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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

GAMING MACHINE (CASH FACILITIES) AMENDMENT BILL 2017

REVISED EXPLANATORY STATEMENT

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GAMING MACHINE (CASH FACILITIES) AMENDMENT BILL 2017

INTRODUCTION

This explanatory statement relates to the Gaming Machine (Cash Facilities) Amendment Bill 2017 (the Amendment Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Amendment Bill and to help inform debate on it. It does not form part of the Amendment Bill and has not been endorsed by the Assembly. The Statement must be read in conjunction with the Amendment Bill. It is not, and is not meant to be, a comprehensive description of the Amendment Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

The *Gaming Machine Act 2004* (the Act) regulates the licensing of gaming machine operators, venues and all gaming machines. The *Gaming Machine Regulation 2004* (the Regulation) has been made under the Act.

For the purposes of the Act, the *Gambling and Racing Control Act 1999* (the Control Act) provides the overarching legislative framework for gambling in the Territory.

The Control Act establishes the ACT Gambling and Racing Commission (the Commission) with a governing board. The Commission has responsibility for administration of gaming laws and control, supervision and regulation of gaming in the Territory.

BACKGROUND

Restricting access to cash in authorised gaming machine premises is a harm minimisation measure that can contribute to reducing gambling harm. A limit of \$250 per card per gaming day applies to cash withdrawals from ATMs in venues with gaming machines. This restriction does not currently apply to cash withdrawals using the EFTPOS system.

Targeted compliance activity by Access Canberra (on behalf of the Commission) focusing on cash withdrawal facilities in gaming machine venues has recently identified practices allowing access to cash through EFTPOS facilities which are not consistent with harm minimisation objectives.

The intent of the Amendment Bill is to provide for restrictions on cash facilities in clubs. In particular, through changes to the Regulation, the Amendment Bill will limit EFTPOS cash withdrawals in clubs to a maximum of \$200 per transaction, limit EFTPOS cash withdrawals to a single location within a club (outside the gaming area), and provide that EFTPOS cash withdrawals must involve human interaction, with the same staff member being involved in

all stages of the transaction. In addition, the staff member operating the EFTPOS facility must be trained in the responsible provision of gambling services.

The restrictions will not apply to small clubs or hotels (those licensees allowed to have not more than 20 gaming machine authorisations under their authorisation certificate). Small clubs generally have lower gross revenue per gaming machine and hotel patrons have accommodation and other tourism-related costs that justify access to higher levels of cash.

The restrictions are being progressed through the Regulation rather than the principal Act to facilitate a quick response where there is evidence that access to cash in clubs continues to remain an issue, and provide flexibility to address technological advances and emerging forms of access to money.

OVERVIEW OF THE AMENDMENT BILL

The Amendment Bill makes amendments to the Act that provide a specific regulation-making power for the operation (including the restriction of the operation) of cash facilities at authorised gaming machine premises.

The Amendment Bill also amends the Regulation to provide for limits on EFTPOS facilities in clubs. The restrictions do not apply to small clubs or hotels (those licensees allowed to have not more than 20 gaming machine authorisations under their authorisation certificate).

It is a strict liability offence where a licensee has more than one EFTPOS facility in a club, with a maximum penalty of 10 penalty units.

It is also a strict liability offence if the requirements for withdrawing cash from EFTPOS facilities set out in section 62A(3) are contravened. These requirements are that a licensee must have not more than one EFTPOS facility that allows a person to withdraw cash, EFTPOS cash withdrawals must not exceed \$200 per transaction, and EFTPOS cash withdrawals must involve human interaction, with the same staff member being involved in all stages of the transaction. In addition, the staff member operating the EFTPOS facility must be trained in the responsible provision of gambling services.

The offences to be included in the Regulation are in line with other existing offences in the Regulation, have been drafted in compliance with the *Guide for Framing Offences* and are limited to a maximum of 10 penalty units. The justification for the offences being strict liability is outlined in the *Human Rights Implications* section below.

The Amendment Bill also corrects and consolidates the existing ATM cash withdrawal exemption provisions in section 153A(2) of the Act.

Amendments included in the Amendment Bill will commence on 1 September 2017.

