



12 January 2018

Ms Christine McDonald
Committee Secretary
Environment and Communications Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: ec.sen@aph.gov.au

Dear Ms McDonald

Inquiry into the Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017

Thank you for the opportunity to comment on the *Communications Legislation Amendment (Online Content Services and Other measures) Bill 2017* (the Bill), which bans gambling advertisements in live coverage of sporting programs from 5 minutes before the scheduled start of play until 5 minutes following the conclusion of play, on online platforms.

Free TV welcomes this Bill which recognises that for gambling advertising restrictions to be effective, they must apply equally across online platforms and not be targeted at, or disproportionately impact on, commercial free-to-air television broadcasters. This is critical to ensuring the success of the Government's policy intention and that the legislation does not exacerbate regulatory bypass which is already problematic under the existing framework (for example, wagering operators can and will continue to be able to advertise in-stadium at live sporting events).

We set out our comments on the Bill for consideration by the Committee below:

Commencement of legislation

The Bill currently does not reflect the commencement of the new restrictions. The Government has previously indicated that these new restrictions will come into effect on 30 March 2018. To ensure these rules apply across all platforms equally and do not unfairly target commercial free-to-air broadcasters, the rules must come into effect across all platforms at the same time. The new rules under the *Commercial Television Industry Code of Practice* should come into effect no earlier than the date on which this legislation comes into force.

Simulcast exemption

Free TV welcomes the inclusion of clause 4 of Schedule 8 in the Bill which exempts online simulcast services that transmit a commercial television broadcasting service provided under a commercial television broadcasting licence. Without this exemption, commercial television content would be regulated under two separate regulatory frameworks for the exact same piece of content. This would be highly administratively burdensome, give rise to a number of practical difficulties and could make broadcasters liable for two sets of sanctions in the event of a breach.

Free TV is also in favour of the practical approach adopted at clauses 4(2) and 4(3) of Schedule 8 which clarifies that online services provided by broadcasters are eligible for the exemption notwithstanding technical differences and watermark-type logo or insignia that may accompany the service. Free TV considers that the categories of permissible watermark-type content should be extended beyond logo and insignia to also include



other water-mark type graphics or textual material that may be relevant to the fixture, and enhance the service for viewers (for example, closed captioning, or a digital scoreboard) provided they do not contain gambling promotional content. The present drafting of clause 4 would mean that a live stream of a sporting event with a captioning service in circumstances where the matching broadcast did not carry captions, would no longer have the exemption in clause 4(1) available despite providing a stream of content that is essentially identical.

Exemptions from the online provisions should not promote regulatory bypass

To avoid regulatory bypass or a situation where the Government's policy impacts disproportionately on commercial free-to-air broadcasters, there must be parity between exemptions applied online and to broadcast platforms, there must be a mechanism to specify additional services or service providers to be subject to the service provider rules, and class exemptions must be subject to clear decision-making criteria.

While the Bill provides broad powers to the ACMA to specify that one or more services or service providers are exempt from the rules (s 3, ss15-16), the legislation should also enable the ACMA to specify additional services or service providers to be subject to the service provider rules for the purposes of s 13. In addition, the ACMA should be able to declare a service to be outside of the exemptions at paragraphs 3(1)(a) to (p). This is important because exempting services or service providers from the scheme provides an opportunity for the development of novel services on one or more of the excluded platforms that is inconsistent with government policy but clearly outside the scope of the proposed regime.

In relation to the new 'class exemptions' at clause 16, in contrast to the individual exemptions in the Bill, they currently do not include decision making criteria which the ACMA is required to comply with. It is unclear to Free TV why decision-making criteria are not also applied to class exemptions to guide the ACMA's discretion. Free TV's view is that for both class and individual licences, the ACMA should be required to have regard to objective criteria to ensure exemptions are applied consistently across all platforms.

Definition of 'sporting event' - legislation should reflect Government policy in relation to horse, harness and greyhound racing

Horse, harness and greyhound racing should be excluded from the definition of 'sporting event' (ss 19-22). Government policy as well as existing legislation and codes of practice acknowledge the intrinsic relationship between wagering and certain sports including horse, harness and greyhound racing. This recognition should continue. These sports were developed in order for people to gamble on them and for that reason they have always been treated differently from other sports on which betting is permitted. There is higher community tolerance for betting on these sports and they are viewed by a very distinct audience. Existing codes of practice including the *Commercial Television Industry Code of Practice*, the *Commercial Radio Code of Practice* and the *Subscription Television Code of Practice* all provide exemptions on this basis and for consistency purposes the Bill should do likewise. In the absence of such an exemption, there will be inconsistent treatment of advertisements relating to these sports depending on which platform they are shown.

