filtering could have a negative impact on Internet performance and would be easily circumvented by determined users.

### **Implementation and review**

A phase-in period between passage of the legislation and commencement will give IGSPs time to upgrade their systems to be compliant with the requirement that interactive gambling services should not be provided to Australians. ISPs will have additional time to prepare an industry code to provide for filtering options for Australian users.

The scheme could be reviewed six months subsequent to the completion of the implementation period, in the same way that the online content scheme has been reviewed.

## ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ABA: Australian Broadcasting Authority

Bill: Interactive Gambling Bill 2001

BSA: *Broadcasting Services Act 1992*

Radiocommunications Act: *Radiocommunications Act 1992*

Telecommunications Act: *Telecommunications Act 1997*

## NOTES ON CLAUSES

### Part 1—Introduction

#### Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the *Interactive Gambling Act 2001*.

#### Clause 2 – Commencement

Clause 2 provides for a staged commencement of the Bill.

Part 2 of the Bill (which relates to the offence of providing an interactive gambling service to customers in Australia) will commence on the 28<sup>th</sup> day after the day on which the Bill receives the Royal Assent. This will provide industry with additional lead-time to put appropriate arrangements in place to avoid contravening the Bill.

Part 2A of the Bill (which relates to the offence of providing Australian-based interactive gambling services to customers in designated countries) will also commence on the 28<sup>th</sup> day after the day on which the Bill receives the Royal Assent.

Part 7A of the Bill (which relates to the offence of advertising interactive gambling services in Australia) will also commence on the 28<sup>th</sup> day after the day on which the Bill receives the Royal Assent. This will provide industry with additional lead-time to put appropriate arrangements in place to avoid contravening the advertising prohibition.

Part 3, sections 42, 43, 48, 49 and Part 5 of the Bill will commence on a date to be proclaimed, or six months after the day on which the Bill receives the Royal Assent, whichever is the earlier. These provisions relate to the complaints system for prohibited Internet gambling content, the compliance with industry codes and standards and on-line provider rules. This later commencement date will enable the industry and the ABA to develop industry codes or standards and ensure that Internet service providers are not subject to offences relating to non-compliance with codes and standards prior to such codes or standards being developed. The later commencement date takes into account the timeframes required to develop codes and standards due to minimum periods for public consultation on draft codes and standards provided for in the Bill.

The remaining provisions within the Bill commence on the day on which it receives the Royal Assent. This includes Part 4 (except sections 42, 43, 48 and 49), which relates to industry codes and industry standards. This immediate commencement will enable industry to start developing a code as soon as the Bill receives the Royal Assent.

### **Clause 3 – Simplified outline**

Clause 3 sets out a simplified outline of the Bill to assist readers.

### **Clause 4 – Definitions**

Clause 4 sets out the key definitions used in the Bill. These definitions are discussed below.

#### ***ABA***

The term ‘ABA’ is defined to mean the Australian Broadcasting Authority. Under the Bill, complaints about prohibited Internet gambling content will be able to be made to the ABA. The Bill enables the ABA to investigate such complaints. If the prohibited Internet gambling content is hosted in Australia and the ABA considers that the complaint should be referred to an Australian police force (for example because it may breach the offence in clause 15 of the Bill), then the ABA must refer it to the police. If the ABA is satisfied that Internet content hosted outside Australia is prohibited Internet gambling content, the ABA will be able to notify the content to a law enforcement agency or take other appropriate action under clause 24 of the Bill.

#### ***Access***

The term ‘access’ is defined to have the same meaning as in Schedule 5 to the BSA (which regulates the publication of illegal and offensive material on the Internet). This term is used in the definitions of ‘prohibited Internet gambling content’ and ‘Internet carriage service’.

The definition of the term ‘access’ in clause 4 is included to avoid doubt and to avoid the term being given an unduly narrow meaning. ‘Access’ will include access that is subject to a pre-condition (such as the use of a password), access by way of push technology (where a customer requests a content provider to provide him or her with online material on a regular basis, for example, subscription to an Internet ‘channel’) and access by way of a standing request to an Internet content host to send material stored on the Internet.

#### ***Australia***

The term ‘Australia’, when used in a geographical sense, is defined to include the external Territories. These Territories include Norfolk Island, Cocos (Keeling) Islands and Christmas Island.

Examples of the use of the term ‘Australia’ are in clauses 8, 16, 61DA and 61EA of the Bill.

### ***Australian-customer link***

The term ‘Australian-customer link’ is defined to have the meaning given by proposed section 8. For the purposes of the Bill, a gambling service (discussed below) will have an Australian-customer link if, and only if, any or all of the customers of the service are physically present in Australia.

An Australian-customer link is one of the key elements of the definition of a ‘prohibited Internet gambling service’ in clause 6 of the Bill. It is also used in the offence provision in clause 15 of the Bill.

### ***Australian police force***

The term ‘Australian police force’ is defined to mean the Australian Federal Police, or the police force of a State or Territory. The ABA may refer a complaint to a member of the Australian police force if the ABA considers that the complaint should be referred to the police. In addition ABA may notify the police of Internet content hosted outside Australia if the ABA is satisfied that it is prohibited Internet gambling content under proposed section 24.

### ***Bet***

The term ‘bet’ is defined in clause 4 to include a wager. A bet in a pool-betting scheme such as the TAB or Tattslotto is a ‘bet’ for the purposes of the Bill.

### ***Broadcasting service***

This term is defined to mean a broadcasting service (as defined by the *Broadcasting Services Act 1992* (BSA)) provided in Australia. The term is used in paragraph 5(1)(b) of the definition of an ‘interactive gambling service’.

Section 6 of the BSA defines ‘broadcasting service’ broadly to mean a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- (a) a service (including a teletext service) that provides no more than data, and no more than text (with or without associated still images); or
- (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
- (c) a service, or a class of services, that the Minister determines, by notice in the Commonwealth *Gazette*, not to fall within this definition.

The explanatory memorandum to the BSA states that the exclusion in paragraph (b) of the definition of ‘broadcasting service’ encompasses those services which allow a person to receive or access a program at a time determined by the person making a request. That is, where the scheduling of the program is determined by the service provider, the service is *not* a ‘point-to-point’ service.

‘Program’, in relation to a broadcasting service, is defined to mean:

- (a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
- (b) advertising or sponsorship matter, whether or not of a commercial kind.

### ***Business***

The term ‘business’ is defined in clause 4 to include a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis. This definition has been included to make it clear that a person would be providing a service in the course of carrying on a business for the purposes of the Bill even if the person conducted a one-off or irregular commercial activity.

The definition also provides that to avoid doubt, the fact that a club or association provides services to its members does not prevent these services from being services provided in the course of carrying on a business. This is included to remove any possible doubt that if a club or association were to provide an interactive gambling service to its members, it could be considered to be carrying on a business for the purposes of this Bill.

The term ‘business’ is used in clauses 6 and 7 of the Bill and in paragraph 5(1)(a) of the definition of an ‘interactive gambling service’. Paragraph 5(1)(a) provides that one of the conditions that needs to be satisfied before a gambling service (as defined in clause 4) can be an interactive gambling service for the purposes of the Bill is that the service is provided in the course of carrying on a business.

The settled legal meaning of ‘carrying on a business’ is to conduct some form of commercial enterprise, systematically or regularly, with a view to a profit: *Hyde v Sullivan* [1956] SR (NSW) 113. The definition of ‘business’ in clause 4 varies the ordinary meaning of ‘business’ so that it is clear that, for the purposes of the Bill, a one-off or irregular gambling service that satisfies the definition of a gambling service and is provided using a communications service specified in paragraph 5(1)(b) would be an interactive gambling service unless the service is an excluded service under subclause 5(3).

A commercial enterprise that provides a service with a view to a profit is clearly providing a service in the course of carrying on a business. However an in-house electronic raffle run by a staff member of a commercial enterprise to raise money for a charity would not be a service provided in the course of carrying on a business, even though it takes place within a commercial enterprise. The motive in this example is not for profit.



In contrast, a not-for-profit body, such as a religious, community or sporting association would generally not be regarded to be providing a service in the course of carrying on a business because, in carrying on its activities, such an association does not exist for the purpose of making a profit. However, the relevant consideration for a Court in assessing whether a service is provided in the course of carrying on a business would be the nature of the particular activity and the profit motive. For example a not-for-profit amateur sporting association that runs an electronic lottery once or twice a year as a fund-raising activity would not generally be regarded as providing that service in the course of carrying on a business due to the absence of the profit motive.

### ***Business day***

The term ‘business day’ is defined in clause 4 to mean a day that is not a Saturday, a Sunday or a public holiday in the place concerned. This term is used in clause 28 of the Bill, which relates to compliance with access-prevention notices.

### ***Chapter 8 agreement***

The term ‘Chapter 8 agreement’ is defined in clause 4 to have the same meaning as in the Corporations Law. This term is used in clause 9 of the Bill, which relates to contracts that are exempt under the Corporations Law. Under clause 5 and clause 6 of the Bill services which relate to contracts that under the Corporations Law are exempt from a law relating to gaming or wagering are specifically excluded from the meaning of an ‘interactive gambling service’ and a ‘prohibited Internet gambling service’ for the purposes of the Bill. Clause 9 of the Bill sets out the meaning of contracts that under the Corporations Law are exempt from a law relating to gaming and wagering for the purposes of the Bill. It includes Chapter 8 agreements covered by subsection 1141(2) of the Corporations Law ie deliverable bond contracts and futures options over such contracts (see regulations 1.2.13 and 1.2.18 of the Corporations Regulations).

### ***Civil proceeding***

The term ‘civil proceeding’ is defined in clause 4 to include a civil action. This term is used in Part 6 of the Bill, which provides protection from civil proceedings for Internet service providers in specified circumstances.

### ***Content service***

The term ‘content service’ is defined in clause 4 to mean a content service (as defined by the *Telecommunications Act 1997* (the Telecommunications Act)) provided using a listed carriage service (discussed below). This term is used in clause 5 of the Bill.

Section 15 of the Telecommunications Act defines a ‘content service’ as:

- a broadcasting service (as defined in the BSA, see above);

- an on-line service (including those for information and entertainment); and
- a service specified in a determination made by the Minister.

Subsection 15(2) of the Telecommunications Act allows the Minister to make a determination specifying a kind of service to be a content service. This gives the flexibility to specifically include particular kinds of services as content services if doubts arise about their status. Such a determination is a disallowable instrument.

A listed carriage service is defined in section 16 of the Telecommunications Act and is intended to include a service for the carriage of Internet communications.

Section 16 of the Telecommunications Act defines a 'listed carriage service' as:

- a carriage service between a point in Australia and one or more other points in Australia;
- a carriage service between a point in Australia and one or more other points, at least one of which is outside Australia; and
- a carriage service between a point outside Australia and one or more other points, at least one of which is in Australia.

Subsection 16(2) of the Telecommunications Act provides that a 'point' includes a mobile or potentially mobile point, whether on land, underground, in the atmosphere, in outer space, at sea or anywhere else. This would include, for example, points on vehicles, aircraft and ships.

Subsection 16(3) of the Telecommunications Act makes it clear that a point in the atmosphere, in or below the stratosphere and above Australia is taken to be in Australia. Accordingly, a point on an aircraft above Australia is taken to be a point in Australia for the purpose of this clause.

Subsection 16(4) of the Telecommunications Act provides that a point on a satellite that is above the stratosphere is taken to be a point outside Australia.

A carriage service is defined in section 7 of the Telecommunications Act to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy. The reference to the carriage of communications by means of 'guided electromagnetic energy' includes the carriage of communications by means of a wire, cable, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with the carrying of the communication. The reference to the carriage of communications by means of 'unguided electromagnetic energy' includes communications by means of radiocommunication.

### ***Datacasting licence***

This term is defined to have the same meaning as in the BSA ie. a licence under Schedule 6 to the BSA to provide a datacasting service.

The term is used in the definition of 'datacasting service'.

***Datacasting service***

This term is defined to mean a datacasting service within the meaning of the BSA that is provided in Australia under a datacasting licence. The term is used in paragraph 5(1)(b) of the definition of an ‘interactive gambling service’. The term is also used in Part 7A of the Bill in the definition of ‘datacast’ in clause 61AA.

The BSA definition provides that a datacasting service is a service that delivers content in any form (eg. text, data, sound including speech or music, still or animated (ie. moving) images etc) to persons having equipment appropriate for receiving that content, where the delivery of the service uses the broadcasting services bands. The broadcasting services bands is that part of the radiofrequency spectrum that is designated under section 31 of the Radiocommunications Act 1992 as being primarily for broadcasting purposes and is assigned by the Minister under that Act to the ABA for planning.

***Designated broadcasting link***

This term is defined to have a meaning given by clause 8C. Clause 8C provides that for the purposes of the Bill a gambling service has a designated broadcasting link where the conditions of paragraphs 8C(1)(a) and (b) are satisfied.

A gambling service that has a designated broadcasting link is an excluded service for the purposes of subclauses 5(3) and 6(3) of the Bill. Consequently it does not come within the offence provisions in clauses 15 and 15A, and does not come within the scope of the complaints system in Part 3 of the Bill.

***Designated country***

This term is defined to have the meaning given by clause 9A. Clause 9A provides that a designated country is a specified foreign country that is declared in writing by the Minister to be a designated country for the purposes of the Bill. The term is discussed in more detail below in relation to clause 9A.

This term is used in the offence in clause 15A of providing an Australian-based interactive gambling service to customers in designated countries.

***Designated country-customer link***

This term is defined to have the meaning given by clause 9B. Clause 9B provides that a gambling service has a designated country-customer link if and only if any or all of the customers of the service are physically present in a designated country.

A designated country-customer link is one of the key elements in the offence provision in clause 15A of the Bill.

***Designated datacasting link***

This term is defined to have a meaning given by clause 8C. Clause 8C provides that for the purposes of the Bill a gambling service has a designated datacasting link where the conditions of paragraphs 8C(2)(a) and (b) are satisfied.

A gambling service that has a designated datacasting link is an excluded service for the purposes of subclauses 5(3) and 6(3) of the Bill. Consequently it does not come within the offence provisions in clauses 15 and 15A, and does not come within the scope of the complaints system in Part 3 of the Bill.

***Designated Internet gambling matter***

This term is defined to have the meaning given by clause 35 of the Bill. Clause 35 of the Bill provides that the formulation of a designated notification scheme (defined in clause 4) and procedures to be followed by Internet service providers in dealing with Internet content notified under paragraph 24(1)(b) or proposed section 26 are designated Internet gambling matters for the purposes of the Bill. Designated Internet gambling matters are the subject of industry codes and standards developed or determined under Part 4 of the Bill.

***Designated notification scheme***

A designated notification scheme is a scheme in the nature of a scheme for substituted service of notices under which the ABA is taken, for the purposes of the Bill, to have notified each Internet service provider of a matter or thing. Such a scheme may, for example, deem a provider to have been notified of a notice that is published in a national newspaper or that is published by some other means (such as on a website, with or without security measures) without the need to physically serve the notice on the provider.

A designated notification scheme applies only in relation to prohibited Internet gambling content hosted outside Australia. The term is referred to in clause 24, which refers to action to be taken in relation to a complaint about prohibited Internet gambling content hosted outside Australia. Clause 31 (dealing with the deemed issuing of access-prevention notices) also refers to a scheme in the nature of a scheme for substituted service.

***Engage in conduct***

This term is defined in clause 4 to mean to do an act or to omit to perform an act. This definition is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code). This term is used in clauses 55, 56(4) and 63 of the Bill. The inclusion of a definition of ‘engage in conduct’ ensures that these offences, relating to contravention of an online provider rule and contravention of a remedial direction relating to a breach of an online provider rule, cover both acts and omissions. For example an offence of contravening a direction from the ABA to take specified action may be committed if a person omits to perform an act, such as omitting to

implement effective administrative systems for monitoring compliance with an online provider rule.

### ***Excluded gaming service***

This term is defined to have the meaning given by clause 8B. Clause 8B provides that an excluded gaming service is a service for the conduct of a game covered by paragraph (e) of the definition of ‘gambling service’ in section 4, to the extent to which the service is provided to customers who are in a public place.

An excluded gaming service is an excluded service for the purposes of subclauses 5(3) and 6(3) of the Bill. Consequently it does not come within the offence provisions in clauses 15 and 15A, and does not come within the scope of the complaints system in Part 3 of the Bill.

### ***Excluded lottery service***

This term is defined to have the meaning given by clause 8D. Clause 8D provides that an excluded lottery service is a service for the conduct of a lottery or a service for the supply of lottery tickets. Subclause 8D(2) provides that an excluded lottery service does not apply to an electronic form of scratch lottery or other instant lottery.

An excluded lottery service is an excluded service for the purposes of subclauses 5(3) and 6(3) of the Bill. Consequently it does not come within the offence provisions in clauses 15 and 15A, and does not come within the scope of the complaints system in Part 3 of the Bill.

### ***Excluded wagering service***

This term is defined to have a meaning given by clause 8A. Clause 8A provides that an excluded wagering service is a service that satisfies the conditions in paragraphs 8A(1)(a) and (b) and the conditions in subclauses 8A(2) and (3).

An excluded wagering service is an excluded service for the purposes of subclauses 5(3) and 6(3) of the Bill. Consequently it does not come within the offence provisions in clauses 15 and 15A, and does not come within the scope of the complaints system in Part 3 of the Bill.

### ***Exempt service***

This term is defined to have the meaning given by proposed section 10. Proposed section 10 enables the Minister to determine that each service included in a specified class of services is an exempt service for the purposes of the Bill.

If the Minister makes such a determination, the service will not be an interactive gambling service nor a prohibited Internet gambling service (see subclauses 5(3) and 6(3)).

***Federal Court***

This term is defined to mean the Federal Court of Australia. This term is used in clause 59 of the Bill. Under this clause the ABA may apply to the Federal Court for an order that a person cease supplying Internet carriage services where the person (an Internet service provider) is supplying the Internet carriage service otherwise than in accordance with an online provider rule (defined in clause 4).

***Futures contract***

The term 'futures contract' is defined in clause 4 to have the same meaning as in the Corporations Law. This term is used in clause 9 of the Bill, which relates to contracts that are exempt under the Corporations Law. Under clause 5 and clause 6 of the Bill a service which relates to contracts that under the Corporations Law are exempt from a law relating to gaming or wagering is specifically excluded from the meaning of an interactive gambling service and a prohibited Internet gambling service. Clause 9 of the Bill sets out the meaning of contracts that under the Corporations Law are exempt from a law relating to gaming or wagering for the purposes of the Bill. It includes futures contracts covered by subsection 1141(1) of the Corporations Law ie futures contracts entered into on a futures exchange or exempt futures market as defined by the Corporations Law.

***Gambling service***

Gambling service is defined in clause 4 to mean:

- (a) a service for the placing, making, receiving or acceptance of bets; or
- (b) a service 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; or
- (c) a service for the conduct of a lottery; or
- (d) a service for the supply of lottery tickets; or
- (e) a service for the conduct of a game, where:
  - (i) the game is played for money or anything else of value; and
  - (ii) the game is a game of chance or of mixed chance and skill; and
  - (iii) a customer of the service gives or agrees to give consideration to play or enter the game; or
- (f) a gambling service (within the ordinary meaning of that expression) that is not covered by any of the above paragraphs.

Two individuals merely having a bet over the Internet would not be a gambling service.

The question of what is the sole or dominant purpose of a service for the purposes of paragraph (b) is a question of fact, which would be determined by a Court in the event of legal proceedings under the Bill.

A service that merely provides lottery results is not a service for the conduct of a lottery for the purposes of paragraph (c).

For the purposes of paragraph (e) a game played for money or anything else of value is a game played for some kind of prize which is of monetary value. An example of a game of chance is Roulette. There is no skill involved in a game of Roulette. An example of a game of mixed chance and skill is Blackjack.

The reference to a game of mixed chance and skill is not intended to include games that would generally be regarded to be games of skill even though it could be argued that the outcome of the game might be affected by chance. For example an on-line competition on knowledge of Australian history should be regarded as a game of skill even though it could be argued that there is an element of chance in relation to the questions that are asked. Similarly an interactive television based quiz game which requires competitors to answer general knowledge questions will not be covered as it does not involve mixed chance and skill. It should be regarded as a game of skill.

Similarly a network electronic game like Quake, a game for one or multiple players, should be regarded as a game of skill even though it could be argued that there is an element of chance in relation to game play. For example there are elements of chance in that a player won't be aware of what another player might do and yet may act in anticipation of what the other player might do.