The Amendment Bill amends the Act and the Regulation. No other legislation will be amended by this Bill.

HUMAN RIGHTS IMPLICATIONS

During the Amendment Bill's development due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004*. The measures introduced in the Amendment Bill support the Government's commitment to reduce gambling harm. The Amendment Bill may be seen as positively engaging the protection of the family and children (section 11) by reducing gambling harm through the introduction of EFTPOS limits that restrict access to cash in gaming machine venues.

The Amendment Bill may also be seen as engaging the presumption of innocence until proven guilty (rights in criminal proceedings section 22(1)). An assessment of the Bill against Section 28 of the Human Rights Act is provided below.

A Compatibility Statement under the *Human Rights Act 2004* has been issued for the Bill by the Attorney General.

Rights in criminal proceedings - presumption of innocence until proven guilty, subsection 22(1)

Any limitation by the Amendment Bill on the right to the presumption of innocence until proven guilty is reasonable and proportionate, noting the public interest benefits in reducing gambling harm.

Section 28 of the Human Rights Act provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the Human Rights Act provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The nature of the right being limited

The incorporation of strict liability elements has been carefully considered during the Amendment Bill's development. Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or

fault, element can justifiably be excluded. The Bill inserts two new strict liability offences into the Regulation in clause 8 – new part 8A ‘Restrictions on cash facilities’.

The importance of the purpose of the limitation

The rationale for inclusion of strict liability offences is that restricting access to cash in authorised premises with gaming machines can contribute to reducing gambling harm. Reducing gambling harm has benefits for the person, the person's family and the broader community. It is important that licensees comply with the harm minimisation measures established through the Amendment Bill's provisions in order for these benefits to be realised.

The nature and extent of the limitation

The impact on human rights is reduced through the fact that the strict liability offences apply only to licensees – they are not applied to individual staff members at authorised premises. A licensee, as the person who has ultimate responsibility for the management of authorised premises, is responsible for the provision, placement and operation of EFTPOS facilities.

Further, as indicated below, all current licensees within the Territory's gaming machine industry operate within a corporate or incorporated association structure, and the restrictions and offences do not apply to class B licensees (hotel and taverns), where an individual may be a licensee.

The relationship between the limitation and its purpose

The overriding rationale for the strict liability offences is to reduce gambling harm through providing measures that limit access to cash in clubs. The potential effect on the Government's harm minimisation strategies and, as a consequence, the potential effect on club patrons, gaming machine players and problem gambling of a failure by a gaming machine licensee to adequately fulfil the requirements established under the Regulation are the justification for strict liability provisions.

The offences included have been assessed against current community standards and norms and are an important element in ensuring the policy intent of limiting EFTPOS cash withdrawals in clubs is achieved.

Less restrictive means reasonably available to achieve the purpose

In developing the legislation an assessment was made as to whether any less restrictive means were available to achieve the purpose of the Amendment Bill. There is no less restrictive means available for the strict liability offences as these offences are limited to those key aspects that are required to achieve the Government's intent of limiting access to cash in gambling venues.

The maximum penalty units applied for the strict liability offences (10 penalty units) falls within the power provided by section 178(3) of the Act and due regard has been given to the *Guide for Framing Offences*.

Furthermore the Criminal Code defences are still available to a person charged under these offence provisions, particularly the mistake of fact defence (*Criminal Code 2002* section 36 and section 53) and the defence of intervening conduct or event (*Criminal Code* section 39, noting section 54).

While due consideration has been given to the framing of offences in the Bill and the impact on human rights, it should be noted that the new strict liability offences introduced by the Amendment Bill all apply to a licensee. It is reasonable to expect that licensees know, or ought to know, their legal obligations. The operation of gaming machines is clearly a regulated activity within the scope of the decision in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154.

At present, all licensees within the Territory's gaming machine industry operate within a corporate or incorporated association structure. Previously, a small number of individual licensees operated gaming machines within the context of running a hotel or tavern business as a sole trader, and the Act retains the capacity for an individual to become a class B (hotel/tavern) licensee only in the limited circumstances where they purchase a business with existing class B gaming machines as a going concern.