Definition of live sporting event

'Live sporting event' is defined in the Bill to include coverage which is delayed where it is provided as if it were live and the coverage begins no later than the conclusion of the sporting event.

In Free TV's view, 'Live sporting event' should mean contemporaneous coverage of a sporting event while it is live, to ensure that it does not capture recordings of live events delivered online or retransmissions delivered after the sporting event has taken place. It should not include first-run transmissions of delayed programming. This would be consistent with the ordinary reasonable meaning of "live", and the intention of the legislation to capture only live coverage of events. The current definition is problematic because the conclusion of the sporting event can be many hours or potentially days after the commencement. As such, the Bill as drafted goes well beyond the Government's stated policy and may capture previous days' events, even when the coverage is not live 'within the ordinary meaning of that expression' as provided for in the first half of the definition.

In addition, the inclusion of 'any matter broadcast' on a broadcasting service during an unscheduled break in the definition of 'live sporting event' (s 125A(10)) has the potential to go well beyond the Government's stated policy intent. Rain breaks can go for several days and it is not uncommon for broadcasters to schedule news programs or other general entertainment programming which is not 'a live sporting event', as replacement



programming. The Bill should permit the continuation of advertising during content which plainly is not a 'live sporting event' rather than deeming that content to be a 'live sporting event'.

Offshore operators

Free TV is pleased that the draft Bill clearly contemplates that the new online content service provider rules will apply to international websites that host streams of online sporting events viewed by Australians. However, while the Bill includes a number of measures aimed at facilitating enforcement in Part 5, Free TV remains concerned that it has traditionally been difficult to enforce local laws on international operators who are not located in the jurisdiction and that this weakness risks a disproportionate impact on commercial free-to-air broadcasters compared to online platforms. The Bill should provide the ACMA with sufficient power to enforce these rules on international operators. Consideration should be given to adopting the mechanisms explored in the context of the Review of Illegal Offshore Wagering in 2016.

New ACMA power to determine program standards (s 125A)

Proposed section 125A provides the ACMA with the power to determine program standards about gambling promotional content if it is directed to do so by the Minister. Free TV's view is that this provision is unnecessary, encroaches on the existing processes set out in the BSA and should be deleted.

Free TV understands that the intention of the Government in relation to commercial free-to-air television is to implement its policy in relation to the banning of gambling advertisements via the Free TV Code. Free TV agrees with this approach as it is the simplest and clearest way to achieve the outcome that the Government is seeking.

Section 125 of the BSA currently already enables the ACMA to determine program standards where codes of practice fail or where no code of practice has been developed. In addition, s 123 of the BSA provides for a very broad list of matters in relation to which standards can be determined. Proposed s 125A would be inconsistent with the current co-regulatory approach to standard setting. Free TV's view is that the existing co-regulatory scheme works well and there is no reason why the proposed changes to gambling content should circumvent the existing processes set out in the BSA.

Requirement to provide explanatory matter (s 125A(6) and clause 13 of Schedule 8)

S 125A(6) provides that any standard could make provision for explanatory matter to be provided in a manner specified in the standard. Similarly, proposed subclause 13(2) of Schedule 8 provides that the online content service provider rules may make provision for certain explanatory content to be provided in the manner specified in the rules. The Explanatory Memorandum to the Bill provides that, 'The standard could require, for example, that explanatory matter consist of information in a program guide or on the licensee's website'. Free TV notes that any such requirement must be practical, feasible and not impact disproportionately on commercial free-to-air television licensees. For example, any rules requiring broadcasters to specify the precise start time of a fixture in a program guide, or the commencement of the period from which gambling promotional content would be considered "in conjunction with" live coverage of a sporting event would be impractical in circumstances where start times are not fixed or run late, or are only advised to broadcasters at or around the time of broadcast. Free TV's view is that it would not be feasible and would impact disproportionately on broadcasters if a requirement was introduced for broadcasters to include explanatory matter in program guides.

Record keeping (s 125A(7))

S 125A (7) and s 13(3) provide that any program standard or online content service provider rules may make provision for record keeping requirements. Commercial free-to-air television is already heavily regulated with substantial compliance reporting requirements, including in relation to compliance with the *Commercial Television Industry Code of Practice*. In Free TV's view, the imposition of additional record keeping requirements would be administratively burdensome and unnecessary.



Further information

Please contact me on issues.

if you require further information or would like to discuss any of these

Yours sincerely,

On behalf of Free TV Australia