Paragraph (f) is intended to ensure that any gambling service not specifically provided for in paragraphs (a) – (e) is subject to the Bill.

Guidance as to the ordinary meaning of “gambling” can be obtained from the *Encyclopedia Britannica* which defines “gambling” as “the betting or staking of something of value, with consciousness of risk and hope of gain, on the outcome of a game, a contest, or an uncertain event whose result may be determined by chance or accident or have an unexpected result by reason of the bettor’s miscalculation.”

A promotion such as the chance to win a trip overseas upon signing up to an online service is not a gambling service for the purposes of the Bill. A promotional game or lottery does not involve the betting or staking of something of value, with consciousness of risk and hope of gain.

A service for online share trading is not a gambling service because online share trading involves the acquisition of contractual rights. As a service for online share trading is not a gambling service it cannot be a ‘interactive gambling service’ for the purposes of this Bill.

A service that carries a gambling service, such as an Internet carriage service does not itself become a gambling service for the purposes of the Bill merely because the Internet carriage service carries a gambling service. A service that is ancillary to a gambling service such as a billing service for a gambling service is not a gambling service for the purposes of the Bill, and therefore is not an ‘interactive gambling service’.



A gambling service is an integral part of the meaning of an ‘interactive gambling service’ in clause 5. This in turn is an integral part of the offence provisions in clauses 15 and 15A. Consequently if a service does not come within the meaning of a gambling service in clause 4, then it cannot be an interactive gambling service and therefore will not be covered by the offence provisions in clauses 15 and 15A of the Bill.

### ***Game***

This term is defined to include an electronic game. The term ‘game’ is used in the definition of ‘gambling service’.

### ***Industry code***

This term is defined to have the meaning given by proposed section 33. An industry code is a code that is developed under Part 4 of the Bill by a body or association that represents Internet service providers. It applies to Internet service providers and deals exclusively with designated Internet gambling matters (as defined in clause 4).

### ***Industry standard***

This term is defined to have the meaning given by proposed section 34. An industry standard is a standard determined by the ABA in the absence of an industry code, or failure of a Code, which applies to Internet service providers and deals exclusively with designated Internet gambling matters (as defined in clause 4).

### ***Interactive gambling service***

This term is defined to have a meaning given by clause 5, which provides that an interactive gambling service is a gambling service (defined in clause 4 of the Bill) where the conditions in paragraphs 5(1)(a) and (b) are satisfied and the service is not an excluded service.

The term ‘interactive gambling service’ is used in the offence provisions in clause 15 and 15A of the Bill. The term is also used in the prohibition on advertising of interactive gambling services in Part 7A of the Bill.

### ***Internet carriage service***

This term is defined to mean a listed carriage service that enables end-users to access the Internet. A listed carriage service is defined in clause 4. Its meaning is discussed above in relation to the definition of ‘content service’.

Like the Telecommunications Act and the Telecommunications (Consumer Protection and Service Standards) Act 1999 (see, for example, subparagraph 127(a)(iii) of that Act), the term ‘end-user’ is used in the Bill without being defined. An end-user need not necessarily be a customer of an Internet service provider.

***Internet content***

The term 'Internet content' is defined to have the same meaning as in Schedule 5 to the BSA. 'Internet content' means information in any form, or in any combination of forms, that makes up a composite such as pictures and text, such as on a web page, which will typically include text and pictures that:

- is kept on a data storage device (separately defined to include a computer disk); and
- is accessed, or is available for access, using an Internet carriage service;

but does not include:

- ordinary electronic mail; or
- information that is transmitted in the form of a broadcasting service.

The exclusion of 'ordinary electronic mail' from the definition of Internet content is intended to make it clear that the exclusion only applies to what an ordinary user of the Internet would regard as being e-mail, and that the exclusion does not apply to other forms of postings of material, such as postings to newsgroups. The term is also intended to minimise the scope for technical arguments about the 'outer boundaries' of the term 'e-mail' within the Internet community. The definition of 'ordinary electronic mail' makes it clear that the term will not include a posting to a newsgroup. These provisions are intended to ensure that personal e-mail is not caught by the definition of 'Internet content'.

Examples of Internet content include pages on the World Wide Web, archived mailing list messages, material available for general access from usenet news groups and information available from databases.

The definition of 'Internet content' will not cover live material such as chat services or voice over the Internet.

The definition of 'Internet content' also excludes information transmitted in the form of a broadcasting service. This is intended to ensure that where material is transmitted over the Internet in the form of a broadcasting service under the BSA (for example audio in the form of a narrowcast radio service), it will be treated as a broadcasting service subject to the rules applying to such services and not as Internet content subject to regulation under the Bill.

***Internet service provider***

This term is defined to have the same meaning as in Schedule 5 to the BSA.

Part 2 of Schedule 5 to the BSA (clause 8) defines Internet service providers primarily as persons supplying, or proposing to supply, an Internet carriage service to the public.

Corporate Intranets, for example, are therefore not generally regarded as Internet service providers. The concept of supply to the public is dealt with in clause 9 of Schedule 5 to the BSA. The Minister also has the ability under subclause 8(2) of Schedule 5 to the BSA to declare that a specified person who supplies, or proposes to supply, a specified Internet carriage service is an Internet service provider. This is intended primarily as an anti-avoidance mechanism, but also provides flexibility to deal with unforeseen consequences.

### ***Listed carriage service***

This term is defined to have the same meaning as in the Telecommunications Act. Its meaning is discussed above in relation to the definition of ‘content service’.

### ***Lottery***

This term is defined to include an electronic lottery. A service for the conduct of a lottery or a service for the supply of lottery tickets are services which are included in the definition of ‘gambling service’ (discussed above).

For clarification, the ordinary meaning of lottery is relevant in the context of the Bill. The *Macquarie Dictionary* definition of lottery is a ‘scheme or arrangement for raising money...by the sale of a large number of tickets, certain among which, as determined by chance after the sale, entitle the holders to prizes’.

An example of a scheme which has previously been generally touted as a lottery, but is not a lottery for the purposes of the Bill, because it is not a ‘lottery’ within the ordinary meaning of the term ‘lottery’, is the Sydney Olympic Ticket Lottery. In this ‘lottery’ people paid for tickets to the Olympics when they put in an application for a specific number of tickets to specific events (or alternative events) and if not successful, their money was refunded. In a lottery within the meaning of the term in the Bill, money is not refunded to a person who is unsuccessful.

### ***Online provider rule***

This term is defined to have the meaning given by proposed section 54. Proposed section 54 provides that several rules are online provider rules for the purposes of the Bill. They are:

- the rules which require an Internet service provider to comply with a standard access-prevention notice or a special access-prevention notice (see subclauses 28(1) and (2));
- the rule which requires an Internet service provider that has contravened, or is contravening, a registered industry code to comply with an ABA direction to comply with the code (see subclause 42(2));
- the rule which requires an Internet service provider to comply with a relevant registered industry standard (clause 48).

Sanctions are provided where a person contravenes an online provider rule (see clauses 55 and 59).

### ***Option contract***

The term ‘option contract’ is defined in clause 4 to have the same meaning as in Chapter 7 of the Corporations Law. This term is used in clause 9 of the Bill which relates to contracts which are exempt under the Corporations Law. Under clause 5 and clause 6 of the Bill a service which relates to contracts that under the Corporations Law are exempt from a law relating to gaming or wagering is specifically excluded from the meaning of an ‘interactive gambling service’ and a ‘prohibited Internet gambling service’. Clause 9 of the Bill sets out the meaning of contracts that under the Corporations Law are exempt from a law relating to gaming or wagering for the purposes of the Bill. It includes option contracts covered by subsection 778(1) of the Corporations Law ie option contracts entered into on a stock exchange or an exempt stock market as defined by the Corporations Law.

### ***Prohibited Internet gambling content***

This term is defined in clause 4 to mean Internet content that is accessed, or available for access, by an end-user in the capacity of customer of a prohibited Internet gambling service (see meaning below).

This term is used in the context of the complaints system in the Bill. Australians are able to complain to the ABA if they believe that Australian customers can access prohibited Internet gambling content over the Internet (clause 16). If the Internet content is hosted in Australia the ABA must refer the complaint to the police if they consider it appropriate. If the Internet content is hosted outside Australia the ABA may refer it to a law enforcement agency if appropriate and notify the content to the Internet service provider so that the Internet service provider can deal with the content in accordance with procedures specified in an industry code or standard. The term is not used in the context of the offence provisions in clauses 15 and 15A of the Bill.

The term ‘prohibited Internet gambling content’ will not catch information provided by third party information providers (such as an Internet site providing information about the progress of a cricket match but no opportunity to bet on that match).

### ***Prohibited Internet gambling service***

This term is defined to have the meaning given by clause 6 of the Bill. A prohibited Internet gambling service is a gambling service (as defined in clause 4 of the Bill) that satisfies the conditions in paragraphs 6(1)(a) to (c) of the Bill and is not an excluded service as defined by subclause 6(3) of the Bill.

The term is an integral part of the definition of prohibited Internet gambling content (see above) which is used in the context of the complaints system in the Bill. It is not used in the context of the offence provisions in clauses 15 and 15A of the Bill.

***Relevant agreement***

The term ‘relevant agreement’ is defined in clause 4 to have the same meaning as in the Corporations Law. This term is used in clause 9 of the Bill which relates to contracts which are exempt under the Corporations Law. Under clause 5 and clause 6 of the Bill services which relate to contracts that under the Corporations Law are exempt from a law relating to gaming or wagering are specifically excluded from the meaning of an interactive gambling service and a prohibited Internet gambling service. Clause 9 of the Bill sets out the meaning of contracts that under the Corporations Law are exempt from a law relating to gaming or wagering for the purposes of the Bill. It includes relevant agreements covered by subsection 778(2) of the Corporations Law ie share ratio contracts (which involve betting on the movement of stock exchange indices).

***Special access-prevention notice***

The term ‘special access-prevention notice’ is defined to mean a notice under proposed section 27. It refers to a notice given to an Internet service provider directing the provider to take all reasonable steps to prevent access to Internet content that is the same or substantially the same as Internet content identified in a ‘standard access-prevention notice’ (as defined below).

***Standard access-prevention notice***

The term ‘standard access-prevention notice’ is defined to mean a notice under proposed paragraph 24(1)(c). It refers to a notice given to an Internet service provider by the ABA directing the provider to take all reasonable steps to prevent access to prohibited Internet gambling content (as defined in clause 4) hosted outside Australia.

Standard access-prevention notices are issued by the ABA in the absence of a relevant code or standard dealing with designated Internet gambling matters.

***Standard telephone service***

The term ‘standard telephone service’ is defined in clause 4 to mean the same as the definition of the term in the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The definition of ‘standard telephone service’ includes voice telephony and another form of communication that is equivalent to voice telephony that would be required to be supplied to the end-user in order to comply with the *Disability Discrimination Act 1992*.

This term is used in the definition of ‘telephone betting service’ in clause 4.

***Telephone betting service***

The term 'telephone betting service' is defined in clause 4 to mean a gambling service (see definition above) provided on the basis that dealings with customers are wholly by way of voice calls (see definition below) made using a standard telephone service (see definition above).

Subclause 5(3) of the Bill provides that a telephone betting service is not an 'interactive gambling service'. It is an excluded service for the purposes of the Bill. Consequently it does not come within the offence provisions in clauses 15 and 15A.

***Ticket***

The term ‘ticket’ is defined in clause 4 to include an electronic ticket. This term is used in the definition of ‘gambling service’ in clause 4 (discussed above).

***Voice call***

The term ‘voice call’ is defined in clause 4 to include a call that involves a recorded or synthetic voice or an equivalent call to a voice call for a person with a disability. The reference to an equivalent call to a voice call for a person with a disability has been included to ensure that it is clear that use of the National Relay Service and a teletypewriter by hearing impaired persons is considered to be a voice call for the purposes of the definition of ‘voice call’.

This term is used in the definition of ‘telephone betting service’ in clause 4.

**Clause 5 –Interactive gambling services**

Clause 5 defines an ‘interactive gambling service’ for the purposes of the Bill. This term is used in the offence provisions in clauses 15 and 15A of the Bill. Clause 15 makes it an offence for a person to intentionally provide an interactive gambling service where the service has an Australian-customer link ie where any of the customers of the service are physically present in Australia. The offence provision extends in its application to offshore providers of interactive gambling services. This means that any interactive gambling service provider, either within or outside Australia, would be committing an offence if it had customers in Australia. Clause 15A makes it an offence to provide an Australian-based interactive gambling service to customers in designated countries.

‘Interactive gambling service’ is also used in the offence provisions in Part 7A of the Bill, which prohibit the advertising of interactive gambling services to persons in Australia. Clause 61DA prohibits the broadcasting or datacasting of interactive gambling service advertisements in Australia and clause 61EA prohibits the publication of such advertisements in Australia.

Subclause 5(1) provides for the purposes of the Bill an interactive gambling service is a gambling service where:

- (a) the service is provided in the course of carrying on a business; and
- (b) the service is provided to customers using an Internet carriage service, any other listed carriage service, a broadcasting service, any other content service or a datacasting service.

The terms ‘gambling service’, ‘business’, ‘Internet carriage service’, ‘listed carriage service’, ‘broadcasting service’, ‘content service’ and ‘datacasting service’ are discussed in the commentary on clause 4.

Subclause 5(2) provides that subclause (1) has effect subject to subclause (3).

Subclause 5(3) provides that none of the following services are an interactive gambling service for the purposes of the Bill: a telephone betting service (as defined in clause 4), a service that relates to certain Corporations Law contracts (as set out in clause 9), an excluded wagering service (clause 8A), and excluded gaming service (clause 8B), a service that has a designated broadcasting or datacasting link (clause 8C), an excluded lottery service (clause 8D) and an exempt service (clause 10). This means that the provision of these services is not covered by the offence provisions in clauses 15 and 15A of the Bill.

### **Clause 6 – Prohibited Internet gambling services**

Clause 6 defines ‘a prohibited Internet gambling service’ for the purpose of the Bill. This term is used in the definition of ‘prohibited Internet gambling content’, which is used in the context of the complaints system in the Bill. It is not relevant to the offence provisions in clauses 15 and 15A of the Bill.

An example of the use of the term prohibited Internet gambling content is in clause 16. Clause 16 enables a person who has reason to believe that end-users in Australia can access prohibited Internet gambling content using an Internet carriage service to make a complaint to the ABA about the matter. The action which the ABA takes in relation to a complaint about prohibited Internet gambling content will depend upon whether the content is hosted in Australia or outside Australia (see clauses 20 and 24).

Subclause 6(1) provides that for the purposes of the Bill a prohibited Internet gambling service is a gambling service where:

- (a) the service is provided in the course of carrying on a business; and
- (b) the service is provided to customers using an Internet carriage service; and
- (c) an individual in Australia is capable of becoming a customer of the service.

The terms ‘gambling service’, ‘business’ and ‘Internet carriage service’ are discussed in the commentary on clause 4. In paragraph (c), ‘an individual’ refers to a natural person.

The effect of paragraph 6(1)(c) is that the ABA, when investigating complaints about prohibited Internet gambling content, will need to establish that the service could be accessed by end users in Australia, rather than prove that the service actually has customers. Establishing that a service actually has customers would lead to more onerous and resource-intensive investigations on the part of the ABA. If in the course of an investigation the ABA is satisfied that Internet content hosted outside Australia is prohibited Internet gambling content, the ABA must take certain steps set out in subclause 24(1) of the Bill.



Subclause 6(1A) provides that for the purposes of paragraph 6(1)(c), in determining whether a person physically present in Australia is capable of becoming a customer of a gambling service, it is to be assumed that the person will not falsify or conceal his or her identity or location. This reflects the intention that paragraph 6(1)(c) should be interpreted in the context of an ordinary person, and assumes that an ordinary customer would not deliberately conceal his or her identity or location.

Subclause 6(2) provides that subclause (1) has effect subject to subclause (3).

Subclause 6(3) provides that none of the following services are a prohibited Internet gambling service for the purposes of the Bill: a service relating to certain Corporations Law contracts (as set out in clause 9), an excluded wagering service (clause 8A), and excluded gaming service (clause 8B), a service that has a designated broadcasting or datacasting link (clause 8C), an excluded lottery service (clause 8D) and an exempt service (clause 10).

### **Clause 8 – Australian-customer link**

Clause 8 provides that for the purposes of the Bill, a gambling service (as defined in clause 4) will have an Australian-customer link if, and only if, any or all of the customers of the service are physically present in Australia.

A person's residency or citizenship is not relevant in establishing an Australian-customer link. It need only be established that a customer is physically present in Australia, whether on holiday or as a resident.

An Australian-customer link is one of the key elements of the definition of 'prohibited Internet gambling services' in clause 6 of the Bill. It is also used in the offence provisions in clauses 15 and 15A of the Bill. Under clause 15, for example, a person will be guilty of an offence if the person intentionally provides an interactive gambling service and the service has an Australian-customer link.

### **Clause 8A - Excluded wagering service**

Clause 8A provides a definition of 'excluded wagering service'.

For the purposes of clause 8A, wagering services are different to gaming services. Wagering is focused on a bet on an event or contingency while gaming is focused on playing games of chance for money or something else of value. In a wager, the bettor usually does not participate in the actual event or contingency. In contrast, interactive gaming involves the bettor in the game.

Paragraph 8A(1)(a) provides that an excluded wagering service is a service that relates to betting on a horse race, harness race, greyhound race or a sporting event, or a series of those races or sporting events. 'Sporting event' is to be given its ordinary meaning. Therefore, for example, a completed match of tennis is a sporting event, but if only a part of

that match is completed, for example just one game or set, then it is not a sporting event for the purposes of subclause 8A(1).

Paragraph 8A(1)(b) provides that other wagering services that relate to betting on an event, a series of events, or a contingency are also excluded wagering services. In this context, a wager includes a bet on any outcome or event. For example, a bet on the weather for a particular day would be a wager for the purposes of this paragraph.

Paragraph 8A(1)(b) distinguishes an 'event' from a 'series of events'. This is consistent with the anti-hoarding provisions in Part 10A of the *Broadcasting Services Act 1992*, which also distinguish between 'events' and a 'series of events'. For example, in the case of the game of cricket, the 'event' would be characterised as a single cricket match. However, the test series would be characterised as a 'series of events'. In the game of tennis, an individual tennis match would be an 'event'. However a tennis tournament, such as the Australian Open, would be characterised as a 'series of events'.

Paragraphs 8A(1)(a) and (b) are intended to cover a service that introduces individuals who wish to make or place bets to individuals who are willing to receive or accept bets on the events or contingencies specified in those paragraphs. Such a service would be a 'service that relates to betting' on those events or contingencies.

Subclause 8A(1A) provides that subclause (1) does not apply to a service unless such other conditions (if any) as are specified in the regulations have been satisfied. The effect of subclause (1A) is to give the Minister a reserve power allowing him or her to impose further conditions in relation to wagering services, through regulations, relating to the exemption for excluded wagering services. This reserve power would allow the Minister to monitor the ongoing effect of this exemption and will ensure that it will not be used as a platform for the significant extension of interactive wagering services especially in the home environment.

Subclause 8A(2) is intended to exclude from the definition of 'excluded wagering service' types of continuous wagering, such as real-time 'ball-by-ball' betting on interactive television, that could evolve into highly addictive and easily accessible forms of interactive gambling. Another type of continuous wagering is 'betting on the run', where a person bets after an event has commenced on the outcome of that event. An example of betting on the run is where a person bets on who will win a football match after that match has already started (for instance, at half time).

These types of continuous wagering mentioned above are also known as 'micro-wagering'.

Paragraph 8A(2)(a) provides that a service is not an excluded wagering service to the extent to which it relates to betting on the outcome of a sporting event where the bets are placed, made, received or accepted after the beginning of the event. Therefore, for example, an interactive gambling service that enables the placing of a bet on the result of a cricket match after the first ball has been bowled is not an excluded wagering service. Such a service will be covered by the offence provisions in clauses 15 and 15A of the Bill.

Paragraph 8A(2)(b) provides that a service is not an excluded wagering service to the extent to which it relates to betting on a contingency that may or may not happen in the course of a sporting event, where the bets are made after the event has commenced. Examples of such contingency betting after an event has commenced include who is going to take the most wickets in a cricket match, whether the next ball in a cricket match will take a wicket, who will serve the next ace in a tennis match or who will win a tennis match after the first set has finished but before the second set has commenced. Such micro-wagering services will be covered by the offence provisions in clause 15 and 15A of the Bill.