In any event, however, the offences do not apply to licensees whose authorisation certificate authorises 20 or less authorisations for gaming machines at the premises. All class B licensees are restricted by the Act to the operation of no more than 10 gaming machines. Accordingly, any penalty resulting from a breach of new section 62A will apply to a corporation (the licensee) rather than an individual.

Revenue/Cost Implications

Compliance with the amendments may result in some cost implications for clubs. These costs will vary and will depend on each club's response to meeting the requirements. Based on current information and understanding of club operations, the costs are not expected to be overly burdensome.

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause is a formal provision setting out the name of the Act as the *Gaming Machine (Cash Facilities) Amendment Act 2017* (the Amendment Act).

Clause 2 Commencement

This clause provides that the Amendment Act will commence on 1 September 2017.

Clause 3 Legislation amended

This clause identifies that the *Gaming Machine Act 2004* (the Act) and the *Gaming Machine Regulation 2004* (the Regulation) will be amended by the Amendment Act.

Part 2 Gaming Machine Act 2004

Clause 4 Cash facilities Section 153 (4)

Clause 4 omits the definition of ‘cash facility’ from section 153(4) of the Act. At present, the term cash facility is used only in section 153 of the Act. As the term ‘cash facility’ will now also be used in relation to the regulation-making power in section 178 of the Act (see clause 6 below), the definition of ‘cash facility’ has been moved to the dictionary so that the definition applies across the entire Act.

Clause 5 Offence—ATM allowing withdrawals exceeding \$250 Section 153A (2) (b) and (c)

Clause 5 amends the existing exemption provision in section 153A(2)(b) and omits the specific exemption in section 153A(2)(c).

The wording of section 153A(2)(b) has been updated to better reflect the licensing and authorisation framework introduced by the *Gaming Machine (Reform) Amendment Act 2015*, which underpins the trading scheme for gaming machine authorisations. A licensee can hold more than one authorisation certificate, and the maximum number of authorisations that may be operated at a particular venue is established under the authorisation certificate (not the licence).

All class B licensees are limited to a maximum of 10 gaming machine authorisations under the Act. Therefore, the exemption under section 153A(2)(c) is redundant and omitted by clause 5 since all class B licensees are included within the exemption under section 153A(2)(b).

The amendment in clause 5 does not change the intent or the effect of the exemptions to the ATM cash withdrawal limit.

Clause 6 Regulation-making power

New section 178 (2) (c)

Clause 6 inserts a new paragraph (c) into the existing regulation-making power in section 178(2). New section 178(2)(c) establishes that a regulation made by the Executive may make provision for the operation (including the restriction of the operation) of a cash facility at authorised premises. Authorised premises are defined in the Act as premises for which an authorisation certificate is in force. The term ‘cash facility’ is currently defined in section 153 of the Act, however, as noted in clauses 4 and 7, this definition is being moved to the dictionary as part of the changes introduced by the Bill.

The regulation-making power covers all types of cash facilities defined in the Act – automatic teller machines (ATMs), EFTPOS facilities and ‘other facilities for gaining access to cash or credit’. This construction of the power provides for flexibility in responding to technological advances and emerging forms of access to money. Any such regulation could not, however, be inconsistent with the existing offences in the Act in relation to the location of cash facilities (section 153) or the limits on ATM cash withdrawals (section 153A).

Through existing section 178(3), offences in the Regulation are limited to not more than 10 penalty units.

Clause 7 Dictionary

New definition of *cash facility*

Clause 7 inserts the definition of ‘cash facility’ into the dictionary.

A cash facility is defined as an automatic teller machine, an EFTPOS facility, or any other facility for gaining access to cash or credit, but not a facility where cash is exchanged for other denominations of cash, tokens, tickets or cards for the purpose of playing machines.

Part 3 *Gaming Machine Regulation 2004*

Clause 8 New part 8A

Clause 8 inserts a new part 8A – ‘Restrictions on cash facilities’ into the Regulation. This part is made under section 178(2)(c) of the Act (as inserted by clause 6).

New part 8A includes new section 62A, which provides for limits on EFTPOS facilities at authorised premises. These limits are being progressed through amendments to the Regulation to provide for a quicker response if there is evidence that access to cash in clubs using EFTPOS facilities remains an issue in the context of reducing gambling harm.

