

GL4015

Gambling advertising and inducements

Introduction

From Monday 2 July 2018, the NSW prohibition on offering any inducement to participate in any gambling activity, including an inducement to open a betting account or to bet more frequently, will be strengthened to also prohibit any inducement offered with a disclaimer. At the same time, penalties for offences will be significantly increased and directors and other corporate officers of a betting service provider may be held liable for any breaches of the gambling advertising restrictions.

These provisions will now be found in Parts 4A and 4B of the *Betting and Racing Act 1998* and Part 7 of the *Totalizator Act 1997*.

It is the responsibility of the betting service provider to ensure prohibited gambling advertising is not published or communicated in NSW. The responsibility for ensuring compliance will be borne by the betting service provider.

Betting service providers will be able to replace non-compliant advertising with advertising that complies with the changes. Betting service providers will also be able to continue to advertise offers directly to betting account holders.

How to use these guidelines

These guidelines give guidance on Liquor & Gaming NSW's (L&GNSW) compliance approach to the publication of gambling advertising and inducements.

Prohibited gambling advertisements may cause significant gambling-related harms, including encouraging individuals to gamble beyond their means.

L&GNSW's risk-based compliance approach is intended to prevent and minimise the risk of these harms occurring. L&GNSW's compliance focus will not be on minor, inadvertent breaches.

These guidelines do not seek to limit betting service providers' ongoing obligation to the public to advertise their services responsibly. To this end, notwithstanding anything contained in these guidelines, where an advertisement seeks to circumvent the objective of the gambling advertising and inducements requirements, L&GNSW may take compliance action.

These guidelines are not intended to limit or extend the application of the *Betting and Racing Act 1998* (the Act) or *Totalizator Act 1997*, or the words used in those Acts¹.

L&GNSW's compliance approach may change to respond to emerging issues and evidence as well as how industry participants comply with requirements imposed by the Act. L&GNSW will advise stakeholders before changes to its compliance approach are made.

These guidelines are provided for guidance only and independent legal advice should be obtained to ensure an informed and complete understanding of obligations and compliance with the legislation.

Prohibition on publishing or communicating gambling inducements

Under section 33H of the Act, in NSW it is an offence to publish or communicate any prohibited gambling advertisement, including an inducement to gamble.

An inducement to gamble includes any inducement to participate, or to participate frequently, in any gambling activity (including an inducement to open a betting account).

What does 'publishing' and 'communicating' mean?

The Act specifies that material is 'published' if it is disseminated or accessible to the public or a section of the public. L&GNSW will consider that material has been published if it is accessible to the 'world at large' and capable of being accessed by people in NSW.

1. Any reference to a requirement under the *Betting and Racing Act 1998* is taken to include the same requirement imposed under the *Totalizator Act 1997*

Gambling advertising and inducements

In assessing what constitutes ‘world at large’ for the purposes of digital advertising, including internet and email, L&GNSW will have regard to section 33G(2) of the Act.

Where an advertisement facilitates the dissemination of information to a person who does not hold a betting account with the betting service provider, L&GNSW will consider it to be a publication to the ‘world at large’.

Gambling advertising communicated directly to a person who holds an account with the betting service provider will not be considered by L&GNSW to have been published or communicated under the Act, because only betting account holders will receive the offer.

Outdoor or out of home advertising

L&GNSW will consider any material displayed in NSW using outdoor and out of home advertising (e.g. billboards, bus advertising or posters) to be published or communicated for the purposes of the Act.

Television and Radio

L&GNSW will consider material broadcast on television or radio that is able to be viewed or heard in NSW to be published to the ‘world at large’ and capable of being accessed by a person in NSW.

Prohibited gambling advertising on television and radio will include:

- ▲ ads during breaks in shows that include inducements,
- ▲ advertorials or in-show endorsements offering inducements on behalf of betting service providers,
- ▲ ticker-tape advertising in-show that includes prohibited advertisements.

Prohibited gambling advertising on television and radio will not include:

- ▲ physical advertising captured during a broadcast where the broadcast is filmed outside NSW, for example a billboard at a Queensland rugby game advertising an inducement that is picked up in the broadcast,
- ▲ prohibited gambling advertising published or communicated in another state or territory by a regional provider that borders NSW that is inadvertently broadcast into NSW due to the proximity to the border (this does not apply to online content).

In determining whether publication is inadvertent, L&GNSW will have regard to the following:

- ▲ is the publication or communication only intended for an audience other than NSW?
- ▲ is the publication or communication intended for an audience other than NSW and the broadcaster has taken reasonable steps to not publish or broadcast the advertisement into NSW?
- ▲ is the publication or communication outside the boundaries of the broadcaster’s licence area?