However paragraph 8A(2)(b) does not cover services relating to betting on extraneous events unrelated to the official course of an event, after an event has started. For example, betting on the likelihood of rain during a cricket match, after the match has begun, would not be categorised as a ‘contingency that may or may not happen in the course of a ‘sporting event’’. Consequently this would mean that a service related to such betting would be an excluded wagering service and will not be covered by the Bill.

Nor would subclause 8A(2) cover betting services on the outcome of a tournament or series after the first match within that tournament or series has begun. Subclause 8A(2) only covers wagering on a sporting event after the event has begun. A ‘sporting event’ refers to an individual event. It does not cover wagering on a ‘series of sporting events’, such as a tournament or series, after an individual event has begun. Paragraph 8A(2)(b) clearly distinguishes between an ‘event’ and a ‘series of events’ (see discussion above on paragraph 8A(2)(b)). Consequently, betting services on the final outcome of a cricket test series after the first cricket match has begun would not be covered by subclause 8A(2) and therefore would be excluded from the Bill.

Paragraphs 8A(3)(a) and (b) provide that a service for the conduct of a scratch lottery or other instant lottery, or the service for the supply of tickets in a scratch lottery or other instant lottery is not an excluded wagering service for the purposes of clause 8A. Paragraph 8A(3)(c) provides that a service relating to the betting on the outcome of a scratch lottery or other instant lottery is not an excluded wagering service for the purposes of clause 8A. Paragraphs 8A(3)(a) to (c) relate to excluded lottery services in clause 8D and ensure that services which are properly characterised as interactive lottery services do not come within the exemption provided in paragraph 5(3)(aa) of the Bill. For example, the betting on the outcome of an electronic instant scratch ticket service would not be excluded wagering service and will still be subject to the offence provisions in clause 15 and 15A of the Bill.

Paragraph 8A(3)(d) provides that a service for the conduct of a game covered by paragraph (e) of the definition of ‘gambling service’ in clause 4 of the Bill is not an excluded wagering service for the purposes of clause 8A. Games relevant to this paragraph are games played for money or anything else of value, which are of chance or mixed skill and chance and involve the customer giving consideration to play or enter the game. Examples of such games include roulette and games played on poker machines. There is no skill involved in these games.

Paragraph 8A(3)(e) provides that a service that relates to betting on the outcome of a game of chance or of mixed chance and skill is not an excluded wagering service for the purposes of clause 8A.

For example, an interactive gambling service which involves a game of virtual roulette, or bet on the outcome of the spin of a virtual roulette wheel, would not be an excluded wagering service and will still be subject to the offence provisions in clause 15 and 15A of the Bill. This ensures that services which are properly characterised as interactive gaming services do not come within the exemption provided in paragraph 5(3)(aa) of the Bill.

The effect of clause 8A, in combination with paragraph 5(3)(aa) of the Bill, is that an excluded wagering service is not an 'interactive gambling service'. Consequently it does not come within the offence provisions in clause 15 and 15A. Similarly, paragraph 6(3)(aa) provides that an excluded wagering service does not come within the complaints system in relation to prohibited Internet content, set out in Part 3 of the Bill.

### **Clause 8B - Excluded gaming service**

Clause 8B provides a definition of 'excluded gaming service'.

Subclause 8B(1) provides that an excluded gaming service is a service for the conduct of a game covered by paragraph (e) of the definition of 'gambling service' in clause 4 of the Bill, to the extent to which the service is provided to customers who are in a public place.

Games covered by paragraph (e) of the definition of 'gambling service' in clause 4 are games played for money or anything else of value, which are of chance or mixed skill and chance and involve the customer giving consideration to play or enter the game. Examples of such games include roulette, games played on poker machines and games played on machines that utilise linked jackpots. There is no skill involved in these games.

Subclause 8B(1A) provides that subclause (1) does not apply to a service unless such other conditions (if any) as are specified in the regulations have been satisfied. The effect of subclause (1A) is to give the Minister a reserve power allowing him or her to impose further conditions in relation to gaming services, through regulations, relating to the exemption for excluded gaming services.

This reserve power would allow the Minister to monitor the ongoing operation of this exemption and will ensure that it will not be used as a platform for the significant extension of interactive gaming services especially in the home environment. It will also allow the Minister to monitor the 'public places' aspect of the exemption and ensure that it does not lead to the spread of interactive gaming services in ways that would exacerbate problem gambling among Australians.

Subclause 8B(2) provides for definitions of 'public place' and 'section of the public'.

A 'public place' means a place or part of a place to which the public ordinarily has access whether or not by payment or by invitation. 'The public' includes a 'section of the public'. Examples of public places include a shop, casino, bar or club.

'Section of the public' includes the members of a particular club, society or organisation. This means that "members-only" clubs, which provide traditional gambling services such as poker machines, are included in the definition of 'public place'. 'Section of the public' does not include a group consisting only of persons with a common workplace or a common employer. It is not intended that common workplaces be included in the definition of 'public place'.

The effect of clause 8B, in combination with paragraph 5(3)(ab) of the Bill, is that an excluded gaming service is not an 'interactive gambling service'. Consequently it does not come within the offence provisions in clause 15 and 15A. Similarly, paragraph 6(3)(ab) provides that an excluded gaming service does not come within the complaints system in relation to prohibited Internet content, set out in Part 3 of the Bill.

The effect of paragraph 5(3)(ab), in combination with clause 69 of the Bill, is to exclude gaming services provided in accordance with a State or Territory law where they are provided to customers in a public place.

Clause 69 of the Bill preserves any State or Territory laws that are capable of operating concurrently with the Bill. Therefore, a gaming service that is provided in accordance with State or Territory laws and that is provided to customers in a public place as defined in subclause 8B(2) will not be in breach of the Bill or the relevant State or Territory law.

The words 'to the extent' in subclause 8B(1) make it clear that interactive gambling services are only exempt from the offence provision of the Bill if they are provided *wholly* in a public place.

This will impact on the provision of gambling services through new interactive broadcasting services and wireless telecommunications services technology. With such technology, the only way an interactive gambling service provider could be certain of avoiding a breach of the offence provision is for that provider to ensure that the means of accessing its gaming service is *fixed* in a public place. An example of a gaming service that is fixed in a public place is a poker machine in a club or casino.

If a gambling service provider uses technology that cannot guarantee that the gaming service will not be accessed in non-public places then it risks breaching the offence provisions of the Bill. This reflects the intention of the Bill to ensure that people do not have ready access to interactive gambling services in a private place such as their own home.

The definition of 'excluded gaming services' ensures that gaming services will not be offered in public places such as Internet cafes and shopping centres unless the relevant gambling service provider can ensure that the services can only be accessed in those places, and are provided in accordance with relevant State or Territory laws. Therefore, an interactive

gaming service that can be accessed in both an Internet cafe and a private home would result in the provider being in breach of the Bill, because the definition applies only to gaming services provided wholly in public places.

If it were hypothetically possible to offer interactive gaming services that were only accessible in certain Internet cafes (or other ‘fixed’ public places) then those fixed places would need to meet the strict licensing requirements under the relevant State or Territory laws.

Prohibited Internet gambling content hosted outside Australia, which could be accessed in public places like Internet cafes, is subject to the complaints mechanism set out in Part 3 of the Bill. Action can be taken by the Australian Broadcasting Authority in relation to such content under Division 3 of Part 3 of the Bill.

### **Clause 8C - Designated broadcasting and designated datacasting link**

Clause 8C provides for definitions of ‘designated broadcasting link’ and ‘designated datacasting link’.

For the purposes of paragraph 8C(1)(a) of the Bill a gambling service has a ‘designated broadcasting link’ if either:

- the service is expressly and exclusively associated with a particular program, or a particular series of programs, broadcast on a broadcasting service; or
- the sole purpose of the gambling service is to promote goods or services (other than gambling services) that are the subject of advertisements broadcast on a broadcasting service, and the gambling service is associated with those advertisements.

For the purposes of paragraph 8C(1)(b) of the Bill a gambling service has a ‘designated broadcasting link’ if other conditions that are specified in the regulations have been satisfied.

For the purposes of paragraph 8C(2)(a) of the Bill a gambling service has a ‘designated datacasting link’ if either:

- the service is expressly and exclusively associated with a particular program, or a particular series of content, transmitted on a datacasting service; or
- the sole purpose of the gambling service is to promote goods or services (other than gambling services) that are the subject of advertisements transmitted on a datacasting service, and the gambling service is associated with those advertisements.

For the purposes of paragraph 8C(2)(b) a gambling service has a ‘designated datacasting link’ if other conditions that are specified in the regulations have been satisfied.

Subclause 8C(3) defines ‘content’ and ‘program’ for the purposes of clause 8B. ‘Content’ in relation to a datacasting service does not include advertising or sponsorship material. ‘Program’ has the same meaning as in the *Broadcasting Services Act 1992* (BSA) but does not include advertising or sponsorship material.

Clause 8C is intended to cover television game shows that involve an element of interactivity and include some form of entry fee such as a 1900 telephone call. Examples of games on TV programs that include some element of interactivity and are intended to be covered by this exemption are ‘Classic Catches’ and programs like ‘Big Brother’ and ‘Video Hits’ that involve television viewers voting for prizes. Clause 8C is also intended to cover promotions or games conducted on television or over the Internet that involve consideration including, for example, the purchase of a product.

Subparagraph 8C(1)(a)(i) is intended to cover services that are expressly and exclusively associated with a particular program. This would include, for example, a viewer paying an entry fee and voting on the Internet for his or her favourite song where that song was played on a particular television program and the Internet entry was specifically linked to that program. These services are intended to be exempt from the Bill.

Subparagraph 8C(1)(a)(ii) is intended to cover services that have the sole purpose of promoting goods or services (other than gambling services) that are included in televised advertisements, and the services are associated with those advertisements. Examples of such services include prize draws conducted through advertising campaigns. Such a promotional service might require a person to purchase a soft drink, enter the barcode of that soft drink into an Internet-based draw, and possibly win a prize as the result of that draw. These services are intended to be exempt from the Bill.

For subclause 8C(1), ‘broadcasting service’ has the same meaning as in the *Broadcasting Services Act 1992*, as provided for in current clause 4 of the Bill, and includes television and radio services.

Subclause 8C(2) is intended to cover the same services covered by subclause 8C(1), but where those services are transmitted on a datacasting service.

For subclause 8C(2), ‘datacasting service’ has the same meaning as in the *Broadcasting Services Act 1992*, as provided for in current clause 4 of the Bill.

Paragraphs 8C(1)(b) and 8C(2)(b) provide that in addition to the condition in paragraph (a) of each subclause being satisfied, a gambling service has a designated broadcasting or datacasting link if such other conditions (if any) as are specified in the regulations have been satisfied. The effect of these paragraphs is to give the Minister a reserve power allowing him or her to impose further conditions on broadcasters and datacasters, through regulations, relating to the exemption for TV game shows and promotions. This reserve power would allow the Minister to monitor the ongoing development of these services and ensure the proposed exemption will not be used as a platform for the significant extension of gambling in the home environment.

Clause 8C is not intended to cover interactive games such as trivia games and arcade games of skill that are or may become available through subscription-based broadcasting services, digital broadcasting services or datacasting services. Such interactive games are generally regarded as games of skill for the purposes of the definition of ‘gambling service’ in clause 4 of the Bill. Therefore, they are not intended to be covered by the Bill, whether a fee is charged to play such games and whether such games are played for prizes or not. As a result, such games do not need to be exempted from the offence provisions in clause 15 and 15A of the Bill.

The reference to a game of mixed chance and skill in the definition of ‘gambling service’ in clause 4 of the Bill is not intended to include games that would generally be regarded to be games of skill even though it could be argued that the outcome of those games might be affected by chance. For example a trivia quiz game, available through interactive or subscription-based television services, that requires competitors to answer general knowledge questions will not be covered by the Bill as it does not involve mixed chance and skill. It should be regarded as a game of skill.

Similarly an arcade-style game, available through interactive or subscription-based television services, should be regarded as a game of skill even though it could be argued that there is an element of chance in relation to playing the game. Examples of these arcade-style games include Tetris, Space Invaders, Tomb Raider and Scrabble-type games.

Where such skill-based quiz or arcade-style games involve interactive ‘leaderboards’, which are lists of the top scoring players of the same game across the network or subscriber base, they should still be regarded as games of skill because a player’s overall skill in his or her performance will determine the position of that player on the leaderboard.

The effect of clause 8C, in combination with paragraphs 5(3)(ac) and (ad) of the Bill, is that a gambling service that has a designated broadcasting link or a designated datacasting link is an excluded service for the purposes of the definition of an ‘interactive gambling service’. Consequently it does not come within the offence provision in clause 15. Similarly, paragraphs 6(3)(ac) and (ad) provide that an excluded gaming service does not come within the complaints system in relation to prohibited Internet content, set out in Part 3 of the Bill.

### **Clause 8D - Excluded lottery service**

Clause 8D provides for a definition of ‘excluded lottery service’.

Subclause 8D(1) provides that an excluded lottery service is a service for the conduct of a lottery or a service for the supply of lottery tickets. For clarification, the ordinary meaning of ‘lottery’ is relevant to clause 8D. The ordinary meaning of lottery is discussed above in relation to clause 4 of the Bill. It makes reference to the Macquarie Dictionary definition of ‘lottery’, which defines it as a ‘scheme or arrangement for raising money...by the sale of a large number of tickets, certain among which, as determined by chance after the sale, entitle the holders to prizes’.



The reference to 'lottery' in subclause 8D(1) is also intended to include reference to 'lotto'. 'Lotto' services include the sale of a large number of tickets or entries, certain among which, as determined by a chance event or draw after the sale, entitle the holders to prizes such as cash jackpots. Examples of such lotto services that are intended to be covered by the reference to 'lottery' are Tattslotto, Oz Lotto, Super 66 and Powerball. 'Keno' is also intended to be covered by the reference to 'lottery', but only when it is in the form of a lotto-based service as described above.

Subclause 8D(1A) provides that subclause (1) does not apply to a service unless such other conditions (if any) as are specified in the regulations have been satisfied. The effect of subclause (1A) is to give the Minister a reserve power allowing him or her to impose further conditions in relation to lottery services, through regulations, relating to the exemption for excluded lottery services.

Subclause 8D(1B) provides that without limiting subclause (1A), a condition specified in regulations made under subclause (1A) may provide that the lottery must not be a highly repetitive or frequently drawn form of a keno-type lottery or similar lottery.

An example of a 'keno-type' lottery is a lottery in which a certain number of 'balls' or numbers are drawn (for instance, 20) out of an original set of balls or numbers (for instance, a set of 100). A customer plays the lottery by choosing certain numbers before the draw commences. After the draw takes place, the customer's numbers are matched up with the numbers that are drawn out of the original set of numbers as the winning numbers. The customer receives a prize depending on how many of his or her numbers are matched with those drawn out of the original set of numbers.

This reserve power would allow the Minister to monitor the ongoing effect of this exemption and will ensure that it will not be used as a platform for the significant extension of interactive lottery services especially in the home environment. It will also allow the Minister to ensure that electronic scratch or other instant lotteries, which are not included in the exemption for lottery services, are not being provided to Australians despite their exclusion from the exemption provision.

Subclause 8D(2) provides that the definition of 'excluded lottery service' does not apply to an electronic form of scratch lottery or an electronic form of other instant lottery. Traditional forms of scratch or other instant lotteries are lotteries where the result and any prize is predetermined at the time of purchase or entry, or is not subject to a separately scheduled drawing. These are not covered by the Bill because they are non-electronic lotteries that involve a physical ticket that a customer scratches or otherwise uses.

However, when scratch or other instant lotteries are in electronic form, they are not covered by the exclusion in subclause 8D(1) and are prohibited by operation of the offence provisions in clause 15 and 15A of the Bill of providing an interactive gambling service. Scratch or other instant lotteries in electronic form are lotteries where the result and prize is not determined by an independent or separate draw held some time after the time of

purchase. The result and prize may be determined by a separate or random electronic process, but that process occurs at a time instantaneous to the ‘scratching’ (or other form of playing or use) of the electronic lottery ticket, and is not subject to a separately scheduled drawing. Therefore, it is a scratch or other instant lottery for the purposes of subclause 8D(2), and is not an ‘excluded lottery service’.

An examples of a prohibited electronic scratch or instant lottery is an ‘on-line’ scratch lottery ticket, which is provided to the customer in a virtual form after that customer accesses an ‘on-line scratchies’ Internet site. After accessing an image of a ticket, the customer controls a cursor and ‘scratches’ away a covering picture on the ticket to reveal various figures representing amounts of money. If the uncovered ticket reveals, for example, three matching figures, then the customer wins a specified amount of money. This example is not an ‘excluded lottery service’ for the purposes of clause 8D.

The effect of clause 8D, in combination with paragraph 5(3)(ae) of the Bill, is that an excluded lottery service is not an ‘interactive gambling service’. Consequently it does not come within the offence provisions in clause 15 and 15A. Similarly, paragraph 6(3)(ae) provides that an excluded lottery service does not come within the complaints system in relation to prohibited Internet content, set out in Part 3 of the Bill.

### **Clause 9 - Contracts exempt under the Corporations Law**

Clause 9 sets out the meaning of ‘contracts that, under the Corporations Law, are exempt from a law relating to gaming or wagering’ for the purposes of the Bill. It refers to option contracts covered by subsection 778(1) of the Corporations Law, relevant agreements covered by subsection 778(2) of the Corporations Law, futures contracts covered by subsection 1141(1) of the Corporations Law, and Chapter 8 agreements covered by subsection 1141(2) of the Corporations Law.

The terms ‘option contracts’, ‘relevant agreements’, ‘futures contracts’ and ‘Chapter 8 agreements’ are discussed in the commentary on clause 4. These contracts and agreements may, for example, involve speculation on whether the price of a share may rise or fall or on what level of a Stock Exchange Index a share may be at a particular time in the future.

‘Contracts that, under the Corporations Law, are exempt from a law relating to gaming or wagering’ are referred to in subclause 5(3) and subclause 6(3). Subclause 5(3) provides that for the purposes of the Bill a service to the extent to which it relates to such contracts is not an interactive gambling service. Similarly subclause 6(3) exempts such services from the meaning of prohibited Internet gambling services for the purposes of the Bill. This means that such contracts are not covered by the offence provisions in clause 15 and 15A of the Bill or the complaints system in the Bill. Exempting such services from the operation of the Bill is consistent with the exemption, under the Corporations Law, from a law relating to gaming or wagering.

### **Clause 9A - Designated country**

Clause 9A sets out the meaning of the term ‘designated country’, which is used in the offence in clause 15A of providing an Australian-based interactive gambling service to customers in designated countries.

Subclause 9A(1) provides that the Minister may declare that a specified foreign country is a designated country for the purposes of the Bill. The declaration must be in writing.

Subclause 9A(2) provides that a declaration under subclause (1) has effect accordingly.

Subclause 9A(3) provides that the Minister must not declare a foreign country under subclause (1) unless the government of that country has requested the Minister to make a declaration and there is in force in that country legislation that corresponds to clause 15 of the Bill. Such corresponding legislation would have to provide for a ban on the provision of interactive gambling services to customers in that country.

Subclause 9A(4) provides that at least 90 days before making a declaration under subclause (1) the Minister must cause to be published a notice in the *Gazette* and in a newspaper circulating in each State, the Northern Territory and the Australian Capital Territory. The notice must set out the Minister’s intention to make the declaration. This notice will give Australian interactive gambling service providers, who might offer interactive gambling services to a country that is proposed to be designated under clause 9A, sufficient time to put in place arrangements to avoid providing such services to customers in that designated country before the proposed instrument comes into effect.

Subclause 9A(5) provides that in deciding whether to declare a foreign country under subclause (1) the Minister must have due regard to any complaints and any supporting statements made by the government of that country. This is intended to ensure that a foreign country will only be designated under subclause (1) after consultation with that country has taken place and the comments of that country’s government are given due regard by the Minister.

Subclause 9A(6) provides that an instrument made under subclause (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. The instrument must accordingly be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The term ‘designated country’ is used in the offence provision in clause 15A of the Bill. Under clause 15A a person will be guilty of an offence if the person intentionally provides an Australian-based interactive gambling service and the service has a designated country-customer link.

### **Clause 9B - Designated country-customer link**

Clause 9B provides that for the purposes of the Bill a gambling service has a designated country-customer link if, and only if, any or all of the customers of the service are physically present in a designated country.

A person's residency or citizenship is not relevant in establishing a designated country-customer link in relation to that designated country. It need only be established that a customer is physically present in that designated country, whether on holiday or as a resident.

