

17 May 2018

Ms Rochelle Zurnamer
Manager Content Projects and Policy Section
Content Projects and Policy Section
Australian Communications and Media Authority
PO Box Q500
Queen Victoria Building
Sydney NSW 1230

RE: Draft online content service provider rules – Gambling promotional content provided in conjunction with live coverage of a sporting event.

Dear Rochelle,

Communications Alliance (CA) welcomes the opportunity to provide feedback on the *Draft online content service provider rules – Gambling promotional content provided in conjunction with live coverage of a sporting event* (draft rules).

CA previously made a submission during the limited and confidential consultation process earlier this year in relation to the *Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017*.

CA appreciates the ACMA's acknowledgement that the operating environments for broadcasting and online content provision and advertising are not equivalent.

We note that our assessment of the draft rules reflects the fact that our members provide gambling promotional content in conjunction with the live coverage of a sporting event as online content service providers - as defined under Part 1 s.2 of Schedule 8 of the Broadcasting Services Act 1992 (BSA) – and as subscription television licensees – as defined under Part 2 s.16 of the BSA. Views submitted, therefore, are targeted at ensuring a consistent approach in both the ASTRA Subscription Broadcast Television Code of Practice (ASTRA Codes) and the draft rules. Any difference in the application of the ASTRA Codes versus the draft rules adds additional complexity, cost and burden to service providers, many of whom currently broadcast live sporting content across multiple platforms via a single feed of content and advertising inventory.

Compliance with new rules

CA notes that the proposed commencement of the draft rules will be 14 days after the instrument is registered on the Federal Register of Legislation.

While it is acknowledged that our members have been aware of the policy intent to implement new service provider rules in relation to gambling promotional content in conjunction with a live sporting event since the Minister's May 2017 announcement:¹

- only a relatively short period of time has been provided for industry to review the practical application of the draft rules; and
- we do not yet have clarity on whether the draft rules will be amended or varied as an outcome of the consultation.

¹ <http://mitchfield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1352/Major-reforms-to-support-Australian-broadcasters.aspx>

Industry does not consider 14 days will provide sufficient time to comply with the new rules. CA recommends that industry should be provided at least 3 months to implement and comply with the new rules. In line with this, we would also seek a position on how hardcoded advertisements already paid for will be treated. It is not known if there will be a grace period in place for these arrangements, some of which are contracted many months in advance.

In relation to the following Parts and Sections of the draft rules, we note inconsistencies between the ASTRA Codes and the draft rules and seek support for alignment or additional clarification.

Part 2 – Interpretation, Section 6 - Definitions

Promotion of odds

CA notes that 'betting odds' is defined in the ASTRA Code but is not defined in the draft rules. The draft rules contain a definition of 'odds'. CA seeks clarity on whether this is intentional (the consultation paper presents reasoning on promotional odds only), or if there should be a revision of the drafting to reflect consistent definitions across both the ASTRA Codes and draft rules.

Unscheduled break

CA notes a number of differences in the definition of an 'unscheduled break' in the draft rules compared to the ASTRA Code. For example:

- unscheduled postponement in play, where the term 'postponed' is defined in the ASTRA Code but not in the draft rules;
- the ASTRA Code refers to 'rain' while the draft rules refer to 'weather';
- the ASTRA Code refers to 'unforeseen events' while the draft rules refer to 'uncontrollable events'.

CA would appreciate further review of the differences in these definitions with an objective of engaging with industry to align the definitions in the draft rules and the ASTRA Codes, as such differences will create complexity in assessing compliance with the scheduling of gambling advertising across different platforms.

Sporting event

CA would appreciate clarification, either in an amendment to the draft rules or explanatory material, that the definition of sporting event does not inadvertently capture a whole football season.

Play

CA suggests the definition of 'play' in the draft rules is aligned with the definition of 'play' in the ASTRA Codes. That is, the definition of 'play' at 9(2) in the draft rules appears to only capture play for long form events, not all sporting events.

Scheduled Start of a sporting event

CA does not consider it necessary for prescriptive rules to define the scheduled start of a sporting event.

That is, it may not always be the case that the scheduled start of a sporting match would be published on a landing page.

Also, CA does not support the requirement for notifications to be provided via email or 'push notifications' to end users.

CA suggests that the draft rules recognise that online content service providers are best placed to understand how to effectively communicate to their customers about the schedule start of a sporting event.

Therefore, CA recommends a more generic approach be adopted, that is: that the draft rule at subsection 8(1) be amended to reflect the definition in the ASTRA Code that refers to the scheduled start of a sporting event be published on the licensee's website at least 24 hours prior to the broadcast of the program.