Section 62A(1) provides that section 62A applies to authorised premises if the authorisation certificate for the premises authorises the operation of more than 20 gaming machines at the premises. Licensees allowed to have 20 or less gaming machine authorisations under their authorisation certificate are therefore exempt from the application of the EFTPOS restrictions established in new section 62A.

Under section 62A(2) it is an offence if a licensee has more than one EFTPOS facility that allows a person to withdraw cash at the authorised premises. In accordance with section 62A(5), an offence against the section is a strict liability offence. The maximum penalty has been set at 10 penalty units. Section 153 of the Act provides that cash facilities (including EFTPOS facilities) must not be located in a gaming area.

Section 62A(3) sets out the requirements for EFTPOS cash withdrawals at authorised premises, as follows:

- (a) the cash withdrawal must not exceed \$200;
- (b) the person operating the EFTPOS facility is a trained staff member of the premises;
- (c) the trained staff member confirms the amount of cash to be withdrawn with the person making the withdrawal before the cash is withdrawn; and
- (d) the trained staff member hands the cash withdrawn directly to the person making the withdrawal.

The intent of this provision is that each EFTPOS cash withdrawal transaction must not exceed \$200. The transaction record or log will clearly show the amount of each cash withdrawal, and provide evidence of compliance.

Further, human interaction with a staff member trained in the responsible provision of gambling services must be part of all stages of the transaction. The use of the word 'the' at the start of sections 62A(3)(c) and (d) is deliberate, in that it is the intention that a single staff member is involved in all stages of a particular transaction. It is not the intent that a patron indicates to one staff member their desire to withdraw an amount of cash, and then the cash is dispensed by another staff member.

Staff members providing gambling services, and supervisors of such staff members, are already required to be trained in the responsible provision of gambling services under the *Gambling and Racing Control (Code of Practice) Regulation 2002*.

The provision has been developed to be technology-neutral so that clubs can continue to utilise existing technology, with modifications if necessary to meet the requirements of section 62A. For example, the requirements do not prohibit the use of systems that include a secure cash dispenser, provided all aspects of the requirements above are met – in

particular, the staff member must operate the EFTPOS facility and physically hand the cash to the patron.

In accordance with section 62A(3), the staff member must communicate with the patron to confirm the amount of cash to be withdrawn. Noting that some members of the community may have communication difficulties, the provision does not specify the particular form of communication – it is intended that verbal, non-verbal or written communication is acceptable, provided that it is clear the patron has confirmed the amount they wish to withdraw.

Section 62A(4) provides that a licensee commits an offence if a person withdraws cash from an EFTPOS facility at the authorised premises and a requirement set out in section 62A(3) is contravened. This offence has a maximum penalty of 10 penalty units and is a strict liability offence under section 62A(5).

Section 62A(6) provides definitions of the terms ‘approved training program’ and ‘trained staff member’ for section 62A.

An ‘approved training program’ is defined as a training program about the responsible provision of gambling services that has been approved under section 9 of the *Gambling and Racing Control (Code of Practice) Regulation 2002*.

A ‘trained staff member’ is defined as a staff member of the authorised premises who has successfully completed an approved training program (as defined above) within the previous three years.

The offences in section 62A are prescribed as strict liability offences and this is discussed further in the *Human Rights Implications* above. A person who has been charged with an offence under this provision bears an evidential burden if they wish to deny criminal responsibility under section 58 of the *Criminal Code 2002*.

It should be noted that the Criminal Code defences are also available to a person charged under this offence provision, particularly the mistake of fact defence (Code section 36 and section 53) and the defence of intervening conduct or event (Code section 39, noting section 54).

The maximum penalty units applied to the strict liability offences (10 penalty units) is within the regulation-making power granted by the Assembly in section 178, and conforms to the *Guide for Framing Offences*.

Clause 9 Dictionary, note 3

Clause 9 amends note 3 in the dictionary to include the term ‘cash facility’. This amendment signals to the reader that the term ‘cash facility’ used in the Regulation has the same meaning as it has in the Act, in accordance with the *Legislation Act 2001*, section 148.