The term is used in the offence provision in clause 15A of the Bill. Under clause 15A, a person will be guilty of an offence if the person intentionally provides an Australian-based interactive gambling service and the service has a designated country-customer link.

### **Clause 10 – Exempt services**

Clause 10 enables the Minister to determine that each service included in a specified class of services is an exempt service for the purposes of the Bill. If the Minister were to make such a determination, the service would not be an interactive gambling service nor a prohibited Internet gambling service (see subclauses 5(3) and 6(3)).

If the Minister were to make such a determination it would have effect accordingly (subclause 10(2)).

Any such determination will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901* (subclause 10(3)). As such it will therefore be required to be published in the Commonwealth *Gazette*, tabled in both Houses of Parliament, and will be subject to Parliamentary disallowance.

The Ministerial determination power is intended to be used only in extraordinary circumstances to ensure that the Bill does not apply to services to which it was never meant to apply. The Ministerial determination cannot specify that a particular provider is taken not to provide an interactive gambling service or a prohibited Internet gambling service. The determination must be a general rule of application, which relates to each service included in a specified class of services.

### **Clause 11 – Extended meaning of *use***

Clause 11 is based on section 24 of the Telecommunications Act. It provides that, unless the contrary intention appears, a reference in the Bill to the 'use' of a thing is a reference to the use of the thing either in isolation or in conjunction with one or more other things.

An example of a provision of the Bill which uses this term is paragraph 5(1)(b) which refers to an interactive gambling service being provided to customers using an Internet carriage service, any other listed carriage service, a broadcasting service, any other content service, or a datacasting service. Clause 11 ensures that it is clear that a customer would be considered to use an Internet carriage service for example if the customer uses the Internet carriage service in conjunction with another listed carriage service.

### **Clause 12 – Crown to be bound**

Subclause 12(1) provides that the Bill binds the Crown in right of the Commonwealth, and each of the States and Territories.

Subclause 12(2) provides that the Bill does not make the Crown liable to be prosecuted for an offence.

Subclause 12(3) provides that the protection in subclause 12(2) does not apply to an authority of the Crown.

### **Clause 13 – Extension to external Territories**

Clause 13 provides that the Bill extends to every external Territory. The external Territories include Norfolk Island, Christmas Island and Cocos (Keeling) Islands.

### **Clause 14 – Extra-territorial application**

Clause 14 provides that, unless the contrary intention appears, the Bill extends to acts, omissions, matters and things outside Australia. The offence provision in clause 15 of the Bill is extra-territorial in its application, as discussed below.

## **Part 2—Offence of providing an interactive gambling service to customers in Australia**

### **Clause 15 – Offence of providing an interactive gambling service to customers in Australia**

Clause 15 is the principal offence provision in the Bill.

Subclause 15(1) provides that a person is guilty of an offence if the person intentionally provides an interactive gambling service (as discussed in clause 5 of the Bill) and the service has an Australian-customer link (as discussed in clause 8 of the Bill).

The offence provision extends in its application to offshore providers of interactive gambling services. This means that any interactive gambling service provider, either within or outside Australia, would be committing an offence if it had customers in Australia.

The penalty for the offence is 2,000 penalty units. A penalty unit is currently \$110, so the current maximum penalty is \$220,000. Under subsection 4B(3) of the *Crimes Act 1914*, if a body corporate is convicted of an offence against a Commonwealth law, the Court may impose a penalty of up to 5 times the amount of the maximum penalty that could be imposed on a natural person. As a result, the current maximum penalty that could be imposed on a corporation is \$1.1 million.

Internet Service Providers will not be prosecuted for the offence of intentionally providing an interactive gambling service unless they themselves are the providers of the content of such a

service. The offence relates specifically to the provision of an interactive gambling service and does not apply to a person who carries the service – an Internet Service Provider. Similarly, the offence will not result in the prosecution of any person who provides services ancillary to an interactive gambling service, such as bill payment in relation to such a service, unless the person is also the provider of the content of such a service.

Subclause 15(2) provides that a person who contravenes the offence provision in subclause 15(1) is guilty of a separate offence in respect of each day (including a day of a conviction for the offence or any later day) during which the contravention continues. The effect of subclause 15(2) is that the maximum possible penalty that may be imposed for contravention of the offence in subclause 15(1) is, for an individual, 2,000 penalty units multiplied by the number of days during which the contravention continues. If a contravention continued for 10 days, the current maximum penalty would be \$2.2 million. If a body corporate contravened the offence provision in subclause 15(1) for 10 days, the maximum penalty would be \$11 million.

Subclause 15(3) provides that subsection (1) does not apply if the person (the provider of an interactive gambling service) did not know and could not, with reasonable diligence, have ascertained, that the service had an Australian-customer link (ie. that it was being provided to persons who were physically present in Australia).

The exception in subclause 15(3) recognises that providers of interactive gambling services will not be able to turn a blind eye or ignore breaches of the Bill. They will be required to use reasonable diligence (including reasonable monitoring systems) to ascertain whether the service is being provided to persons who are physically present in Australia.

Subclause 15(4) provides detail for the defence of ‘reasonable diligence’ in paragraph 15(3)(b) of the Bill. Subclause 15(4) provides that in determining whether a person could, with reasonable diligence, have ascertained that the service had an Australian-customer link, the following matters are to be taken into account:

- (a) whether prospective customers were informed that Australian law prohibits the provision of the service to customers physically present in Australia;
- (b) whether customers had entered a contractual relationship with the provider with an explicit condition that the customer was not to use the service while physically located in Australia;
- (c) whether the person providing the service required customers to provide personal details, and, if so, whether those details suggested that the customer was not physically present in Australia;
- (d) whether the person providing the service has network data that indicates that a customer was physically present outside Australia when the relevant customer account was opened and throughout the period when the services were provided to the customer; and
- (e) any other relevant matters.

An example for the matter provided for in paragraph 15(4)(a) is whether a customer was informed of the prohibition through a disclaimer message posted on an Internet site that offers the service.

The matters outlined in paragraphs 15(4)(d) and (e) are intended to cover any new technology that allows interactive gambling service providers who are operating legally by providing their services wholly to customers outside Australia to determine that their customers are physically present outside Australia. Paragraph 15(4)(e) is also intended to cover any other relevant matters not necessarily relating to technology.

In an article by Lisa Guernsey of the New York Times that appeared in the Sydney Morning Herald on 16 March 2001, it was noted that geolocation software programs are available to assist in working out the location of end-users who access the Internet. By conducting real-time analyses of Internet traffic, these software programs can try to determine the country, the State and, in limited cases, even the city from which a person is accessing the Internet. Based on that extrapolated location and with the use of programs such as keyword filters, the software can then block Web pages from being seen, essentially putting a tall fence around part of the Web.

In determining whether the use of geolocation software programs or other monitoring systems constituted reasonable diligence, regard would need to be had, amongst other things, to the technical and commercial feasibility of using such programs or systems.

The note at the end of subclause 15(3) explains that the effect of the *Criminal Code* is that the defendant bears an evidential burden. An evidential burden requires the defendant to adduce evidence that suggests a real possibility that the matter exists or does not exist (subsection 13.3 of the *Criminal Code*). This means that the defendant must adduce or point to evidence that suggests they did not know that the service had an Australian-customer link and could not, with reasonable diligence, have ascertained that the service had an Australian-customer link. If the defendant does this then the prosecution would then need to disprove that the defendant did not know, and could not with reasonable care and diligence have ascertained, that the service had an Australian-customer link (subsection 13.1(2) of the Code).

Placing an evidential burden on the defendant is consistent with the *Criminal Code* (see subsection 13.3 of the Code).

Subclause 15(5) provides that section 15.4 of the *Criminal Code* applies to the offence in clause 15(1) of providing an interactive gambling service to a customer in Australia. Section 15.4 of the *Criminal Code* relates to extended geographical jurisdiction and provides that if a law of the Commonwealth applies section 15.4 of the Code to a particular offence, the offence applies whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Subclause 15(5) ensures that the extraterritorial extension of the offence in clause 15 of the Bill is done within the framework of Commonwealth criminal law policy, as set out in the *Criminal Code*.



## **Part 2A—Offence of providing an Australian-based interactive gambling service to customers in designated countries**

### **Clause 15A – Offence of providing an Australian-based interactive gambling service to customers in designated countries**

Clause 15A provides for an offence of providing an Australian-based interactive gambling service to customers in designated countries. This offence is separate to the offence in clause 15.

Subclause 15A(1) provides that a person is guilty of an offence if the person intentionally provides an Australian-based interactive gambling service (as discussed in subclause 15A(6) below) and the service has a designated country-customer link (as discussed in clause 9B above).

The penalty for the offence is 2000 penalty units. A penalty unit is currently \$110, so the current maximum penalty is \$220,000. Under subsection 4B(3) of the *Crimes Act 1914*, if a body corporate is convicted of an offence against a Commonwealth law, the Court may impose a penalty of up to 5 times the amount of the maximum penalty that could be imposed on a natural person. As a result, the current maximum penalty that could be imposed on a corporation is \$1.1 million.

Internet Service Providers will not be prosecuted for the offence of intentionally providing an Australian-based interactive gambling service to customers in designated countries unless they themselves are the providers of the content of such a service. The offence relates specifically to the provision of an Australian-based interactive gambling service to customers in designated countries and does not apply to a person who carries the service – an Internet Service Provider. Similarly, the offence will not result in the prosecution of any person who provides services ancillary to such an Australian-based interactive gambling service, such as bill payment in relation to such a service, unless the person is also the provider of the content of such a service.

Subclause 15A(2) provides that a person who contravenes the offence provision in subclause 15A(1) is guilty of a separate offence in respect of each day (including a day of a conviction for the offence or any later day) during which the contravention continues. The effect of subclause 15A(2) is that the maximum possible penalty that may be imposed for contravention of the offence in subclause 15A(1) is, for an individual, 2,000 penalty units multiplied by the number of days during which the contravention continues. If a contravention continued for 10 days, the current maximum penalty would be \$2.2 million. If a body corporate contravened the offence provision in subclause 15A(1) for 10 days, the maximum penalty would be \$11 million.

Subclause 15A(3) provides that subsection (1) does not apply if the person (the provider of an Australian-based interactive gambling service) did not know and could not, with reasonable diligence, have ascertained, that the service had a designated country-customer

link (ie. that it was being provided to persons who were physically present in a designated country).

Subclause 15A(4) provides detail for the defence of ‘reasonable diligence’ in paragraph 15A(3)(b) of the Bill. Subclause 15A(4) provides that in determining whether a person could, with reasonable diligence, have ascertained that the service had a designated country-customer link, the following matters are to be taken into account:

- (a) whether prospective customers were informed that Australian law prohibits the provision of the service to customers physically present in a designated country;
- (b) whether customers were required to enter into contracts with the provider that were subject to an explicit condition that the customer was not to use the service while physically present in the designated country;
- (c) whether the person providing the service required customers to provide personal details, and, if so, whether those details suggested that the customer was not physically present in the designated country;
- (d) whether the person providing the service has network data that indicates that a customer was physically present outside the designated country when the relevant customer account was opened and throughout the period when the services were provided to the customer; and
- (e) any other relevant matters.

An example for the matter provided for in paragraph 15A(4)(a) is whether a customer was informed of the prohibition through a disclaimer message posted on an Internet site that offers the service.

The matters outlined in paragraphs 15A(4)(d) and (e) are intended to cover any new technology that allows interactive gambling service providers to determine that their customers are physically present outside a relevant designated country. Paragraph 15A(4)(e) is also intended to cover any other relevant matters not necessarily relating to technology.

The note at the end of subclause 15A(3) explains that the effect of the *Criminal Code* is that the defendant bears an evidential burden. An evidential burden requires the defendant to adduce evidence that suggests a real possibility that the matter exists or does not exist (subsection 13.3 of the *Criminal Code*). This means that the defendant must adduce or point to evidence that suggests they did not know that the service had a designated country-customer link and could not, with reasonable diligence, have ascertained that the service had a designated country-customer link. If the defendant does this then the prosecution would then need to disprove that the defendant did not know, and could not with reasonable care and diligence have ascertained, that the service had a designated country-customer link (subsection 13.1(2) of the Code).

Placing an evidential burden on the defendant is consistent with the *Criminal Code* (see subsection 13.3 of the Code).

Subclause 15A(5) provides that section 15.4 of the *Criminal Code* applies to the offence in clause 15A(1) of providing an Australian-based interactive gambling service to a customer in a designated country. Section 15.4 of the *Criminal Code* relates to extended geographical jurisdiction and provides that if a law of the Commonwealth applies section 15.4 of the Code to a particular offence, the offence applies whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Subclause 15A(5) ensures that any extraterritorial extension of the offence in clause 15A of the Bill is done within the framework of Commonwealth criminal law policy, as set out in the *Criminal Code*.

Subclause 15A(6) provides that for the purposes of clause 15A, an Australian-based interactive gambling service provider is an interactive service provider where the service has an Australian-provider link. ‘Australian-provider link’ is defined in subclause 15A(7).

Subclause 15A(7) provides that for the purposes of clause 15A an interactive gambling service has an Australian-provider link if, and only if:

- (a) the service is provided in the course of carrying on a business in Australia; or
- (b) the central management and control of the service is in Australia; or
- (c) the service is provided through an agent in Australia; or
- (d) the service is provided to customers using an Internet carriage service, and any or all of the relevant Internet content is hosted in Australia.

One or more of these conditions are all that is required to establish an Australian-provider link. Residency or citizenship issues are not relevant in relation to whether one of the above conditions is satisfied.

An example of the central management and control of a service being in Australia when a service would be considered to have an Australian-provider link is that of a company that provides an on-line gambling service such as a casino which has its web-site maintained in an offshore jurisdiction and the company executives (or principal company executives) are based in Australia.

Subclause 15A(8) provides that for the purposes of clause 15A the ‘relevant Internet content’ in relation to a gambling service is Internet content that is accessed or available for access by an end-user in the capacity of customer of the service.

### **Part 3—Complaints system: prohibited Internet gambling content**

#### **Division 1—Making of complaints to the ABA**

##### **Clause 16 – Complaints about prohibited Internet gambling content**

If a person (including an Australian Government or company – see s. 22(1) of the *Acts Interpretation Act 1901* and clause 19 of the Bill) has reason to believe that end-users in

Australia can access prohibited Internet gambling content using an Internet carriage service the person will be able to make a complaint to the ABA about the matter (subclause 16(1)).

Subclause 16(2) sets out the details that must be included in a complaint. It includes identification of the Internet content, how to access the Internet content, the name of the country in which the Internet content is hosted (if known), reasons for believing the Internet content is prohibited Internet gambling content, and any other information (if any) required by the ABA.

As a result of clause 23, a complainant who makes a complaint under Division 1 of Part 3 in good faith will be given immunity from civil proceedings (such as for defamation or breach of contract) if another person suffers loss, damage or injury or any kind because of the making of the complaint.

The action which the ABA must take in relation to a complaint will depend on whether a complaint relates to Internet content hosted in Australia or outside Australia (see clauses 20 and 24).

#### **Clause 17 – Complaints about breaches of online provider rules etc.**

Clause 17 provides that if a person has reason to believe that an Internet service provider has contravened a relevant industry code under Part 4 of the Bill or has contravened a relevant online provider rule (see clause 54), including the requirement in clause 48 to comply with a relevant industry standard, a person will be able to make a complaint to the ABA about the matter.

#### **Clause 18 – Form of complaint**

Clause 18 generally requires a complaint under Division 1 of Part 3 of the Bill (ie about prohibited Internet gambling content, breaches of online provider rules or breach of an industry code or standard) to be in writing. The ABA will, however, be able to permit complaints to be given in accordance with specified software requirements, by way of a specified kind of electronic transmission.

#### **Clause 19 – Residency etc. of complainant**

Clause 19 provides that a person will not be entitled to make a complaint under Division 1 of Part 3 of the Bill unless the person is a resident of Australia, a body corporate that carries on activities in Australia or the Commonwealth, a State or a Territory.

#### **Division 2—Investigations by the ABA**

##### **Clause 20 – Investigation of complaints by the ABA**

The ABA will be required to investigate a complaint under Division 1 of Part 3 of the Bill unless:

- the complaint relates to Internet content hosted in Australia; or
- the ABA is satisfied that the complaint is frivolous, vexatious or not made in good faith; or
- the ABA has reason to believe that the complaint was made for the purpose, or for purposes that include the purpose, of frustrating or undermining the effective administration of Part 3 of the Bill (subclauses 20(3) and (4)).

If a complaint relates to Internet content hosted in Australia the ABA must not investigate the complaint. However, the ABA must refer the complaint to a member of an Australian police force if the ABA considers the complaint should be so referred (paragraphs 20(3)(a) and (b)). For example, the ABA may consider that the complaint should be referred to the police if the complaint suggests that there may be a breach of clause 15 (ie that a person was providing an interactive gambling service to Australian customers) or if it points to some other fraudulent activity.

The ABA is not required to carry out an investigation to determine if the subject of a complaint amounts to a breach of clause 15. Such an investigation would be properly carried out by the police once the matter had been referred to them.

Where the ABA has referred a complaint to an Australian police force, the ABA must give written notice to the complainant stating that the complaint has been so referred (subparagraph 20(3)(b)(ii)).

The manner in which Internet content will be able to be notified to the police under paragraph 20(3)(b) will include, but will not be limited to, a manner ascertained in accordance with an arrangement (such as an MOU) between the ABA and the chief (however described) of the police force concerned (subclause 20(7)).

If a complaint is referred to a member of an Australian police force under subclause 20(3) the member may refer the complaint to a member of another Australian police force (subclause 20(8)).

Clause 20 will not, by implication, limit the ABA's powers to refer other matters to a member of the Australian Federal Police or of a State or Territory police force (subclause 20(9)).

The ABA will be required to notify the complainant of the results of an investigation (subclause 20(5)).

The ABA will also be able to terminate an investigation if it is of the opinion that it does not have sufficient information to conclude the investigation (subclause 20(6)).

### **Clause 21 – ABA may investigate matters on its initiative**

Clause 21 sets out the matters that the ABA may investigate if it thinks it desirable to do so.

It provides that the ABA may investigate:

- whether an Internet service provider is supplying an Internet carriage service that enables end-users to access prohibited Internet gambling content hosted outside Australia;
- whether an Internet service provider has contravened a relevant industry code;
- whether an Internet service provider has contravened an online provider rule.

Clause 21 is not intended to preclude the ABA from actively monitoring content. In addition clause 21 provides a mechanism to allow the ABA to investigate matters where, for example, information about particular Internet content or conduct of an Internet service provider is drawn to its attention by a source other than a complaint from the public. Clause 21 will also improve the ABA's ability to deal with avoidance situations.

### **Clause 22 – Conduct of investigations**

Clause 22 enables the ABA to conduct investigations under Division 2 of Part 3 of the Bill as it thinks fit.

The ABA will be able, for the purposes of an investigation, to obtain information from such persons and make such inquiries as it thinks fit.

Clause 22 will apply in addition to Part 13 of the BSA which deals with information gathering by the ABA, including investigation powers and procedures.

### **Clause 23 – Protection from civil proceedings**

Clause 23 provides an immunity from civil proceedings (such as proceedings for breach of contract in relation to the disclosure of a password or proceedings for defamation) for a person who in good faith makes a complaint under Division 1 of Part 3 of the Bill or who makes a statement or gives information to the ABA in connection with an investigation under Division 2 of Part 3.

### **Division 3—Action to be taken in relation to a complaint about prohibited Internet gambling content hosted outside Australia**

#### **Clause 24 – Action to be taken in relation to a complaint about prohibited Internet gambling content hosted outside Australia**

If, in the course of an investigation under Division 2 of Part 3 of the Bill the ABA is satisfied that Internet content hosted outside Australia is prohibited Internet gambling content, the ABA will be required:

- if the ABA considers the content should be referred to a law enforcement agency (whether in or outside Australia) – notify the content (see clause 29):
  - to a member of the Australian police force (see clause 4); or
  - if there is an arrangement (such as an MOU) between the ABA and the chief of an Australian police force under which the ABA is authorised to notify the content to another person or body, whether in Australia or overseas – to that other person or body; and
- if an industry code or industry standard under Part 4 deals exclusively with designated Internet gambling matters (ie. formulation of a designated notification scheme and procedures which Internet service providers will follow in dealing with overseas hosted Internet content notified by the ABA under a designated notification scheme set out in an industry code, see clause 35) – notify the content to Internet service providers under the designated notification scheme (see clause 4) set out in the code or standard; and
- if there is no code or standard dealing with the designated Internet gambling matters – give each Internet service provider known to the ABA a written notice (known as a standard access-prevention notice) directing the provider to take all reasonable steps to prevent end-users from accessing the content (subclause 24(1)).