Part 3 Explanatory Matter – Section 11 Advising of Exemption

CA considers that the requirements for notification of exemption are more onerous under the draft Rules than obligations under the ASTRA Codes.

Section 11 of the draft rules requires '*prominent notification, at the time that the end user accesses the live coverage of the sporting event.*' Whereas the ASTRA Codes require a licensee to '*draw to the reasonable attention of prospective viewers*' of the exemption, '*including through notification on its website and in any promotional material that includes the licensee's pricing and packaging*' for the exempt channel.

CA supports the alignment of the draft rules to the ASTRA Code in relation to requirements to exemption advice.

It is also CA's view that the requirement for notifications to accompany any communication to the end user where an exemption is in play is not fit for purpose and should be removed.

Part 5 – Rules for gambling promotional content

Scheduled breaks (16(4))

CA suggests that the draft rules are amended to align with the ASTRA Codes in relation to scheduled breaks. That is, the ASTRA Code includes a generic definition of a 'scheduled break in play' and includes some examples.

Part 6 – Safeguards and exceptions

CA notes that the drafting of the prohibition restricting gambling advertising" in conjunction with" a live sporting event is complicated in an online and mobile environment, where it is technically possible for multiple pages to be viewed simultaneously.

In practice, this means that a viewer could concurrently view static content pages of an online or mobile site, as well as the page on which a live sporting event is being streamed. The viewing of multiple pages is user initiated and would not be possible without a user navigating to those pages while also viewing the live stream.

CA seeks clarification of the drafting so that it is clear that in these circumstances, the incidental viewing by individuals of any gambling advertising on pages that do not contain the stream of the live sporting event, would fall within the scope of section 17. CA's suggested drafting revisions are highlighted in blue below.

S17: When a part of an online content service is taken to be an online content service in its own right

(1) For the purposes of the application of this Schedule to a sporting event, if content that consists of live coverage of the sporting event is, or is to be, provided on a distinct part (or page) of an online content service (the overall online content service):

(a) that part (or page) is taken to be an online content service in its own right; and

(b) that part is taken not to be included in the overall online content service.

(2) For the purposes of subclause (1), it is immaterial whether:

(a) gambling promotional content; or

(b) any other content;

is, or is to be, provided on the overall online content service.

Responsible Gambling Message (18(2))

CA notes that state and territory-based gambling advertising already contain various requirements in relation to the contents of a responsible gambling message.

CA suggests the draft rules be amended to:

- confirm that a responsible gambling message that complies with relevant state/territory regulations would satisfy obligations in the draft rules.
- remove the requirement in 18(2) that requires a responsible gambling message to be included at the conclusion of gambling promotional content. This change would align with the ASTRA Code which leaves the placement of such messaging at the discretion of the subscription television licensee.

These amendments will help improve consistency between state, territory and commonwealth jurisdictions and between platforms for responsible gambling messaging obligations that will reduce the cost and complexity to industry in meeting these obligations.

Exception for circumstances beyond control (19(1)(b))

CA would appreciate clarification on its assessment that 19(1)(b) appears to be narrower than the ASTRA Code's exception which states that the "licensee was made aware less than one hour prior to broadcast".

19(1)(b): - "the online content service provider was not aware, or could not have reasonably ascertained, that the actual commencement of the sporting event would be different to the scheduled start of the sporting event, as publicised in accordance with paragraph 10(a)."

If CA's interpretation is correct, we suggest that the draft rules be amended to align with the definition in the Astra Codes.

Record Keeping Rules

CA members again highlight the concerns that the Record Keeping Rules (RKR) impose an additional compliance burden and cost on online content service providers and appear to go beyond the equivalent requirements imposed on broadcasters. For example, the RKR do not reflect and go well beyond record keeping requirements in the recently updated ASTRA Code.

Industry's view is:

- records are already retained for commercial contracts, as proposed under s.21, and the record of placement of gambling promotional content as per s.22.
- the requirement to identify end users under s.23 is reasonable, if relying on an exemption, but is not practical to identify whether the end user is a resident in Australia.
- clarification is required on what RKR would apply to exempt online simulcast services as defined under s.4 of Schedule 8 to the *Broadcasting Services Act 1992*.

Due to the need for both clarification and consideration of amendments to the draft rules to address a number of concerns raised by industry, CA would encourage, and be happy to assist with convening a workshop between the ACMA and industry.

We look forward to further engaging with the ACMA to ensure the draft rules can be applied in practice to meet the Government's policy objective. Please contact Craig Purdon (c.purdon@commsalliance.com.au) or myself (stanton@commsalliance.com.au) if you have further questions or would like to discuss.

Yours sincerely,

A handwritten signature in black ink that reads "John Stanton". The signature is written in a cursive style with a large initial "J".

John Stanton
Chief Executive Officer