Internal Affairs Briefing

Hon Chris Tremain
Minister of Internal Affairs

Title: Policy Briefing 4: Amendments to the Gambling Act 2003 in order to incentivise compliant behaviour by societies

Date: 1 March 2013

Key issues

- The Gambling Act 2003 (the Act) provides the Department of Internal Affairs (the Department) with a limited range of mechanisms to encourage compliant behaviour from corporate gaming societies. In addition, mechanisms that are available are not all well targeted at those responsible for breaching the Act.

- There are two proposals to amend the Act in order to introduce new tools to incentivise compliance. These will better enable the Department to encourage societies to meet their obligations and ensure that the goals of the Act are achieved.

Action sought

**Agree** to seek Cabinet agreement to the proposed legislative amendments outlined in this briefing, to provide the Department of Internal Affairs with new mechanisms to incentivise compliance:

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<th>Name</th>
<th>Position</th>
<th>Telephone</th>
<th>Suggested first contact</th>
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<td></td>
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<td>direct line</td>
<td>after hours</td>
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Timeframe

By 8 March 2013

Contact for telephone discussion (if required)

Return to:
DMS file reference: POL-1083-1_2, 811905DB
Ministerial database reference: IA201300143
Purpose of briefing

1. This briefing reviews what enforcement mechanisms are available to the Department of Internal Affairs (the Department) and recommends a number of amendments to the Gambling Act 2003 (the Act) to strengthen the Department’s powers in this area.

Deterrent mechanisms within the Gambling Act

2. The Act provides the Department with limited mechanisms to incentivise corporate gambling societies (societies) to comply with the requirements of the Act and associated rules, regulations and licence conditions. A recent High Court judgment has further reduced the scope of the Department’s powers to suspend Class 4 operating licences.

3. In some cases, the Act specifies that where a society fails to comply with a requirement (e.g. fails to distribute net proceeds from Class 4 gambling to authorised purposes) it commits an offence and is liable on conviction to a fine not exceeding a prescribed amount. There are no offences specified for the failure to meet licence conditions.

4. Section 58 of the Act gives the Department the power to suspend or cancel a Class 4 operating licence if:
   a. any of the grounds for the granting of an operating licence are no longer met;
   b. the society is failing, or has failed, to comply with any relevant requirement of the Act, licence conditions, game rules and minimum standards (e.g. venue payment limits);
   c. a Class 4 venue agreement is no longer consistent with ensuring compliance with the Act;
   d. the society supplied false information as part of its licence application.

5. When a society’s operating licence is suspended, all venues that operate the society’s gaming machines must cease gambling operations for the duration of the suspension. The Department has the same powers to suspend or cancel a Class 4 venue licence under section 74 of the Act.

6. The procedure for suspending, cancelling, or refusing to amend or renew an operating licence is set out in section 59. When issuing a suspension, the Secretary of Internal Affairs must notify the society of:
   a. the date that the suspension takes effect;
   b. the suspension period (up to 6 months);
   c. the reason for the suspension;
   d. the matters to be dealt with in order for the Secretary to consider an early withdrawal of the suspension; and
   e. the consequences of not dealing with the matters identified.

7. Similarly, if the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the society of the reason. The same legal requirements apply to suspensions and cancellations of venue licences.
8. In the recent case, *Pub Charity v The Gambling Commission and Secretary of Internal Affairs*¹, the High Court ruled that the power to suspend under section 58 cannot be used for past one-off breaches of the Act, further limiting the Department’s already limited enforcement toolkit.

**Framework for analysis**

9. Options for reform considered in this briefing were assessed against your priorities for the Class 4 sector, and in particular, the potential for new compliance mechanisms to increase returns to the community, without introducing new costs on societies or the Department.

**Problem Definition**

*The Department has limited tools to encourage compliance*

10. The existing mechanisms to ensure compliance with the Act have been severely limited by the High Court’s judgment in the *Pub Charity v The Gambling Commission and Secretary of Internal Affairs* case. The judgment means that the Department now has few tools with which to fulfil its role as the regulator of the sector. The decision holds that the Department is unable to suspend societies in response to one-off breaches, such as where a society exceeds limits on venue cost reimbursements, or fails to meet its minimum returns to authorised purposes.