Clause 31 deals with the circumstances where the ABA may be deemed to have given a standard access-prevention notice for the purposes of paragraph 24(1)(c).

The ABA's decision to issue such a standard access-prevention notice will be reviewable by the Tribunal on the application of the relevant Internet service provider concerned (paragraph 61(1)(a) and subclause 61(2)).

In determining whether particular steps are reasonable for the purposes of paragraph 24(1)(c), regard will be required to be had to the technical and commercial feasibility of taking the steps and the matters set out in the statement of Parliamentary intention in subsection 4(3) of the BSA and such other matters as are relevant (subclauses 24(2) and (3)). It is also anticipated that the statement of Parliamentary intention in subsection 4(3) of the BSA will inform the development of any industry code or industry standard on this issue.

Many users, including schools and major businesses, will already have their own blocking technologies in place such as firewalls and filtering software. It would be inefficient to be 'double filtering' such material by also requiring Internet service providers to filter all requests coming from such users. The processing overheads from filtering requirements would be reduced significantly if such users could be exempted from the filtering requirements.

Subclauses 24(4) to (7) address this issue.

Subclause 24(4) provides that an Internet service provider will not be required to comply with a standard-access prevention notice under paragraph 24(1)(c) in relation to a particular end-user of Internet content if access by the end-user is subject to a recognised alternative access-prevention arrangement that is applicable to the end-user.

Subclause 24(5) defines the term ‘recognised alternative access-prevention arrangement’. The ABA will be able, by written instrument, to declare that a specified arrangement or a specified class of arrangement is a recognised alternative access-prevention arrangement for the purposes of the application of Division 3 of Part 3 of the Bill (which deals with action to be taken in relation to a complaint about prohibited Internet gambling content hosted outside Australia) to one or more specified end-users. The ABA will be able to do so if it is satisfied that the arrangement is likely to provide a reasonably effective means of preventing access by those end-users to prohibited Internet gambling content.

Subclause 24(6) provides examples of arrangements that could be declared to be recognised alternative access-prevention arrangements under subclause 24(5). These include an arrangement that involves the use of regularly updated Internet content filtering software and an arrangement that involves the use of a filtered Internet carriage service. These examples are not intended to be exhaustive.

Subclause 24(7) provides that the ABA’s instrument declaring that a specified arrangement or specified class of arrangement is a recognised alternative access-prevention arrangement under subclause 24(5) will be a disallowable instrument. The instrument must accordingly be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The ABA will not be able to delegate its power to make, vary or revoke an instrument under subclause 24(5) (see paragraph 18(2)(p) of Schedule 3 to the BSA).

The manner in which Internet content will be able to be notified to the police under paragraph 24(1)(a) will include, but will not be limited to, a manner ascertained in accordance with an arrangement (such as an MOU) between the ABA and the chief (however described) of the police force concerned (subclause 24(8)).

If a member of the Australian Federal Police or of a State or Territory police force is notified of particular Internet content under clause 24, that person may notify the content to a member of another law enforcement agency in Australia or overseas (subclause 24(9)).

Clause 24 will not, by implication, limit the ABA’s powers to refer other matters to a member of the Australian Federal Police or of a State or Territory police force (subclause 24(10)).

### **Clause 25 – Deferral of action in order to avoid prejudicing a criminal investigation**

In cases of extreme concern, for example a serious online fraud, it is possible that a police investigation may be concurrent with a complaint to the ABA about particular material. The



public nature of the ABA complaints and investigation process proposed in the Bill could prejudice a police investigation in these circumstances. As a safeguard, therefore, it is proposed to give the ABA a discretion to defer action where a member of the Federal, State or Territory police satisfies the ABA that an investigation should be deferred for a specified period.

Clause 25 specifically provides that if:

- in the course of an investigation under Division 2 of Part 3 of the Bill the ABA is satisfied that Internet content hosted outside Australia is prohibited Internet gambling content; and
- apart from subclause 25(1), the ABA would be required to take action under subclause 24(1) in relation to a complaint about content; and
- a member of an Australian police force satisfies the ABA that the taking of that action should be deferred until the end of a particular period in order to avoid prejudicing a criminal investigation;

the ABA will be able to defer taking that action until the end of that period (subclause 25(1)).

Subclause 25(1) will have effect despite anything in clause 24 (subclause 25(2)).

#### **Clause 26 – Anti-avoidance—~~notified~~ Internet content**

As an anti-avoidance mechanism, clause 26 provides that if:

- particular Internet content has been notified to Internet service providers under a designated notification scheme contained in an industry code or industry standard; and
- the ABA is satisfied that Internet content that is the same as, or substantially similar to, this particular Internet content and is being hosted outside Australia; and
- the ABA is satisfied that the identical or similar Internet content is prohibited Internet gambling content; and
- an industry code or an industry standard under Part 4 of the Bill deals exclusively with designated Internet gambling matters (see clause 35);

the ABA will be required to notify the similar Internet content to Internet service providers under the designated notification scheme (see clause 4) set out in the code or standard.

The reference to Internet content being the same as prohibited Internet gambling content is intended to address the situation where Internet content is moved to another site without modification.

### **Clause 27 – Anti-avoidance—special access-prevention notice**

If:

- a standard access-prevention notice (see paragraph 24(1)(c)) relating to particular Internet content is applicable to a particular Internet service provider; and
- the ABA is satisfied that the provider is supplying an Internet carriage service that enables end-users to access Internet content that is the same as, or substantially similar to, the Internet content identified in the standard access-prevention notice; and
- the ABA is satisfied that the similar Internet content is prohibited Internet gambling content;

the ABA will be able to give the provider a written notice known as a special access-prevention notice directing the provider to take all reasonable steps to prevent end-users from accessing the similar Internet content at any time when the standard access-prevention notice is in force (subclause 27(1)).

Clause 31 sets out the circumstances in which the ABA may be deemed to have given a notice under clause 27.

The ABA's decision to give an Internet service provider a special access-prevention notice will be reviewable by the Tribunal on the application of the relevant Internet service provider concerned (paragraph 61(1)(b) and subclause 61(2)).

In determining whether particular steps are reasonable for the purposes of subclause 27(1), regard will be required to be had to the technical and commercial feasibility of taking the steps and the matters set out in the statement of Parliamentary intention in proposed subsection 4(3) of the BSA and such other matters as are relevant (subclauses 27(2) and (3)).

Many users, including schools and major businesses, will already have their own blocking technologies in place such as firewalls and filtering software. It would be inefficient to be 'double filtering' such material by also requiring Internet service providers to filter all requests coming from such users. The processing overheads from filtering requirements could be reduced significantly if such users could be exempted from the filtering requirements.

Subclause 27(4) addresses this issue. It provides that an Internet service provider will not be required to comply with a special-access prevention notice under subclause 27(1) in relation to a particular end-user of Internet content if access by the end-user is subject to a recognised alternative access-prevention arrangement that is applicable to the end-user.

Subclause 24(5) defines the term 'recognised alternative access-prevention arrangement'. The ABA will be able, by written instrument, to declare that a specified arrangement or a

specified class of arrangement is a recognised alternative access-prevention arrangement for the purposes of the application of Division 3 of Part 4 of the Bill (which deals with action to be taken in relation to a complaint about prohibited Internet gambling content hosted outside Australia) to one or more specified end-users. The ABA will be able to do so if it is satisfied that the arrangement is likely to provide a reasonably effective means of preventing access by those end-users to prohibited Internet gambling content.

Subclause 24(6) provides examples of arrangements that could be declared to be recognised alternative access-prevention arrangements under subclause 24(5). These include an arrangement that involves the use of regularly updated Internet content filtering software and an arrangement that involves the use of a filtered Internet carriage service. These examples are not intended to be exhaustive.

### **Clause 28 – Compliance with access-prevention notices**

An Internet service provider will be required to comply with a standard access-prevention notice (see paragraph 24(1)(c)) or a special access-prevention notice (see clause 27) that applies to the provider as soon as practicable, and in any event by 6pm on the next business day, after the notice was given to the provider (subclauses 28(1) and (2)).

The term ‘business day’ is defined in clause 4 of the Bill to mean a day that is not a Saturday, a Sunday or a public holiday in the place concerned.

These requirements are online provider rules (see clause 54). Accordingly, an Internet service provider who fails to comply with a standard access-prevention notice or a special access-prevention notice that applies to the provider in accordance with clause 28 will be subject to an offence under clause 55 and to a continuing offence under clause 57.

The penalty for the offence of contravening an online provider rule is 50 penalty units. A penalty unit is currently \$110, so the current maximum penalty is \$5,500. Under subsection 4B(3) of the *Crimes Act 1914*, if a body corporate is convicted of an offence against a Commonwealth law, the Court may impose a penalty of up to 5 times the amount of the maximum penalty that could be imposed on a natural person. As a result, the current maximum penalty that could be imposed on a corporation is \$27,500.

### **Clause 29 – Notification of Internet content**

Clause 29 provides that Internet content will be able to be notified in accordance with Division 3 of Part 3 of the Bill by setting out the content, describing the content or in any other way.

### **Clause 30 – Application of notifications under this Division**

For the purposes of greater clarity concerning the operation of clause 29, clause 30 puts beyond doubt that notices under Division 3 should identify a particular Internet site, a class of Internet site or a distinct part of such a site.

### **Clause 31 – ABA may be taken to have issued access-prevention notices**

Subject to subclause 31(2), the ABA will be empowered to formulate a scheme, by disallowable instrument:

- in the nature of a scheme for substituted service (eg. publication in a national newspaper or by some other means, such as on a website, with or without security measures, without the need to physically serve the notice);
- under which the ABA will be deemed, for the purposes of the Bill, to have done any or all of the following:
  - given each Internet service provider a standard access-prevention notice under paragraph 24(1)(c) of the Bill;
  - given each Internet service provider a special access-prevention notice under clause 27 (subclauses 31(1) and (4)).

At a minimum, a scheme formulated under subclause (1) must provide for each Internet service provider to be alerted by electronic means (ie. by e-mail) to the existence of a notice (subclause 31(2)).

As the instrument under subclause (1) is disallowable (see subclause 31(4)) it will be required to be published in the Commonwealth *Gazette*, tabled in both Houses of Parliament and will be subject to Parliamentary disallowance.

The ABA will not be able to delegate its power to make, vary or revoke an instrument under subclause 31(1) (see paragraph 18(2)(p) of Schedule 3 to the BSA).

Paragraph 24(1)(c) of the Bill will have effect, in relation to a scheme under subclause 31(1), as if the reference in paragraph 24(1)(c) to each Internet service provider known to the ABA were a reference to each Internet service provider (subclause 31(3)).

### **Part 4—Complaints system: industry code and industry standard**

Part 4 of the Bill sets out rules for the development of a self-regulatory industry code by bodies and associations that represent Internet service providers. The only code that will be able to be developed is a code that deals with the designated Internet gambling matters (see clause 35). These are formulation of a designated notification scheme (a scheme whereby the ABA is taken to have notified an Internet service provider of a particular matter) and procedures which an Internet service provider must follow when the ABA notifies them of prohibited Internet gambling content under paragraph 24(1)(b) or clause 26.

The ABA will have a reserve power to make a mandatory industry standard if the industry is unwilling to make such codes or such codes are deficient. This Part operates independently

of the program codes and standards provisions for the broadcasting industry made under Part 9 of the BSA.

### **Division 1—Simplified outline**

#### **Clause 32 – Simplified outline**

Clause 32 contains a simplified outline of Part 4 of the Bill (which deals with the industry codes and industry standards) to assist readers.

### **Division 2—Interpretation**

#### **Clause 33 – Industry code**

Clause 33 provides that for the purposes of this Bill, an industry code will be a code developed under Part 4, whether or not in response to a request under Part 4. Codes will be developed by bodies and associations that represent Internet service providers.

#### **Clause 34 – Industry standard**

Clause 34 defines an industry standard as a standard determined under Part 4 of this Bill. Standards will be determined by the ABA if there are no industry codes or if an industry code is deficient.

#### **Clause 35 – Designated Internet gambling matters**

Clause 35 sets out the meaning of designated Internet gambling matters for the purposes of the Bill. Industry codes or standards are to deal with designated Internet gambling matters (see clause 37).

Clause 35 sets out two designated Internet gambling matters:

- the formulation of a designated notification scheme (a scheme whereby the ABA is taken to have notified an Internet service provider of a particular matter, see clause 4);
- procedures which an Internet service provider must follow when the ABA notifies them of prohibited Internet gambling content hosted outside Australia under paragraph 24(1)(b) or clause 26. An example of such procedures are procedures relating to the provision of regularly updated Internet content filtering software to subscribers.

### **Division 3—General principles relating to industry code and industry standard**

#### **Clause 36 – Statement of regulatory policy**

Clause 36 is a statement of the Parliament's regulatory policy and provides important guidance to the ABA in performing its functions under Part 4.

Subclause 36(1) provides that it is the Parliament's intention that bodies or associations that the ABA is satisfied represent Internet service providers should develop a single industry code that is to apply to Internet service providers and deals only with designated Internet gambling matters (see clause 35).

This reflects the self-regulatory objective of the code-standard regime. An industry body or association which represents Internet service providers does not need to be incorporated to develop a code.

Subclause 36(2) provides that it is the intention of Parliament that an industry code developed or standard determined under Part 4 should be in addition to any codes developed, or standards determined under Schedule 5 to the BSA (which regulates the publication of illegal and offensive material on the Internet).

General codes that are already in place for the purposes of Schedule 5 to the BSA (which regulates the publication of illegal and offensive content on the Internet) will not be displaced. They will continue to cover matters such as giving customers information about the availability, use and appropriate application of Internet filtering software and the supervising and controlling children's access to Internet content.

The general codes deal with procedures directed towards the achievement of the objective of ensuring that online accounts are not provided to children without the consent of a parent or responsible adult; procedures to be followed in order to assist parents and responsible adults to supervise and control children's access to Internet content and the procedures to be followed in order to inform producers of Internet content about their legal responsibilities in relation to that content. In addition the codes outline the obligations of Internet service providers in relation to access to content hosted outside Australia.

Subclause 36(3) provides that it is the intention of Parliament that Part 4 does not limit the matters that may be dealt with by any codes developed, or standards determined under Schedule 5 to the BSA.

Subclause 36(4) provides that it is the Parliament's intention that the ABA should make reasonable efforts to ensure that, either an industry code is registered under Part 4 before Part 3 of the Bill commences (see clause 2) or an industry standard is registered under that Part before this time.

#### **Clause 37 – Matters that must be dealt with by industry code and industry standard**

Clause 37 sets out the matters to be dealt with in an industry code or standard.

Subclause 37(2) provides that it is the intention of the Parliament that, for the Internet service provider, there should be an industry code or an industry standard that deals with, or an industry code and an industry standard that together deal with each of the following matters:

- the formulation of a designated notification scheme (see clause 34);
- procedures to be followed by Internet service providers in dealing with overseas hosted Internet content notified to them by the ABA in accordance with a designated notification scheme (for example, procedures relating to the provision of regularly updated Internet content filtering software to subscribers).

Many users, including schools and major businesses, will already have their own blocking technologies in place such as firewalls and filtering software. It would be inefficient to be 'double filtering' such material by also requiring Internet service providers to filter all requests coming from such users. The processing overheads from filtering requirements could be reduced significantly if such users could be exempted from the filtering requirements.

Subclauses 37(3) to (8) address this issue.

Subclause 37(3) provides that an industry code or an industry standard will be able to exempt an Internet service provider from taking steps to prevent end-users from accessing prohibited Internet gambling content hosted outside Australia, or content that is substantially similar to such prohibited content, if access is subject to an arrangement that is declared by the code or standard to be a designated alternative access-prevention arrangement for the purposes of the application of clause 37 to those end-users.

Subclause 37(4) provides that the body or association developing an industry code will not be able to declare that a specified arrangement, or a class of specified arrangement, is a designated alternative access-prevention arrangement for the purposes of the application of clause 37 to one or more specified end-users, or classes of specified end-users, unless the body or association is satisfied that the arrangement is likely to provide a reasonably effective means of preventing access by those end-users to prohibited Internet gambling content.

Similarly, subclause 37(5) provides that the ABA, in making an industry standard, will not be able to declare that a specified arrangement, or a class of specified arrangement, is a designated alternative access-prevention arrangement for the purposes of the application of clause 37 to one or more specified end-users, or classes of specified end-users, unless the ABA is satisfied that the arrangement is likely to provide a reasonably effective means of preventing access by those end-users to prohibited Internet gambling content.



Subclause 37(6) provides examples of arrangements that could be declared to be designated alternative access-prevention arrangements under subclause 37(3). These include an arrangement that involves the use of regularly updated Internet content filtering software and an arrangement that involves the use of a filtered Internet carriage service. These examples are not intended to be exhaustive.

Subclauses 36(7) and (8) provide that for the purposes of the Bill, if an industry code or an industry standard:

- deals to any extent with procedures to be followed by Internet service providers in dealing with prohibited Internet gambling content hosted outside Australia, or content that is substantially similar to such content; and
- makes provision for a designated alternative access-prevention arrangement;

then

- the code or standard is deemed to have dealt with the requirements of paragraph 35(2)(b) (which requires codes and standards to deal with procedures, including filtering procedures, to be followed by Internet service providers in dealing with prohibited Internet gambling content hosted outside Australia, or content that is substantially similar to such content); and
- the code or standard is deemed to be consistent with subclause 37(2).

#### **Division 4—Industry code**

##### **Clause 38 – Registration of industry code**

Clause 38 will enable a body or association representing Internet service providers to submit a draft industry code that applies to Internet service providers and deals exclusively with designated Internet gambling matters (see clause 35) to the ABA for registration.

Subclauses 38(1) and (2) require the ABA to register an industry code if the ABA is satisfied that:

- the code provides appropriate community safeguards for the designated Internet gambling matters. An example of what may be considered an appropriate community safeguard is that the code provides for appropriate regularly updated Internet content filtering software. The community has an interest in ensuring that software is regularly updated so as to include matters such as addressing issues of children’s access and problem gambling;
- the body or association has published a draft code, invited Internet service providers to make submissions within a period of at least 30 days (subclause 38(3)) and considered any submissions; and

- the body or association has published a draft code, invited members of the public to make submissions within a period of at least 30 days (subclause 38(3)) and considered any submissions.

The public comment requirements are additional to any opportunities the industry may provide for the involvement of the public or consumer representatives in the code development process.

Subclause 38(4) provides that when a new code is registered under Part 4 and it is expressed to replace another industry code, the other code ceases to be registered.

A decision to refuse to register a code is subject to Tribunal review on the application of the body or association that developed the code (see subclauses 61(3) and (4)).

### **Clause 39 – ABA may request Code**

Clause 39 performs the function of being a formal trigger for the development of an industry code. The failure to develop the code which has been requested provides a ground for the ABA to develop an industry standard (clause 44). That provision has the effect of preventing the ABA developing a standard before the industry has the opportunity to develop a code.

Clause 39 provides that if the ABA is satisfied that a body or association represents Internet service providers, it may request them to develop a code that applies to Internet service providers and deals exclusively with designated Internet gambling matters (see clause 35). The ABA must specify a period of at least 120 days for a code to be developed and a copy to be given to it (subclause 39(2)).

The ABA will not be permitted to make a request under clause 39 unless it is satisfied that it is unlikely that an industry code would be developed within a reasonable period without such a request (subclause 39(3)).

The ABA will be able to vary the request by extending the period (subclause 39(4)). This will not by implication limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* which provides that where an Act confers a power to make an instrument, the power shall, unless the contrary intention appears, be construed as including a power exercisable in a like manner and subject to like conditions (if any), to revoke or vary such an instrument (subclause 39(5)).

The ABA's notice under subclause 39(1) will be able to specify indicative targets for achieving progress in developing the code. The targets are binding and may be used to guide the timing of the development process of a standard (see subparagraph 44(1)(b)(ii)).

The ABA's request for a code must be kept on a publicly available Register (see clause 53).

### **Clause 40 – Publication of notice where no body or association represents Internet service providers**

Clause 40 provides that if the ABA is satisfied that there is no body or association in existence that represents Internet service providers, it may publish a notice in the Commonwealth *Gazette* to the effect that if such a body were to come into existence, the ABA would be likely to request it to develop a code under clause 39. The notice must set a period of at least 60 days for the Internet service providers to establish a representative body.