For example, Radio Station A broadcasts a prohibited gambling inducement for Victorian residents from Shepparton. If the broadcast is inadvertently received in Albury, L&GNSW may not prosecute this publication or communication.

Where a broadcaster has been advised that the material published or communicated includes prohibited gambling advertising, it must ensure no further broadcast occurs. Where a broadcaster continues to broadcast prohibited gambling advertising after being advised by the Minister or the Minister’s delegate that the content breaches the Act, it may be prosecuted for that breach.

The restrictions detailed in these guidelines apply to live broadcasts (including online), and those rebroadcasted (including online).

Print

In considering whether printed material is published or communicated for the purposes of the Act, L&GNSW will consider material to be published or communicated where:

- ▲ prohibited gambling advertising is printed in NSW, for example a Sydney-based newspaper advertisement that includes an inducement
- ▲ prohibited gambling advertising printed in another State or Territory but intended for significant distribution in NSW, for example a sporting magazine printed in Victoria but routinely circulated within NSW.

L&GNSW will not consider that printed materials have been published or communicated for the purposes of the Act where the prohibited gambling advertisement has been inadvertently published or communicated in NSW.

Gambling advertising and inducements

For example, Betting Service Provider A publishes a full page ad offering an inducement in a newspaper with primarily Queensland circulation. Where the newspaper is available in NSW, but it is clear that the publication is incidental to its primary circulation, L&GNSW will not consider the material breaches the publishing requirement under the Act.

In determining whether publication is incidental, L&GNSW will have regard to the following:

- ▲ is the publication or communication only intended for an audience other than NSW?
- ▲ is the publication or communication primarily or substantially intended for an audience other than NSW?

Where material has been published or communicated in NSW and the publication or communication in NSW is not inadvertent, L&GNSW will consider that the material has been published or communicated for the purposes of the Act.

Physical advertising captured in a still photograph taken outside NSW, for example a billboard at a sporting event that is communicated or published in print in NSW will in most cases be considered inadvertent by L&GNSW.

Digital media

Advertising on digital media provides betting service providers the opportunity to engage with a broad audience that is often not accessed through television or print. Digital media includes banner advertising, advertising on webpages, mobile display, search engine results, email, SMS and in apps. Any advertising through digital media must comply with all requirements under the Act.

In assessing whether a betting service provider has published or communicated prohibited gambling advertising on digital media, L&GNSW will have regard to the intended audience and whether the betting service provider has taken reasonable steps to prevent the prohibited advertisement from being published or communicated in NSW. This will include, but may not be limited to:

- ▲ is the publication or communication primarily or substantially intended for an audience other than NSW?
- ▲ is the digital media on which the publication or communication is made wholly or substantially intended for an audience other than NSW?

- ▲ has the betting service provider caused any prohibited advertising to be geo-blocked for NSW?

These restrictions also apply to any advertising on a betting service provider's website unless it is behind a membership wall.

L&GNSW will not consider that an advertisement has been published online where:

- ▲ the betting service provider has caused all prohibited gambling advertisements to be geo-blocked,
- ▲ the geo-blocking provider has taken reasonable steps to ensure the geo-blocking function is working, and
- ▲ a person in NSW has used a virtual private network (VPN) to mask their location to access the online content.

Digital media behind a membership or pay wall

The Act distinguishes between people who have betting accounts and those who do not (see section 33G(2) of the Act). A person who does not have a betting account with the betting service provider will be considered part of the 'world at large'. Any communication to this person will satisfy L&GNSW that an advertisement has been published or communicated.

Where a betting service provider publishes or communicates, or causes to have published or communicated, a prohibited gambling advertisement to a membership-based online forum, that advertisement will be taken to have been published or communicated for the purpose of the Act.

A betting service provider must ensure that prohibited gambling advertisements are not provided to online publishers, including websites, email lists and social media, to be published or communicated to the publisher's members unless the betting service provider is satisfied that the advertisement will only be published or communicated to persons who hold betting accounts with it.

This applies to all digital media, including where a person must sign in before they are able to access the advertisement, or where members have opted in to receiving information on inducements (as this is capable of being published or communicated to persons who do not hold a betting account with the betting service provider).

Gambling advertising and inducements

This restriction also applies to any advertising on a betting service provider's website or app where the advertising is visible before a person signs into their betting account. A betting service provider must not advertise any inducement on its website or app that is able to be accessed by a person in NSW unless that inducement is only able to be accessed by a person who holds a betting account with that betting service provider.

An advertisement is published or communicated for the purposes of the Act whether or not the advertisement is actually received by a person in NSW (see section 33G(2) of the Act). It is sufficient that the advertisement is capable of being published or communicated to a person in NSW who does not hold a betting account with the betting service provider.