11. Such suspensions have been the Department’s main method for ensuring compliance with the Act. The High Court judgment leaves licence cancellation as the only remaining option available to the Department to respond to one-off breaches of the Act. This would likely be seen as a disproportionate response to a one-off breach in most cases.

*Existing compliance mechanisms do not effectively target those responsible for breaching the Act*

12. The second problem is that existing compliance mechanisms are not well targeted at those responsible for breaching the Act. Penalties may be incurred by people other than the offending party. One reason for the High Court’s judgment in *Pub Charity v The Gambling Commission and Secretary of Internal Affairs* was that suspending an operating licence imposes a penalty on every venue owner that hosts the operator’s gaming machines, without necessarily any fault on their part.

13. Similarly, fines made under the Act will largely fail to hold society key persons (e.g. trustees or the chief executive) to account. Societies must distribute net proceeds to authorised purposes, so the primary effect of fines will be to reduce the amount of funding that is returned to the community.

**Proposals**

*The Act could be clarified so that it is possible to suspend a society for a one-off breach*

14. We considered that there was only one workable option to remedy the lack of enforcement tools as an outcome of the High Court judgment. We propose that section 58 is amended to clarify that the power to suspend can be applied for both punitive and remedial reasons.

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¹ [2012] NZHC 3530
Require societies to compensate venues for costs incurred as a result of hosting the gaming machines during the suspension period

15. The use of operating licence suspensions creates a natural justice issue, as venues are penalised regardless of fault on their part. Therefore, we also propose amending the Act to make it a requirement that societies compensate venues for any actual, reasonable and necessary costs incurred as a result of hosting the gaming machines during the suspension period. Such costs would include rental costs for the floor space taken up by the machines and insurance costs. Similarly, if a new venue payment regime was introduced this could be the basis of any recompense.

Reform to allow punitive suspensions and to compensate societies for costs incurred during the suspension period

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<th>Advantages</th>
<th>Disadvantages</th>
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<td>• This would incentivise societies to comply with the Act and avoid one-off breaches.</td>
<td>• Venues would still be prevented from hosting gambling activities (and associated benefits from customer spending on food and drink) through no fault of their own. However, this option would also incentivise venues to avoid signing agreements with a society that has a record of non-compliance and suspension. This, in turn, could act as an incentive on societies to comply with the Act.</td>
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<td>• Venues would be partially compensated for the suspension of their gambling operations.</td>
<td>• Requiring societies to pay additional venue costs would reduce the amount of funding available to the community.</td>
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<td>• The Department would have a necessary tool to sanction non-compliant societies.</td>
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Other options considered

16. We also considered whether it is possible to hold society key persons (e.g. Trustee members, the Chief Executive or anyone else with significant influence in the society) personally liable for a fine of up to $10,000, if they failed to do everything reasonable to avoid breaching the Act. However, the evidential requirements would likely be high. It would be necessary to show that society key persons knew about the non-compliance, and did nothing to rectify it. This would make it difficult and costly for the Department to prosecute cases. Further, society key persons could attempt to increase their own salaries to compensate for the risk of a fine.

17. Another option considered was to introduce a requirement that if a society failed to meet the minimum rate of return in one year, its minimum rate of return in the following year would be increased by an equivalent amount. However, it is already a requirement for societies when they are licensed to maximise their returns to the community and failing to do so can lead to sanctions.
Recommendations

The recommendations are that you:

a) **note** that the Gambling Act 2003 provides the Department with a limited range of deterrent mechanisms in its role as the regulator of Class 4 gambling and those mechanisms are not well targeted;

b) **agree** to seek Cabinet agreement to legislative amendments to the Gambling Act 2003 to:
   
i) clarify that the Department can use the power of suspension as both a remedial and a punitive action; **Yes/No**
   
   and
   
   ii) explicitly provide that societies must cover any venue costs associated with the hosting of the society’s gaming machines, that are incurred during a suspension period. **Yes/No**

Director Policy

Hon Chris Tremain
Minister of Internal Affairs

/ 2013