The notice must be kept on a publicly available Register (see clause 53).

If no such body or association is formed within the period set out in the notice, this would be a consideration in whether an industry standard would be made under clause 45. Again, the provision has the effect of preventing the ABA developing an industry standard before industry has an opportunity to develop a code.

### **Clause 41 – Replacement of industry code**

Clause 41 provides that changes to an industry code are to be achieved by replacement of the code rather than varying the code. However, when the changes are of a minor nature, the requirements for consultation with Internet service providers and the public in paragraphs 38(1)(e) and (f) of the Bill will not apply to the registration process. This will limit consultation to when matters of substance arise and facilitate the making of minor changes to registered codes.

### **Clause 42 – Compliance with industry code**

Clause 42 provides that Internet service providers must comply with any ABA direction to comply with an industry code registered under Part 4 that applies to them. The ABA may make such a direction if the ABA is satisfied that the Internet service provider has contravened, or is contravening a registered code.

The ABA's direction must be kept on a publicly available Register (see clause 53).

This requirement is an online provider rule (see clause 54). Contravention of online provider rules is an offence (clause 55) and a continuing offence (clause 57).

The ABA's decision to give, vary or refuse to revoke a direction to an Internet service provider will be reviewable by the Tribunal on the application of the Internet service provider concerned (paragraph 61(1)(c) and subclause 61(2)).

### **Clause 43 – Formal warnings—breach of industry code**

Clause 43 provides that if an Internet service provider contravenes an industry code, the ABA may issue a formal warning to the Internet service provider. It is intended to enable

the ABA to formally indicate its concerns about a contravention of a code to a person. Such a warning may be a precursor to the taking of enforcement action under clauses 56 to 59. However, in the case of a serious, flagrant or recurring breach, the ABA may decide to institute enforcement action without giving a prior formal warning.

### **Division 5—Industry standard**

#### **Clause 44 – ABA may determine an industry standard if a request for an industry code is not complied with**

Clause 44 will enable the ABA to make a standard where it has requested industry to develop a code and it has failed to do so or to have made satisfactory progress.

Clause 44 provides that, if the ABA requests a code to be developed by an Internet service provider under subclause 39(1) and this request has not been complied with, indicative targets have not been met, or a code has been developed that the ABA subsequently refused to register, then the ABA may determine an industry standard. The standard is to deal exclusively with designated Internet gambling matters (see clause 35).

Subclause 44(3) requires the ABA to consult the body or association to which it made the request before determining an industry standard.

Subclause 44(4) provides that a standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* which accordingly must be notified in the *Commonwealth Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The ABA will not be able to delegate its power to make a standard under subclause 44(2) (see paragraph 18(2)(p) of Schedule 3 to the BSA).

Subclause 44(5) empowers the Minister to give the ABA a written direction as to the exercise of its powers under clause 44.

Before the ABA determines a standard it must provide for public consultation (see clause 52).

#### **Clause 45 – ABA may determine industry standard where no industry body or association formed**

Clause 45 enables the ABA to make a standard where no industry representative body has been established. The provision works in tandem with clause 40. It prevents the ABA from making a standard before Internet service providers have had an appropriate opportunity to develop a code.

If the ABA is satisfied that Internet service providers are not represented by a body or association, has published a notice under subclause 40(1) and no such body or association comes into existence within the period in the notice, then the ABA may determine an

industry standard. The standard is to deal exclusively with designated Internet gambling matters (see clause 35).

Subclause 45(3) provides that such a standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* which accordingly must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The ABA will not be able to delegate its power to make such a standard (see paragraph 18(2)(p) of Schedule 3 to the BSA).

Subclause 45(4) empowers the Minister to give the ABA a written direction as to the exercise of its powers under clause 45.

Before the ABA determines a standard it must provide for public consultation (see clause 52).

#### **Clause 46 – ABA may determine industry standard—total failure of industry code**

Clause 46 enables the ABA to make a standard where a code has totally failed. It prevents the ABA from making a standard before a code has proven to be ineffective.

If the ABA is satisfied that an industry code is totally deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ABA is satisfied that it is necessary or convenient to determine a standard, the ABA may determine an industry standard. This clause only applies to codes registered for at least 180 days to ensure that the implementation of a code has had adequate time before its success is judged and is intended to reinforce the preference for successful industry self-regulation.

If the ABA is satisfied that a body or association represents Internet service providers, subclause 46(4) requires the ABA to consult with the body or association before determining an industry standard. The industry code ceases to be registered on the day the industry standard comes into force (subclause 46(6)).

Subclause 46(5) provides that such a standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* which accordingly must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The ABA will not be able to delegate its power to make such a standard (see paragraph 18(2)(p) of Schedule 3 to the BSA).

An industry code is totally deficient if, and only if, it is not operating to provide appropriate community safeguards in relation to the designated Internet gambling matters (subclause 46(7)). An example of what may be considered an appropriate community safeguard is that

the code provides for appropriate regularly updated Internet content filtering software. The community has an interest in ensuring that software is regularly updated so as to include matters such as addressing issues of children's access and problem gambling.

Subclause 46(8) empowers the Minister to give the ABA a written direction as to the exercise of its powers under clause 46.

Before the ABA determines a standard it must provide for public consultation (see clause 52).

### **Clause 47 – ABA may determine industry standard—partial failure of industry code**

Clause 47 enables the ABA to make a standard where a code has partially failed. It prevents the ABA from making a standard before a code has proven to be ineffective. It is intended to provide flexibility in the scheme dealing with industry codes and industry standards. It is anticipated that the ABA would make use of this provision only as a last resort.

If the ABA is satisfied that an industry code is partially but not totally deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ABA is satisfied that it is necessary or convenient to determine a standard, the ABA may determine an industry standard. This clause only applies to codes registered for at least 180 days to ensure that the implementation of a code has had adequate time before its success is judged and is intended to reinforce the preference for successful industry self-regulation. The industry standard determined by the ABA will only deal with the deficient matter.

If the ABA is satisfied that a body or association represents Internet service providers, subclause 47(4) requires the ABA to consult with the body or association before determining an industry standard. The deficient matter in the industry code ceases to have effect on the day the industry standard comes into force. This does not, however, affect the continuing registration of the remainder of the code or any pre-existing investigation, proceeding or remedy in respect of a contravention of the code or of an ABA direction to comply with the code (subclause 47(6)).

Subclause 47(5) provides that such a standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* which accordingly must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The ABA will not be able to delegate its power to make such a standard (see paragraph 18(2)(p) of Schedule 3 to the BSA).

An industry code is deficient if, and only if, it is not operating to provide appropriate community safeguards in relation to a designated Internet gambling matter (subclause 47(7)). An example of what may be considered an appropriate community safeguard is that the

code provides for appropriate regularly updated Internet content filtering software. The community has an interest in ensuring that software is regularly updated so as to include matters such as addressing issues of children's access and problem gambling.

Subclause 47(8) empowers the Minister to give the ABA a written direction as to the exercise of its powers under clause 47.

Before the ABA determines a standard it must provide for public consultation (see clause 52).

#### **Clause 48 – Compliance with industry standard**

Clause 48 provides that Internet service providers must comply with any industry standard registered under Part 4 that applies to them.

This requirement is an online provider rule (see clause 54). Contravention of online provider rules is an offence (clause 55) and a continuing offence (clause 57).

#### **Clause 49 – Formal warnings—breach of industry standard**

Clause 49 provides that if an Internet service provider contravenes an industry standard, the ABA may issue a formal warning to the Internet service provider. It is intended to enable the ABA to formally indicate its concerns about a contravention of a standard to a person. Such a warning may be a precursor to the taking of enforcement action under clauses 56 to 59. However, in the case of a serious, flagrant or recurring breach, the ABA may decide to institute enforcement action without giving a prior formal warning.

#### **Clause 50 – Variation of industry standard**

Clause 50 provides that the ABA will be able to vary an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards in relation to either or both of the designated Internet gambling matters. An example of what may be considered an appropriate community safeguard is that the code provides for appropriate regularly updated Internet content filtering software. The community has an interest in ensuring that software is regularly updated so as to include matters such as addressing issues of children's access and problem gambling.

A variation will be a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* and accordingly must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance (subclause 50(2)).

The ABA will not be able to delegate its power to vary an industry standard (see paragraph 18(2)(p) of Schedule 3 to the BSA).

Before the ABA varies a standard it must provide for public consultation (see clause 52).

### **Clause 51 – Revocation of industry standard**

Clause 51 provides that the ABA will be able to revoke an industry standard by written instrument.

An instrument of revocation will be a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* and accordingly must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance (subclause 51(3)).

The ABA will not be able to delegate its power to revoke an industry standard (see paragraph 18(2)(p) of Schedule 3 to the BSA).

If an industry code is developed by Internet service providers to replace an industry standard, the industry standard is revoked when the new code is registered. The process by which the code will be registered will ensure the code provides appropriate community safeguards.

### **Clause 52 – Public consultation on industry standard**

Clause 52 provides that, before the ABA determines or varies a standard, it must publish a notice in a newspaper circulating in each State and the internal Territories seeking public comment on a draft industry standard within a specified period (being at least 30 days after the publication of the notice). Minor variations are exempted from this requirement (subclause 52(3)).

The ABA must have due regard to any comments made (subclause 52(4)).

## **Division 6 - Industry code and industry standard to be included on a Register**

### **Clause 53 – Industry code and industry standard to be included on a Register**

Clause 53 provides for the establishment and maintenance by the ABA of a Register of industry codes and standards, requests under clause 39 (ABA requests for a Code), notices under clause 40 (a notice where there is no body or association representing Internet service providers) and ABA directions under clause 42 (directing persons to comply with a Code). The Register may be maintained in electronic form and is to be made available for inspection on the Internet.

The maintenance of the Register is intended to provide industry and the public with ready information about the codes and standards that are in force.



## **Part 5—Complaints system: online provider rules**

### **Clause 54 – Online provider rules**

Clause 54 provides that for the purposes of the Bill, each of the following is an online provider rule:

- the rules set out in subclauses 28(1) and (2), which require an Internet service provider to comply with any standard access-prevention notice (see paragraph 24(1)(c)) or any special access-prevention notice (see clause 27) that applies to the provider as soon as practicable, and in any event by 6pm on the next business day, after the notice was given to the provider;
- the rule set out in subclause 42(2), which requires an Internet service provider that has contravened, or is contravening, a relevant registered industry code to comply with any ABA direction to comply with the code;
- the rule set out in clause 48, which requires an Internet service provider to comply with any industry standard registered under Part 4 that applies to them.

Under clauses 55 and 57, a person subject to online provider rules who contravenes any of those rules will be guilty of an offence and a continuing offence for each day during which the contravention continues.

### **Clause 55 – Compliance with online provider rules**

Clause 55 provides that a person subject to an online provider rule whose conduct contravenes the rule will be guilty of an offence subject to a maximum penalty of 50 penalty units in the case of an individual and 250 penalty units in the case of a body corporate (see subsection 4B(3) of the *Crimes Act 1914* (Cth)). A penalty unit equals \$110 (see section 4AA of the *Crimes Act 1914* (Cth)).

A contravention of the online provider rules will also be a continuing offence in respect of each day during which the contravention continues (see clause 57).

### **Clause 56 – Remedial directions—breach of online provider rules**

Clause 56 will apply if an Internet service provider has engaged in conduct that amounts to a contravention, or is engaging in conduct that amounts to a contravention, of an online provider rule.

The ABA will be empowered to give the Internet service provider a written direction requiring the provider to take specified action (including the compliance time for this action) directed towards ensuring that the rule is not contravened, or is not likely to be contravened, in the future.

Subclause 56(3) gives two examples of the kinds of directions which the ABA may give under subclause 56(2):

- a direction that the provider implement effective administrative systems for monitoring compliance with an online provider rule; and
- a direction that the provider implement a system designed to inform its employees, agents and contractors of the requirements of an online provider rule.

Subclause 56(4) provides that a person subject to a remedial direction who engages in conduct in contravention of the direction will be guilty of an offence subject to a maximum penalty of 50 penalty units in the case of an individual and 250 penalty units in the case of a body corporate (see subsection 4B(3) of the *Crimes Act 1914* (Cth)). A penalty unit equals \$110 (see section 4AA of the *Crimes Act 1914* (Cth)).

A contravention of a remedial direction will also be a continuing offence in respect of each day during which the contravention continues (see clause 57).

The ABA's decision to give, vary or refuse to revoke a remedial direction that is applicable to an Internet service provider will be reviewable by the Tribunal on the application of the Internet service provider concerned (paragraph 61(1)(c) and subclause 61(2)).

### **Clause 57 – Continuing offences**

Clause 57 provides that a person who contravenes:

- clause 55 (which provides that a person subject to an online provider rule who engages in conduct in contravention of the rule will be guilty of an offence); or
- subclause 56(4) (which provides that a person subject to a remedial direction who engages in conduct in contravention of the direction will be guilty of an offence);

will be guilty of a separate offence in respect of each day (including the day of a conviction for the offence or any later day) during which the contravention continues.

The maximum penalty for each day that the offence continues is ten percent of the maximum penalty that could be imposed in respect of the principal offence. That is ten percent of 50 penalty units (\$5,500) or \$550 for each of the offences in clauses 55 and 56(4).

### **Clause 58 – Formal warnings—breach of online provider rules**

Clause 58 will allow the ABA to issue a formal warning if a person contravenes an online provider rule.

### **Clause 59 – Federal Court may order a person to cease supplying Internet carriage services**

If the ABA is satisfied that an Internet service provider is supplying an Internet carriage service, otherwise than in accordance with an online provider rule, the ABA will be able to apply to the Federal Court for an order that the provider cease supplying that service, as the case requires (subclause 59(1)).

If the Federal Court is satisfied, on such an application, that the Internet service provider is supplying an Internet carriage service, otherwise than in accordance with the online provider rule, it will be able to order the provider to cease supplying that service (subclause 59(2)).

## **Part 6—Complaints system: Protection from civil proceedings**

### **Clause 60 – Protection from civil proceedings**

Internet service providers will be protected from civil proceedings (for example, for breach of contract or defamation) in respect of anything done by them in compliance with:

- an industry code or an industry standard under Part 4 of the Bill in so far as the code or standard deals with procedures to be followed by providers in dealing with Internet content notified under a designated notification scheme set out in the code or standard (subclause 60(1)); or
- clause 28 which requires an Internet service provider to comply with a standard access-prevention notice or a special access-prevention notice that applies to the provider as soon as practicable, and in any event by 6pm on the next business day, after the notice was given to the provider (subclause 60(2)).

## **Part 7— Complaints system: review of decisions**

### **Clause 61 – Review of decisions**

Clause 61 of the Bill provides for the review of certain decisions of the ABA by the Tribunal. Persons whose interests are affected by a decision referred to in clause 61 may apply to the Tribunal for a review of the decision.

The Tribunal means the Administrative Appeals Tribunal (AAT) or, after the commencement of Parts 4 to 10 of the *Administrative Review Tribunal Act 2001*, the Administrative Review Tribunal, which is the body which is proposed to replace the AAT (subclause 61(6)).

The ABA's decision to issue a standard access-prevention notice to an Internet service provider under paragraph 24(1)(c) will be reviewable by the Tribunal on the application of the relevant Internet service provider concerned (paragraph 61(1)(a) and subclause 61(2)).

The ABA's decision to give an Internet service provider a special access-prevention notice (see clause 27) will be reviewable by the Tribunal on the application of the relevant Internet service provider concerned (paragraph 61(1)(b) and subclause 61(2)).

The ABA's decision to give, vary or refuse to revoke a direction to comply with an industry code (clause 42) or a remedial direction (clause 56) that is applicable to an Internet service provider will be reviewable by the Tribunal on the application of the Internet service provider concerned (paragraph 61(1)(c) and subclause 61(2)).

An ABA decision to refuse to register a code is subject to Tribunal review on the application of the body or association that developed the code (see subclauses 61(3) and (4)).

Subclause 61(5) is based on section 205 of the BSA. It provides that if the ABA makes a decision that is reviewable under clause 61, it must include in the document by which the decision is notified a statement setting out the reasons for the decision and a statement to the effect that an application may be made to the Tribunal for a review of the decision.

## **Part 7A—Prohibition of advertising of interactive gambling services**

Part 7A of the Bill provides for a prohibition of advertising of interactive gambling services.

Part 7A establishes a prohibition on both online and offline advertising of interactive gambling in Australia and the external Territories.

The prohibition in Part 7A is to apply to any person who publishes or broadcasts an advertisement in Australia for any interactive gambling service (whether or not the interactive gambling service has any Australian customers), subject to certain exceptions set out in Part 7A.

The prohibition does not extend to advertisements published in overseas media such as magazines published overseas or websites that are aimed at non-Australian audiences.

The prohibition extends to all forms of media, both electronic and non-electronic, including advertising via the Internet, broadcasting, print media, billboards and hoardings.

The amendments are modelled broadly on the *Tobacco Advertising Prohibition Act 1992* (the Tobacco Act). The amendments include transitional provisions modelled on the equivalent provisions in the Tobacco Act to accommodate existing arrangements relating to the advertising of interactive gambling services.

There are two general offences:

- an offence of broadcasting or datacasting an interactive gambling advertisement in Australia; and

- an offence of publishing an interactive gambling advertisement in Australia.

## **Division 1—Interpretation: definitions**

### **Clause 61AA – Definitions**

Clause 61AA sets out the key definitions used in Part 7A. These definitions are discussed below.

#### ***Broadcast***

The term ‘broadcast’ is defined to mean transmit by means of a broadcasting service, and is used in Division 4 of Part 7A, which sets out the prohibition of broadcasting or datacasting interactive gambling service advertisements in Australia.

#### ***Broadcasting service***

‘Broadcasting service’ is given a different meaning in Part 7A to the remainder of the Act. ‘Broadcasting service’ is defined to mean a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- (a) a datacasting service; or
- (b) Internet video and audio streaming.

Paragraph (b) of the definition of ‘broadcasting service’ provides that Internet audio and video streaming are not a broadcasting service for the purposes of Part 7A of the Bill. This is consistent with a Ministerial determination made under paragraph (c) of the definition of ‘broadcasting service’ in subsection 6(1) of the *Broadcasting Services Act 1992* (the BSA) (Determination under paragraph (c) of the definition of ‘broadcasting service’ (No.1 of 2000)). The determination made it clear that audio and video streaming over the Internet are not broadcasting services for the purposes of the BSA.

#### ***Broadcasting service bands***

The term ‘broadcasting service bands’ has the same meaning as in the BSA.

#### ***Datacast***

The term ‘datacast’ is defined to mean transmit by means of a datacasting service. The phrase ‘datacasting service’ is defined in clause 4 of the Bill and means a datacasting service provided by a licensed datacaster. ‘Datacast’ is used in Division 4 of Part 7A, which sets out the prohibition of broadcasting or datacasting interactive gambling service advertisements in Australia.

***Display***

The term ‘display’ is defined to include continue to display. ‘Display’ is used in clause 61CA, which sets out the meaning of ‘publish’.

***Exempt library***

The phrase ‘exempt library’ is defined in to mean a public library, a library of a tertiary institution, or a library of an authority of the Commonwealth or of a State or Territory. ‘Exempt library’ is used in clause 61CE, which establishes an exception to the meaning of ‘interactive gambling service advertisement’ in relation to ordinary activities of exempt libraries.

***Government or political matters***

The phrase ‘government or political matters’ is defined to mean government or political matters relating to any level of government in Australia, and includes:

- (a) matters relating to any election or appointment to public office; and
- (b) political views or public conduct relating to activities that have become the subject of political debate; and
- (c) the performance, conduct, capacity or fitness of a person elected, or seeking appointment, to any public office; and
- (d) the actions or policies of any government in Australia or any Australian political party.

This phrase is used in clause 61BB, which establishes the political communication exception to the meaning of ‘interactive gambling service advertisement’.

***Interactive gambling service provider***

The phrase ‘interactive gambling service provider’ is defined to mean a person who provides an interactive gambling service.

The phrase ‘interactive gambling service’ is to have the same meaning as ‘interactive gambling service’ as defined in clause 5 of the Bill. It is used in clauses 61BC, 61BD, 61BE and 61CD.

***Periodical***

The term ‘periodical’ is defined to mean an issue of a newspaper, magazine, journal, newsletter, or other similar publication, issues of which are published at regular or irregular intervals. The term is used in clause 61EB relating to periodicals distributed outside Australia.