Social media

A betting service provider must not publish or communicate a prohibited gambling advertisement on social media if that advertisement can be accessed by a person in NSW.

Where a betting service provider enters into an agreement with an online publisher or individual to publish or communicate gambling advertising through social media, the agreement should ensure that prohibited gambling advertisements, including inducements, are not published or communicated in NSW. The responsibility for ensuring compliance will be borne by the betting service provider.

L&GNSW will generally consider that a prohibited gambling advertisement has been published or communicated on social media where:

- ▶ the betting service provider posts the prohibited gambling advertisement on a social media platform and that post is able to be accessed by a person in NSW, or
- ▶ the betting service provider enters into an agreement with a person to post (including pictures, comments, links and shares), or authorises, or permits a person to post the prohibited gambling advertisement on social media on behalf of the betting service provider or its agent, and that post is able to be accessed by a person in NSW.

As is the case with other digital media, L&GNSW will not consider that an advertisement has been published online where:

- ▶ the betting service provider has caused all prohibited gambling advertisements to be geo-blocked,

- ▶ the geo-blocking provider has taken reasonable steps to ensure that the geo-blocking function is working, and
- ▶ a person in NSW has used a virtual private network (VPN) to mask their location to access the online content.

Third party

A person who publishes or communicates a prohibited gambling advertisement on behalf of a betting service provider may be guilty of an offence.

A third party may be held liable for publishing or communicating a prohibited gambling advertisement where:

- ▶ they have entered into an agreement with a betting service provider to publish or communicate the prohibited gambling advertisement, or
- ▶ they have published or communicated the prohibited gambling advertisement for a benefit.

L&GNSW may prosecute a person who publishes or communicates a prohibited gambling advertisement in addition to, or in place of, a betting service provider.

What is an inducement?

The Act does not provide a definition for 'inducement'. These guidelines do not seek to limit the broad wording included in the Act.

For the purpose of these guidelines, L&GNSW considers that an inducement includes any offer that is capable of persuading or encouraging a person to participate, or to participate frequently, in any gambling activity, including any encouragement to open a betting account.

In considering whether an offer constitutes an inducement for the purposes of the Act, L&GNSW will have regard to the following:

- ▶ does the advertisement offer a reward or benefit which might persuade or encourage people to open a betting account or to switch from a competitor betting service provider?
- ▶ does the advertisement offer a reward or benefit which might persuade or encourage people to engage in gambling behaviour?
- ▶ does the advertisement offer a reward or benefit which might persuade or encourage people to engage in gambling behaviour in a certain way, for example online or on a device, or at certain times?

Gambling advertising and inducements

- ▲ does the advertisement offer a reward or benefit which might persuade or encourage people to continue gambling behaviour?
- ▲ does the advertisement offer a reward or benefit which might persuade or encourage people to intensify their gambling behaviour?
- ▲ is the advertisement offering one or more incentives which might persuade or encourage people to bet that are additional to what is normally received as part of the core wagering product?

Section 33H of the Act prohibits any inducement being offered to a person in NSW, including an inducement that includes a disclaimer that the offer is not available to NSW residents. To be clear, the use of a disclaimer that an offer is not available to NSW residents will not stop an advertisement being considered a prohibited gambling advertisement.

For example, it is prohibited for Betting Service Provider C to publish online *“Deposit \$50 and receive \$120 PLUS a bonus \$200 in bets if team/horse wins. New customers only. T&Cs apply. Excludes NSW, WA, SA and VIC”*

The advertising of a rewards program that:

- ▲ does not require a person to participate, or to participate frequently in any gambling activity,
- ▲ does not require a person to open a betting account, and
- ▲ does not provide any voucher, credit or account for betting purposes as part of the rewards program,

will not attract adverse attention from L&GNSW.

The offering of an inducement to gamble to a rewards program member who does not have a betting account with the betting service provider will be considered by L&GNSW to be in breach of the legislation.

Advertising that will offend

While L&GNSW takes a broad approach to what could be considered an inducement, consistent with the Act, L&GNSW will consider the following kinds of offer to be a prohibited offer when made to the ‘world at large’ (irrespective of whether they are accompanied by a disclaimer).

This is not an exhaustive list of offers that may be a prohibited gambling advertisement. Other offers may constitute an inducement. This will be informed by the criteria detailed above.