***Program***

The term ‘program’ is taken to have the same meaning as in the BSA. The BSA defines ‘program’ in section 6 to mean:

- (a) matter the primary purpose of which is to entertain, to educate or to inform an audience;  
or
- (b) advertising or sponsorship matter, whether or not of a commercial kind.

The term is used in clause 61CA, which provides the basic meaning of ‘publish an interactive gambling service advertisement’.

### ***Public place***

The phrase ‘public place’ is defined to mean a place, or part of a place, to which the public, or a section of the public, ordinarily has access, whether or not by payment or by invitation (including, for example, a shop, restaurant, hotel, cinema or club). Clause 61AA also defines ‘section of the public’, as set out below. The inclusion of a place accessible by only a section of the public in the definition of ‘public place’ is designed to allow ‘member’s only’ clubs to be covered.

### ***Publish***

The term ‘publish’ is given a special meaning with respect to an interactive gambling service advertisement in Division 3 of Part 7A. For matters other than interactive gambling service advertisements, ‘publish’ is to have a meaning equally as broad as it has in relation to interactive gambling service advertisements. Further explanation of the definition of ‘publish’ in Division 3 is set out below.

### ***Section of the public***

The phrase ‘section of the public’ is defined to include members of a club, society or organisation, or a group consisting only of persons sharing a common workplace or common employer. An example of a section of the public is the members of a sporting club. The definition of ‘section of the public’ for the purposes of Part 7A differs from the definition of ‘section of the public’ set out in clause 8B of the Bill. For the purposes of Part 7A it is defined more broadly to include persons with a common workplace. This is to ensure the prohibition on advertising extends in its application to sections of the public in particular workplaces. The term is used in clause 61CA in relation to the basic meaning of publish.

### ***Workplace***

The term ‘workplace’ is defined as a premises where contractors or employees work, other than a premises that is primarily used as a private dwelling. The term is used in the definition of ‘section of the public’.

## **Division 2—Interpretation: interactive gambling service advertisement**

### **Clause 61BA – Basic meaning of interactive gambling service advertisement**

Subclause 61BA(1) provides that for the purposes of Part 7A an ‘interactive gambling service advertisement’ is any writing, still or moving picture, sign, symbol or other visual image or audible message, or any combination of 2 or more of those things, that gives publicity to or otherwise promotes or is intended to promote:

- an interactive gambling service;
- interactive gambling services in general;
- the whole or part of a trademark or design in respect of an interactive gambling service, such as a domain name;
- a domain name or URL that relates to an interactive gambling service; or
- any other words that are closely associated with an interactive gambling service, whether also closely associated with other kinds of services or products.

In paragraph 61BA(1)(d), ‘URL’ has its ordinary meaning of ‘uniform resource locator’, which is the address of a document on the Internet.

‘Interactive gambling service advertisement’ is intended to cover more than just the promotion of an individual interactive gambling service. For example, an advertisement that refers to a website where details of interactive gambling services can be found should be regarded as advertising for the purposes of Part 7A of the Bill.

Further, the term is intended to cover both advertisements for particular interactive gambling sites, such as “IGSP.com.au”, as well as the advertising of particular interactive gambling services, such as online casinos.

Clause 61BA has effect subject to exceptions set out in clauses 61BB, 61BC, 61BD, 61BE, 61BF and 61BG.

### **Clause 61BB – Exception—political communication**

Clause 61BB clarifies that interactive gambling service advertisements are permitted in the context of discourse on government and political matters, provided the advertisements do not promote interactive gambling services.

Subclause 61BB(1) provides that if an advertisement does not promote and is not intended to promote any particular interactive gambling service, and the advertisement relates solely to government or political matters, the advertisement is not an interactive gambling service advertisement for the purposes of Part 7A of the Bill.

Subclause 61BB(2) provides that the use in an advertisement of the whole name of an interactive gambling service provider does not itself constitute promotion of an interactive gambling service or services for the purposes of paragraph 61BB(1)(a).



Subclause 61BB(3) provides that subclause (2) does not apply to the use of names referred to in that subclause in a way prohibited by regulations made for this subsection. This is intended to prevent manipulation of the exemption set out in subclause 61BB(2).

Subclause 61BB(4) is a saving provision that provides that clause 61BA does not apply to the extent that it would infringe any doctrine of implied freedom of political communication.

### **Clause 61BC – Exception—Internet sites etc. and business documents**

The exception in clause 61BC is intended to apply in a similar way to the exemption in subsection 9(2) of the Tobacco Act that allows words to appear on tobacco products and packaging.

The exception in clause 61BC provides that the following material does not constitute an interactive gambling service advertisement:

- (a) words, signs or symbols that appear on the Internet site of an interactive gambling service that is provided to customers using an Internet carriage service or on or at an equivalent point of provision of any other interactive gambling service; or
- (b) words, signs or symbols that appear on business documents of interactive gambling service providers, whether or not the documents are in electronic form. Business documents include an invoice, statement, order form, letterhead, business card, cheque, manual of other document ordinarily used in the course of business.

However, this does not prevent a still or moving screen shot of an Internet site or equivalent point of provision referred to in (a) from being an interactive gambling service advertisement. Likewise, it does not prevent a still or moving picture or other visual image of business documents referred to in paragraph (b) from being an interactive gambling service advertisement. The intention of this qualification is that the exception for the material mentioned in paragraphs (a) and (b) does not extend to the secondary transmission of that material.

The reference to 'an equivalent point of provision of any other interactive gambling service' in paragraph 61BC(a) is intended to include interactive gambling services provided via means other than the Internet. This will include, for example, interactive gambling services provided through interactive television, through datacasting and through other interactive technologies.

### **Clause 61BD – Exception—premises of providers**

The exemption in clause 61BD is intended to cover words, signs or symbols appearing on land or buildings occupied by interactive gambling service providers. As with the exception in clause 61BC, the exception for these words, signs and symbols does not extend to secondary transmission of those things.

### **Clause 61BE – Exception—management advertisements etc.**

Clause 61BE is intended to remove any doubt as to whether or not certain things fall within the definition of interactive gambling service advertisement. The clause provides that the following things are not to be considered interactive gambling service advertisements for the purposes of Part 7A of the Bill:

- anything that is required to be done under Commonwealth, State or Territory laws;
- an advertisement relating to the internal management of the business of an interactive gambling service provider, provided that the advertisement does not promote the interactive gambling service. This could include, for example, as advertisement in a newspaper or on the Internet for staff or calling for tenders;
- the taking of any action to prevent persons becoming victims of fraud or any other dishonest or unethical conduct. This could include, for example, the publishing of a notice warning consumers of the fraudulent offering of services supposedly connected with the interactive gambling service provider who publishes the notice.

**Clause 61BF – Exception—products or services having the same name as an interactive gambling service**

Subclause 61BF(1) provides that an advertisement for a product that is not an interactive gambling service, but which by coincidence shares a name with an interactive gambling service or an interactive gambling service provider, does not constitute an advertisement for an interactive gambling service.

Paragraph 61BF(1)(b) provides that the exception in paragraph (1)(a) only applies if the manufacturer, distributor or retailer of the non-gambling product or the provider of the service is not associated in any way with the interactive gambling service provider concerned.

Subclause 61BF(2) provides that two corporations that are related to each other are taken to be associated with each other for the purposes of subclause 61BF(1).

Subclause 61BF(3) states that for the purposes of subclause (2), the question of whether two corporations are related to each other will be determined in the same way that the question would be determined under the Corporations Law.

**Clause 61BG – Exception—anti-gambling advertisements**

Clause 61BG provides that something, such as an anti-gambling advertisement, that is clearly intended to discourage the use of interactive gambling services or particular kinds of gambling services is not to be considered to be a ‘interactive gambling service advertisement’ for the purposes of Part 7A of the Bill.

**Clause 61BH – Definition**

Clause 61BH states that for the purposes of Division 2 of Part 7A, ‘words’ includes abbreviations, initials and numbers.

### **Division 3—Interpretation: publication of interactive gambling service advertisement**

#### **Clause 61CA – Basic meaning of *publish* an interactive gambling service advertisement**

Clause 61CA provides that for the purposes of Part 7A a person publishes an interactive gambling site if the person does any of the following things:

- includes the advertisement on an Internet site;
- includes the advertisement in a document, including a newspaper, magazine, program, leaflet or ticket, that is available or distributed to the public;
- includes the advertisement in a film, video, television program or radio program that is or is intended to be seen or heard by the public;
- the person sells or hires the advertisement to the public, or offers it for sale, supply or hire to the public;
- the person displays, screens or plays the advertisement so that it can be seen or heard in a public place, on public transport or in a workplace;
- the person otherwise brings the advertisement to the notice of or disseminates the advertisement to the public by any means, including for example, by means of a film, video, computer disk or electronic medium.

For the above matters ‘the public’ includes a section of the public. An advertisement includes something that contains the advertisement

Clause 61CA has effect subject to exceptions set out in clauses 61CB, 61CC, 61CD, 61CE and 61CF.

#### **Clause 61CB – Publish does not include broadcast or datacast**

Clause 61CB excludes the broadcasting or datacasting of an interactive gambling service advertisement from the definition of ‘publish an interactive gambling service advertisement’. This is to avoid overlap between publishing, and broadcasting or datacasting, which are addressed separately in Part 7A.

#### **Clause 61CC – Exception—trade communications**

Clause 61CC excludes from the definition of ‘publish’ the communication of information within the interactive gambling service industry to people who are all involved in the interactive gambling service industry.

Therefore, publishing an interactive gambling service advertisement in a trade journal that goes only to people in the interactive gambling service industry would not be ‘publishing an

interactive gambling service advertisement for the purposes of Part 7A. However, if this journal containing the interactive gambling service advertisement was also available to the public or to people whose only involvement in the industry is as consumers, then the publishing would be considered ‘publishing an interactive gambling service advertisement’.

**Clause 61CD – Exception—advertisements in telephone directories**

Subclause 61CD(1) provides that the publishing of the name of an interactive gambling service provider in a telephone directory does not amount to the publication of an interactive gambling service advertisement.

However, subclause (2) provides that subclause (1) does not apply if the publication is on the Internet and the entry for the provider contains a link to an Internet site for the provider that relates to an interactive gambling service. Therefore, for example, a listing in an on-line White Pages for an interactive gambling service provider that contains a link to that provider’s Internet site will not come within the exception in this clause.

An example of an acceptable listing for the purposes of subclause (1) would be a listing on an Internet directory site that simply provides information relating to an interactive gambling service provider’s business address and telephone number, and does not provide any link whatsoever to an interactive gambling service site.

**Clause 61CE – Exception—ordinary activities of exempt libraries**

Clause 61CE excludes from the definition of ‘publish an interactive gambling service advertisement’ anything done on behalf of an ‘exempt library’ for the normal practices of that library.

**Clause 61CF – Exception—acknowledgments of assistance or support**

Clause 61CF excludes from the definition of ‘publish an interactive gambling service advertisement’ limited recognition of a sponsorship or some other arrangement of assistance or support. However, such recognition must comply with relevant regulations made for the purposes of this provision in order to qualify with this exception.

**Division 4—Broadcasting or datacasting of interactive gambling service advertisements in Australia**

**Clause 61DA – Interactive gambling service advertisements not to be broadcast or datacast in Australia**

Subclause 61DA(1) provides that a person is guilty of 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 relates to accidental or incidental broadcasts; and
- the broadcast or datacast is not permitted by section 61DC, which relates to the broadcast or datacast of advertisements during flights of aircraft.

Subclause 61DA(2) provides that a person is guilty of an offence if:

- the person authorises or causes an interactive gambling service advertisement to be broadcast or datacast in Australia; and
- the broadcast or datacast is not permitted by section 61DB; and
- the broadcast or datacast is not permitted by section 61DC.

The penalty for the offences in subclauses 61DA(1) and (2) is 120 penalty units. A penalty unit is currently \$110, so the current maximum penalty for an individual is \$13,200. Under subsection 4B(3) of the *Crimes Act 1914*, if a body corporate is convicted of an offence against a Commonwealth law, the Court may impose a penalty of up to 5 times the amount of the maximum penalty that could be imposed on a natural person. As a result, the current maximum penalty that could be imposed on a corporation is \$66,000.

The offences in clause 61DA do not specify fault elements, in line with Commonwealth criminal law policy. In place of specified fault elements, section 5.6 of the *Criminal Code* applies to the offences in clause 61DA.

Section 5.6(1) of the *Criminal Code* provides that if a fault element for a physical element consists only of conduct, intention is the fault element for that physical element. Section 5.6(2) provides that if a fault element for a physical element consists of a circumstance or a result, recklessness is the fault element for that physical element.

This ensures that the appropriate fault element of intention applies to the physical element of conduct in the offences in clause 61DA, and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

### **Clause 61DB – Accidental or incidental broadcast or datacast permitted**

Clause 61DB permits an interactive gambling service advertisement that is broadcast or datacast as an accidental or incidental accompaniment to other matter provided the broadcaster or datacaster does not receive any benefit additional to the benefit they receive for broadcasting the other matter. The benefit need not be financial.

This will permit broadcasters and datacasters to include incidental material that is technically advertising in their broadcasts or datacasts. For example, this would permit the broadcast of an international sporting event at an overseas venue where an interactive gambling service advertisement might be permitted. If however, the broadcaster receives some benefit for the interactive gambling service advertisement, additional to the benefit arising from broadcasting the sporting event, the interactive gambling service advertisement would not be permitted under this clause.

Subclause 61DB(2) provides that subsection (1) only has effect for the purposes of Part 7A.

### **Clause 61DC – Broadcast or datacast of advertisements during flights of aircraft**

Subclause 61DC(1) permits the publication of advertisements for interactive gambling services in an aircraft during a flight of the aircraft, provided the flight does not commence and terminate within Australia. The effect of this provision is to permit the advertising of interactive gambling services on international flights. Such advertisements are not permitted on domestic flights, which are flights starting at a place in Australia and terminating within Australia.

For example, an advertisement for interactive gambling services on a flight departing from Japan and arriving in England would not be covered. Neither would an advertisement on a flight from Paris to Australia. However, an advertisement for an interactive gambling service on a flight from Sydney to Perth would be prohibited as the flight begins and ends within Australia.

Subclause 61DC (2) provides that each sector of a flight of an aircraft is to be taken to be a separate flight. This covers flights with various stops between the departure point and the eventual destination. For example, a flight might commence in Sydney, stop in Perth, and continue on to London. The flight from Sydney to Perth, and the flight from Perth to London, are treated as separate flights for the purposes of subclause (2). As a result, an interactive gambling advertisement broadcast during the flight from Sydney to Perth would be prohibited, but if the advertisement was broadcast during the flight from Perth to London, the advertisement would be permitted.

Subclause 61DC(3) provides that subsection (1) only has effect for the purposes of Part 7A.

## **Division 5—Publication of interactive gambling service advertisements in Australia**

### **Clause 61EA – Interactive gambling service advertisements not to be published in Australia**

Clause 61EA prohibits the publication of advertisements for interactive gambling services in Australia.

Subclause 61EA(1) provides that a person is guilty of an offence if:

- the person publishes an interactive gambling service advertisement in Australia; and
- the publication is not permitted by section 61EB, which relates to periodicals distributed outside Australia; and
- the publication is not permitted by section 61EC, which relates to Australian sporting and cultural events of international significance; and
- the publication is not permitted by section 61ED, which relates to accidental or incidental publication; and
- the publication is not permitted by section 61EE, which relates to publications by persons not receiving any benefit; and
- the publication is not permitted by section 61EF, which relates to publication of advertisements during flights of aircraft.

Subclause 61EA(2) provides that a person is guilty of an offence if:

- the person authorises or causes an interactive gambling service advertisement to be published in Australia; and
- the publication is not permitted by section 61EB; and
- the publication is not permitted by section 61EC; and
- the publication is not permitted by section 61ED; and
- the publication is not permitted by section 61EE; and
- the publication is not permitted by section 61EF.

The penalty for the offences in subclauses 61EA(1) and (2) is 120 penalty units. A penalty unit is currently \$110, so the current maximum penalty for an individual is \$13,200. Under subsection 4B(3) of the *Crimes Act 1914*, if a body corporate is convicted of an offence against a Commonwealth law, the Court may impose a penalty of up to 5 times the amount of the maximum penalty that could be imposed on a natural person. As a result, the current maximum penalty that could be imposed on a corporation is \$66,000.

As discussed above in relation to the offences in clause 61DA, the offences in clause 61EA also do not specify fault elements. In place of specified fault elements, section 5.6 of the *Criminal Code* therefore applies to the offences in clause 61EA.

This ensures that the appropriate fault element of intention applies to the physical element of conduct in the offences in clause 61EA, and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Subclause 61EA(3) sets out the circumstances where an interactive gambling service advertisement published on an Internet site will be considered to have been published in Australia. Publication will be taken to have occurred in Australia if two conditions are satisfied. First, the site must be accessible for users in Australia. Second, the content and marketing of the site must indicate that the majority of users accessing the site are physically present in Australia.

An example for the first condition, as set out in paragraph 61EA(3)(a), is a site that does not block users from registering with the site if they supply an Australian address. An example for the second condition, as set out in paragraph 61EA(3)(b), is a site that contains reports of events occurring in Australia, results of sporting matches held in Australia, reports from Australian stock markets and Australian weather reports. A site that had an international focus with little or no mention of matters specific to Australia would not be a site for the purposes of paragraph (3)(b). ‘Time.com’ and ‘CNN.com’ are examples of international Internet sites that would not come within paragraph (3)(b).

#### **Clause 61EB – Periodicals distributed outside Australia—acts of publication permitted**

Subclause 61EB(1) permits interactive gambling service advertisements to be published in any magazine, newspaper, journal or similar document that is not principally intended for the Australian market. Therefore, for example, such documents can be printed in Australia but only where those documents are not principally intended for the Australian market and are thus mostly distributed outside Australia.

Advertisements for interactive gambling services would not be permitted in the Australian edition of a periodical. Likewise, it would not be permitted in a periodical which has more than 50 percent of its readership in Australia, which is an example of a periodical that is ‘principally intended for the Australian market’.

Subclause 61EB(2) provides that subclause (1) only has effect for the purposes of Part 7A of the Bill.

#### **Clause 61EC – Australian sporting and cultural events of international significance—acts of publication permitted**

Clause 61EC permits the publication of interactive gambling service advertisements in association with specified sporting or cultural events, subject to conditions. Clause 61EC is modelled on section 18 of the Tobacco Act, which permits publication of tobacco advertising in similar circumstances. The advertising prohibition in Part 7A of the Bill is modelled substantially on the Tobacco Act prohibition, and the intention is to provide similar exemptions for sporting and cultural events as are available in the Tobacco Act.



Subclause 61EC(1) provides that a person may publish an interactive gambling service advertisement if:

- the advertisement is published in connection with a sporting or cultural event held or to be held in Australia; and
- the event is specified in a notice in force under subclause (2); and
- the publication of the advertisement complies with any conditions specified in the notice in accordance with subclause (3).

Subclause 61EC(2) provides that for the purposes of subclause (1) the Minister may by notice published in the *Gazette* specify a sporting or cultural event to be held in Australia only if:

- the Minister is satisfied the event is to be completed before 1 October 2003; and
- if the event is to be held on or after 1 October 2001, a similar event held before that date was specified in a notice under this subclause and no application to have another similar event specified in a notice under this subclause has been rejected since the earlier event; and
- the Minister is satisfied, having regard to the guidelines in force under subclause (5) that the event is of international significance and failure to specify the event would be likely to result in the event not being held in Australia.

Clause 61FB, set out below, provides for the making of applications to have events specified in notices under subclause (2).

Subclause (3) provides that in a notice under subclause (2) specifying an event, the Minister may impose conditions on the interactive gambling service advertising permitted at a specified sporting or cultural event. The Minister is to have regard to any guidelines in force under subclause (5) when imposing conditions relating to the content, number and method of publication of the advertisements that may be published under this provision.

Subclause (4) provides that a notice under subclause (2) comes into force on the day it is published in the *Gazette* or on a later day specified in the notice. A notice stops being in force (unless it is revoked earlier) at the end of 3 years after it came into force, or if an earlier day is specified in the notice, on that earlier day.

Subclause (5) provides that the Minister may determine guidelines for the purposes of subclauses (2) and (3). These guidelines must be made in writing.

Subclause (6) provides that the guidelines are a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. Accordingly, the guidelines will be required to be notified in the *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Subclause (7) limits the application of subclause (1) to Part 7A only.

### **Clause 61ED – Accidental or incidental publication permitted**

Subclause 61ED(1) permits advertisements for gambling services where the advertisement was published accidentally, or where the advertisement was an incidental accompaniment to another matter. For the advertisement to be permitted, the publisher must not receive any benefit, either financial or other, in addition to the benefit received for the publication of the other matter.

This clause permits publishers to include incidental material in their publications which is technically interactive gambling advertising, provided they receive no benefit for including such material. For example, reporting on a specified sporting or cultural event sponsored by an interactive gambling service provider would not breach Part 7A unless the publisher received some benefit for the interactive gambling advertising.

Subclause (2) provides that subclause (1) only applies to Part 7A of the Bill.

### **Clause 61EE – Publication by person not receiving any benefit permitted**

Subclause 61EE(1) permits the publication of an interactive gambling service by a person if that person:

- is not publishing the advertisement in the course of providing interactive gambling services;
- is publishing the advertisement on his or her own initiative; and
- is not receiving any direct or indirect benefit, whether financial or not, for the publication.

This clause is intended to make it clear that a person is not covered by the prohibition on advertising interactive gambling services where that person is not deriving any kind of benefit from the advertising. Examples of interactive gambling advertising which are permitted under this provision include:

- wearing items of clothing with the names of interactive gambling service providers on those items;
- listing interactive gambling service providers on Internet search engines; and
- providing links on personal homepages to interactive gambling Internet sites.

The intention of this clause is to permit such activities as long as the publication is not in the course of the provision of interactive gambling services, the person publishes the advertisement at his or her own initiative, and no benefits are received by the person for the publication of the advertisement.

Subclause (2) provides that subclause (1) only applies for the purposes of Part 7A.

### **Clause 61EF – Publication of advertisements during flights of aircraft**

Subclause 61EF(1) permits the publication of advertisements for interactive gambling services in an aircraft during a flight of the aircraft, provided the flight does not commence and terminate within Australia.

This permitted activity is discussed in more detail above in relation to clause 61DC, which permits the broadcasting or datacasting of advertisements during aircraft flights.

### **Clause 61EG – Defence—advertising under existing contracts or arrangements**

Subclause 61EG(1) provides for a temporary defence from the publishing prohibition for persons publishing interactive gambling service advertisements arising from a sponsorship contract or other legally enforceable arrangement already entered into before the commencement of the Bill. The advertisement may not be published (including displayed) after 30 June 2003.

In order to qualify for this defence, each party to the contract or arrangement must have notified the Minister, before the advertisement was published, of the specifics of the advertisements which are to be published and the date of the contract or arrangement out of which the advertisement arises. For example, the parties should notify the Minister of the location, size and content of the advertisements.

The contract or arrangement may be altered without affecting the defence provided that the advertising arose from legally enforceable obligations under the original contract or arrangement. Furthermore, the advertising may be continued past the original termination date of the contract or arrangement.

For the defence in clause 61EG, the defendant bears an evidential burden in relation to the matters set out in subclause (1).

An evidential burden requires the defendant to adduce evidence that suggests a real possibility that the matter exists or does not exist (subsection 13.3 of the *Criminal Code*). This means that the defendant must adduce or point to evidence that establishes that the requirements in paragraphs 61EG(1)(a) to (d) were all met in relation to the publication of the relevant interactive gambling service advertisement.

If the defendant can do this then the prosecution would then need to disprove that those requirements were met by the defendant (subsection 13.1(2) of the Code).

Placing an evidential burden on the defendant is consistent with the *Criminal Code* (see subsection 13.3 of the Code).

Subclause 61EG(2) provides that, should this defence apply to advertising published as a result of a particular sponsorship contract or arrangement, then the defence would also apply to other persons involved in the publishing of the interactive gambling advertisement.

**Clause 61EH – Defence—display of signs before 1 July 2003**

Subclause 61EH(1) provides a temporary defence from the publishing prohibition for persons publishing an interactive gambling advertisement on a billboard, illuminated sign or other outdoor sign. The advertisement may not be published (including displayed) after 30 June 2003 or an earlier date if specified in any regulation made pursuant to this provision and must arise from a contract or arrangement entered into before the commencement of this Bill.

For the defence in clause 61EH, the defendant bears an evidential burden in relation to the matters set out in subclause (1). The effect of an evidential burden is explained above in relation to the defence in clause 61EG.

Subclause (2) provides that regulations are to be made which specify the permitted circumstances for the display of signs, the size and composition of the signs, and the final date that the signs may be used to publish interactive gambling advertisements.

Subclause (3) ensures that this defence applies also to persons who publish an interactive gambling service advertisement using an electronic sign. This subclause defines the terms ‘interactive gambling service advertising sign’ and ‘sign’ which fall within this provision.

**Division 6—Miscellaneous****Clause 61FA – Failure to broadcast, datacast or publish advertisement not actionable if this Part would be contravened**

Subclause 61FA(1) provides that if a person refuses or fails to broadcast, datacast or publish an interactive gambling advertisement in compliance with the prohibition contained in Part 7A of this Bill, no legal action can be taken against that person for not engaging in that prohibited conduct.

**Clause 61FB – Applications for the purposes of section 61CC**

Subclause 61FB (1) provides that a person may apply to the Minister for a specification under subclause 61EC(2) in relation to an event of international significance.

Subclause (2) provides that applications under this provision must be in writing and must set out the grounds on which the applicant thinks the Minister should grant it.

Subclause (3) provides that the Minister may ask the applicant to provide further information to enable the Minister to decide on an application.

Subclause (4) provides that the Minister must make a decision regarding an application within 60 days, subject to subclauses (5) to (7).

Subclause (5) provides that the Minister may extend the period for deciding an application by up to 60 days if the Minister thinks that it will take longer to decide an application.

Subclause (6) requires the giving of notice in writing to the applicant where the Minister has decided to extend the period for deciding an application.

Subclause (7) requires the Minister to decide the application within any extended period.

Subclause (8) provides that if the Minister has not reached a decision on the application before the end of the day by which the Minister is obliged to decide it, then it is to be taken that the Minister has refused the application under clause 61EC.

Subclause (9) makes it clause that the Minister is able to make decisions in respect of matters under subclause 61EC without an application being made pursuant to this provision.

### **Clause 61FC – Review of decisions**

Subclause 61FC(1) provides that decisions concerning events of international significance (subclauses 61EC(2) and 61EC(3)) are to be reviewable by the Tribunal.

Subclause (2) defines the term “Tribunal” as meaning:

- before the commencement of Parts 4 to 10 of the *Administrative Review Tribunal Act 2001*—the Administrative Appeals Tribunal; and
- after the commencement of Parts 4 to 10 of the *Administrative Review Tribunal Act 2001*—the Administrative Review Tribunal.

### **Clause 61FD – Additional conditions for licences under the *Broadcasting Services Act 1992***

Clause 61FD sets out further conditions which apply to licences granted under the provisions of the *Broadcasting Services Act 1992* (BSA). Subclause (1) provides that all commercial television broadcasting licences are subject to the condition that the licensee does not broadcast an interactive gambling service advertisement in breach of Part 7A of the Bill.

Subclause (2) provides that all commercial radio broadcasting licences are subject to the condition that the licensee does not broadcast an interactive gambling service advertisement in breach of Part 7A of the Bill.

Subclause (3) provides that all community broadcasting licences are subject to the condition that the licensee does not broadcast an interactive gambling service advertisement in breach of Part 7A of the Bill.

Subclause (4) provides that all subscription television broadcasting licences are subject to the condition that the licensee does not broadcast an interactive gambling service advertisement in breach of Part 7A of the Bill.

Subclause (5) provides that all persons providing broadcasting services under a class licence must not broadcast an interactive gambling service advertisement in breach of Part 7A of the Bill.

Subclause (6) provides that all datacasting licences are subject to the condition that the licensee does not broadcast an interactive gambling service advertisement in breach of Part 7A of the Bill.

Subclause (7) defines the terms “class licence”, “commercial radio broadcasting licence”, “commercial television broadcasting licence”, “community broadcasting licence” and “subscription television broadcasting licence”. All terms in subclause (7) have the same meaning as in the BSA.

The licence conditions imposed under this clause are additional conditions for those licences under the BSA and are enforceable under provisions of the BSA that deal generally with breaches of licence conditions.

Where a licensee breaches the condition that interactive gambling service advertisements are not to be broadcast, the Australian Broadcasting Authority (ABA) may take action against the licensee under Division 3 of Part 10 of the BSA.

Broadcasting an interactive gambling service advertisement in contravention of a commercial television broadcasting licence, a commercial radio licence, a community broadcasting licence, or a subscription television broadcasting licence may be an offence under sections 139 or 140 of the BSA. Further, the ABA may issue a notice to the licensee to cease broadcasting in contravention of the licence under section 141, and a breach of a notice issued by the ABA will be an offence under section 142. The ABA may suspend or cancel a licence under section 143 for breach of a licence condition or breach of a notice issued by the ABA. Thus, the ABA may take action under these provisions of the BSA where a licensee breaches a licence condition created under subclauses 61FD(1), (2), (3) or (4) of the Bill.

Under s144 of the BSA, the ABA may seek a Federal Court order against a class licensee to cease broadcasting where the class licensee breaches a condition attached to the class licence. Thus, where a class licensee broadcasts an interactive gambling service advertisement in contravention of subclause 61FD(5) of the Bill, the ABA may seek a Federal Court order under section 144 of the BSA to prevent the continued broadcasting of that advertisement by the class licensee.

Breaches of datacasting licence conditions are dealt with under Part 8 of Division 1 of Schedule 6 to the BSA. A breach of a datacasting licence condition may result in an offence under clause 52 of Schedule 6 to the BSA. Under subclause 53(1) of Schedule 6 to the

BSA the ABA may direct a licensee not to breach a licence condition, and a failure to comply with a notice issued by the ABA may be an offence under subclause 53(4). The ABA may also suspend or cancel a datacasting licence under clause 54 if the licensee fails to comply with a direction of the ABA or breaches a licence condition. In addition, clause 55 grants the ABA the power to apply to the Federal Court for an injunction to prevent a breach of a licence condition. These provisions provide the mechanisms for enforcing subclause 61FD(6) of the Bill and provide remedies to prevent datacasters from datacasting interactive gambling services advertisements.

### **Clause 61FE – Reports to Parliament**

Subclause 61FE(1) provides that as soon as practicable after each 31 December, the Minister must cause a report to be prepared on:

- the number and nature of any contraventions of Part 7A of the Bill occurring in the preceding 12 months; and
- any action taken by the Minister or a Commonwealth agency in response to each contravention.

Subclause (2) provides that the person who prepares the report must give a copy to the Minister.

Subclause (3) requires the Minister to lay copies of the report before each House of Parliament within 15 sitting days of that House after receiving it.

The reporting requirement will ensure that the operation of the prohibition on interactive gambling service advertisements is monitored for its efficacy in limiting the take-up by Australians of new and potentially addictive forms of interactive gambling services.

## **Part 8—Miscellaneous**

### **Clause 62 – Application of *Criminal Code***

Clause 62 provides that Chapter 2 of the *Criminal Code* (except Part 2.5) applies to an offence against the Bill.

The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995*, which was enacted as part of the development of a nationwide uniform criminal code. Chapter 2 of the *Criminal Code* contains all the general principles of criminal responsibility that apply to any offence against a law of the Commonwealth. For example Chapter 2 sets out:

- the elements of an offence;
- the circumstances in which there is no criminal responsibility (for example if a child is under 10, duress, self defence);

- the general principles of corporate criminal responsibility;
- offences which deal with extensions of criminal responsibility (for example attempt and conspiracy); and
- the proof of criminal responsibility.

While Chapter 2 of the *Criminal Code* does not apply to all existing Commonwealth offences until on and after 15 December 2001, the Code is being applied to all new legislation which contains offences, to ensure that they are consistent with the Code once it comes into operation. Clause 62 ensures that the general principles contained in the Code will apply to an offence against the Bill.

Part 2.5 of the Code deals with general principles of corporate criminal responsibility. Part 2.5 of the Code is the only part of Chapter 2, which does not apply automatically to offences. When the *Criminal Code* was introduced into the Senate on 30 June 1994 it was stated that Part 2.5 would be the basis of liability if no other basis were provided. Since clause 63 of this Bill contains a provision that deals with corporate criminal responsibility, Part 2.5 of the *Criminal Code* has not been applied to an offence against this Bill.

### **Clause 63 – Conduct by directors, employees and agents**

If a body corporate (such as a company) has committed an offence or an ancillary offence relating to the Bill (see subclause 63(8)) and it is necessary in proceedings to establish the state of mind of the body corporate, it will be sufficient to show that:

- a director, employee or agent of the body corporate, acting within the scope of his or her authority, engaged in that conduct; and
- the director, employee or agent had that state of mind (subclause 63(1)).

If conduct is engaged in on behalf of a body corporate by a director, employee or agent of the body corporate and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a prosecution for an offence under this Bill or an ancillary offence that relates to this Bill, to have been engaged in by the body corporate unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct (subclause 63(2)).

If, in proceedings for an offence or an ancillary offence relating to this Bill in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it will be sufficient to show that the conduct was engaged in by an employee or agent of the person within the scope of his or her authority and the employee or agent had that state of mind (subclause 63(3)).

If conduct is engaged in on behalf of a person other than a body corporate by an employee or agent of the person and the conduct is within the scope of his or her authority, the



conduct will be taken, for the purposes of a prosecution for an offence against this Bill or an ancillary offence relating to this Bill, to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct (subclause 63(4)).

If a person other than a body corporate is convicted of an offence for which the person would not have been convicted if subclauses 63(3) and (4) had not been in force, the person will not be liable to be punished by imprisonment for that offence (subclause 63(5)).

For the purposes of subclauses 63(1) and (3), the state of mind of a person will include the person's knowledge, intention, opinion, belief or purpose and the person's reasons for the intention, opinion, belief or purpose (subclause 63(6)).

A reference in clause 63 to a director of a body corporate will include a reference to a constituent member of a body corporate incorporated for a public purpose by Commonwealth, State or Territory law such as a member of a statutory authority or Government Business Enterprise (subclause 63(7)).

A reference in clause 63 to 'an ancillary offence relating to this Act' means a reference to an offence created by:

- section 6 of the *Crimes Act 1914*, dealing with persons who are accessories after the fact; or
- Part 2.4 of the Criminal Code, dealing with extensions of criminal responsibility such as attempt, complicity and common purpose, innocent agency, incitement and conspiracy;

that relates to the Bill (subclause 63(8)).

#### **Clause 64 – Service of summons or process on foreign corporations – criminal proceedings**

Clause 64 provides a special rule for the service of summons or process on foreign corporations for criminal proceedings under the Bill.

The special rule is additional to the general rule for service of documents at section 28A of the *Acts Interpretation Act 1901*.

The special rule allows a summons or process in criminal proceedings under the Bill to be effected by serving the summons or process on an Australian agent of a body corporate incorporated outside Australia in the following circumstances:

- (a) the body corporate does not have a registered office in Australia; and
- (b) the body corporate has an agent in Australia.

### **Clause 65 – Service of notices**

Clause 65 provides that a notice under this Bill (for example a special access-prevention notice) may be given by fax, as well as by other means.

### **Clause 66 – Application of the *Broadcasting Services Act 1992***

Clause 66 ensures that a reference to the BSA in the following provisions in the BSA also include a reference to this Bill:

- Section 3, which contains the objects of the BSA;
- Subparagraph 5(1)(b)(ii) and subsection 5(2), which provides for the role of the ABA in achieving the objects of the BSA.
- Paragraph 158(n). Paragraph 66(1)(d) ensures that the ABA's function to monitor and report to the Minister on the operation of the BSA will also extend to a function to monitor and report to the Minister on the operation this Bill;
- Paragraph 160(c). Currently paragraph 160(c) provides that the ABA is required to perform its functions in a manner consistent with any directions given by the Minister in accordance with the BSA. Paragraph 66(1)(c) ensures that the ABA's functions must also be performed consistently with any directions given by the Minister in accordance with this Bill. This ensures that the general obligations of the ABA under all of section 160 will apply to the ABA when performing its functions under this Bill;
- Subsection 162(1). Subsection 162(1) provides that written directions given to the ABA by the Minister relating to the performance of its functions must be of a general nature, except as otherwise specified in the BSA. This is extended to include this Bill;
- Paragraph 168(2)(b). This paragraph relates to the ABA obtaining information. Paragraph 66(1)(g) will ensure that the procedures that the ABA adopts in informing itself of matters relevant to its functions will promote the due administration of the BSA and this Bill;
- Paragraph 171(2)(a). This paragraph relates to a Minister's direction to the ABA to conduct an investigation. Paragraph 66(1)(b) will ensure that the Minister may direct the ABA to investigate any matter that the Minister is satisfied should be investigated in the interests of the due administration of the BSA and this Bill;
- Section 183. This section relates to a Minister's direction to the ABA to hold a hearing. Paragraph 66(1)(i) will ensure that if the Minister is satisfied that the ABA should in the interests of the due administration of the BSA or this Bill, hold a hearing in relation to any matter, the Minister may so direct the ABA to hold a hearing;

- Paragraph 187(2)(b). This paragraph relates to the conduct of ABA hearings. Paragraph 66(1)(j) ensures that a hearing may be conducted in private if the ABA is satisfied that hearing a matter in public would not be conducive to the due administration of the BSA or this Bill.

Subclause 66(2) provides that paragraph 18(2)(j) of Schedule 3 to the BSA does not apply to a notice given under this Act.

### **Clause 67 – Additional ABA function – monitoring compliance with codes and standards**

Clause 67 provides that the ABA's functions include monitoring compliance with codes and standards registered under Part 4. This is additional to the functions of the ABA for the purposes of section 159 of the BSA.

### **Clause 68 – Review before 1 July 2003**

Clause 68 requires the Minister to conduct a review before 1 July 2003 of the following matters:

- (a) the operation of the Bill;
- (b) the growth of interactive gambling services;
- (c) the social and commercial impact of interactive gambling services;
- (d) the effect of the exemptions relating to excluded wagering services, excluded gaming services, services that have a designated broadcasting or datacasting link, and excluded lottery services;
- (e) the effectiveness of the Bill in dealing with the social and commercial impact of interactive gambling services;
- (f) technological developments that are relevant to the regulation of interactive gambling services; and
- (g) technological developments that may assist in dealing with problem gambling.

The review will look at the general operation of the Bill and at the particular operation of the exclusions set out in subclause 5(3) of the Bill. In addition, the review will cover the broader issues of the growth of interactive gambling services in Australia and overseas and the social and commercial impact of interactive gambling services. The effectiveness of the Bill in addressing these impacts will be addressed.

The review will consider technological developments that are relevant to the regulation of interactive gambling services. Because technology is developing so rapidly, it is important to have a clear assessment of what is technically available in terms of filtering prohibited Internet gambling content on the Internet and in terms of assisting in dealing with problem gambling.

Subclause 68(4) provides that for the purposes of the review all gambling services referred to in subclause (1) should be assumed to be interactive gambling services, even though they

are presently excluded from the definition of ‘interactive gambling services’ by operation of subclause 5(3) of the Bill. This will ensure that all gambling services covered by the Bill, whether or not they are ‘interactive gambling services’ for the purposes of clause 5, will be considered in the conduct of the review.

### **Clause 69 – Operation of State and Territory laws**

Clause 69 provides that the Bill is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with the Bill.

Clause 69 has been included to ensure that any State or Territory law that is capable of operating concurrently with the Bill is not affected by the Bill in this regard.

### **Clause 69A – Regulations about unenforceability of agreements relating to illegal interactive gambling services**

Clause 69A provides that regulations may be made about the unenforceability of agreements relating to illegal interactive gambling services.

Subclause 69A(1) provides that regulations may provide that an agreement has no effect to the extent to which it provides for the payment of money for the supply of an illegal interactive gambling service. Regulations may also provide that civil proceedings do not lie against a person to recover money alleged to have been won or paid in connection with an illegal interactive gambling service.

Subclause 69A(2) provides that the Minister must take all reasonable steps to ensure that regulations are made for the purposes of this clause within 6 months after the commencement of Part 2. Part 2 of the Bill will commence on the 28<sup>th</sup> day after the day on which the Bill receives Royal Assent.

Subclause 69A(3) provides that for the purposes of clause 69A an interactive gambling service is an ‘illegal interactive gambling service’ if, and only if, the provision of the service contravenes an offence provision in the Bill.

Subclause 69A(4) defines “agreement” for the purposes of this clause. “Agreement” is defined to mean an agreement, whether made orally or in writing.

### **Clause 70 – Regulations**

Clause 70 provides that the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Bill.