- ▲ Offers of free or bonus bets e.g. *“New customer sign-up bonus – deposit \$50 and bet with \$200”*

- ▲ First deposit bonus e.g. *“Join now – get up to \$100 bonus bet with your first bet”*
- ▲ Offers of refunds (whether as a bonus bet or cash) e.g. *“Get a refund on your fixed odds win bet if your horse runs 2nd or 3rd”, “If your team leads at half time and loses, we’ll refund half your bet”*
- ▲ Offering an inducement through a third party e.g. a website publishes a bonus bet offer to members of the website that are not members of the betting service provider
- ▲ Offering an inducement through a third party on social media e.g. a comment on a post on Facebook that communicates an offer for the licensed wagering operator *“Join now and get \$500 free – New customers receive a deposit match up to \$500”*
- ▲ Refer a friend and your friend scores a bonus e.g. *“Welcome bonus – each friend receives \$300 bonus”*
- ▲ First bet refunds, including first bets on particular races/sports e.g. *“First bet refund on tonight’s dogs”*
- ▲ Reward points for bets placed or for opening an account e.g. *“5,000 bonus rewards points – redeem as a \$100 bonus bet”*
- ▲ Bonus or special odds for a limited period or bet amount e.g. *“Super bonus – win 25% more on every race this Saturday at Randwick”, “Super boost your odds on races every Saturday from 11am to 2pm”*
- ▲ Join now and receive free bonus bet plus e.g. *“Deposit \$50 and receive \$120 PLUS a bonus \$200 in bets if team/horse wins. New customers only. T&Cs apply. Excludes NSW, WA, SA and VIC”*
- ▲ The advertising of ‘cash out’ features or similar e.g. *“Have a break and cash out now”.*

Advertising that will not offend

L&GNSW will not consider the following kinds of offers prohibited under the Act:

- ▲ Advertising of a base service or generic corporate branding e.g. *“Bet with Lucky Betting Club today”*
- ▲ Current odds being offered, including best price e.g. *“Best Odds on State of Origin”*
- ▲ Live streaming of sports or racing events e.g. *“Watch live sport here right now”*

Gambling advertising and inducements

Defence against prosecution for publishers

A person will not be guilty of an offence for publishing or communicating a prohibited gambling advertisement if (under section 33H(6) of the Act):

- ▲ the gambling advertisement was in the form provided or was approved by or on behalf of the betting service provider, and
- ▲ the person has not been notified by the Minister or the Minister's delegate that the publication or communication may include a prohibited gambling advertisement.

To be afforded this protection from prosecution, a publisher or broadcaster will need to abide by any direction by the Minister or the Minister's delegate about the possible legality of the publication or communication of a gambling advertisement.

L&GNSW will consider that a notification that a publication or communication may be in breach of the Act will apply to an entire campaign where the prohibited gambling advertisement is in the same form throughout the campaign.

For example, Television Station A agrees to run a 10-week campaign for Betting Service Provider C that includes a bonus bet offer. The Minister or the Minister's delegate notifies Television Station A that the advertisement is a breach of the Act in week 1 of the campaign. Future publications of the prohibited gambling advertisement after this notification may be prosecuted by L&GNSW.

For example, Television Station B agrees to run a 10 week-campaign for Betting Service Provider D that includes a bonus bet offer of \$50 for every \$50 spent. The Minister or the Minister's delegate notifies Television Station B that the advertisement is a breach of the Act in week 1 of the campaign. Betting Service Provider D changes the ad so that the bonus bet offer is \$51 for every \$50 spent. L&GNSW will consider that the notification continues to apply to this campaign, even though the advertisement has changed slightly as the advertisement continues to contain an inducement and the offer is under the same campaign.

Investigations

L&GNSW has broad powers of investigation for any breach of the Act.

Part 4B of the Act provides that L&GNSW is empowered, in certain circumstances, to:

- ▲ require a person (corporation or individual) to provide information or records,
- ▲ require a person to answer any question asked by an inspector, except where a person refuses to answer a question on the ground that the answer may tend to incriminate that person,
- ▲ enter into residential premises with consent or search warrant, or any time for other premises, and
- ▲ inspect and seize things, including computers.

Racing industry related arrangements

The new prohibitions against inducements are not intended to be enforced by L&GNSW in relation to advertisements published or communicated on existing platforms which exclusively provide racing content.

L&GNSW does not intend to take action against a person where:

- ▲ an advertisement that includes an inducement has been published or communicated in NSW, and
- ▲ the advertisement has been published or communicated on an existing platform which solely and exclusively provides racing content (that is, dedicated racing television channels, websites, written publications or radio stations).

L&GNSW will continue to consider that any inducement offered on any other platform, including general television channels, websites, written publications and radio stations, is an offence, even if these platforms are displaying or communicating racing content.

If a person is unsure as to whether or not a platform 'exclusively' publishes racing content, that person should generally adopt the view that it does not.

L&GNSW's regulatory approach for certain racing publications and communications will be reviewed after 12 months in consultation with the NSW Responsible Gambling Fund.