



## Submission to the Senate Environment and Communications Legislation Committee Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 January 2018

### *Key Points*

- SBS acknowledges the Government's policy commitment to restrict gambling advertising during live sporting events on online platforms, and notes that the *Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017* (the **Bill**) seeks to establish a framework for implementing this policy.
- SBS is committed to implementing appropriate restrictions in accordance with the policy.
- However, the implementation mechanism set out in the Bill is inappropriate for application to a public broadcaster such as SBS. This is because it would disturb SBS's editorial independence from Government, and is inconsistent with provisions of the *Special Broadcasting Service Act 1991* (**SBS Act**) which safeguard this independence.
- SBS should not be captured by the regulatory regime set out in the Bill. Instead, implementation of new restrictions should be achieved by establishing one set of rules in the SBS Codes of Practice (**SBS Codes**) that cover both broadcast and digital platforms.
- The SBS Codes are developed by the SBS Board under the SBS Act, and are a robust and enforceable set of rules. They are overseen by the independent SBS Ombudsman with recourse to the Australian Communications and Media Authority (**ACMA**).<sup>1</sup>
- Including restrictions on gambling advertising during live sporting events on online platforms in the single set of rules in the SBS Codes would be clearer for audiences, enable more efficient handling of complaints by both SBS and the ACMA, and would appropriately preserve SBS's editorial independence from Government.
- This submission recommends expressly excluding SBS from the operation of the regulatory scheme set out in the Bill. This would be consistent with the existing structure of the *Broadcasting Services Act 1992* (**BSA**) which recognises SBS's independence by confirming that certain regulatory regimes that apply to other sectors do not apply to SBS.

<sup>1</sup> Sections 150–153, *Broadcasting Services Act 1992* (**BSA**)

## **Introduction**

SBS is a national public multiplatform media organisation, which has a crucial and unique role in the Australian media landscape—exploring and reflecting multicultural Australia and contributing to its media diversity and plurality. Among other content genres, SBS brings a range of sports content from around the world and domestically to Australian audiences.

As a national free-to-air broadcaster, SBS reaches almost 100 per cent of the population through its six free-to-air TV channels (SBS, SBS HD, SBS VICELAND, SBS VICELAND HD, Food Network and NITV) and radio stations (SBS Radio 1, 2, 3, and 4, SBS Arabic24, SBS PopDesi, SBS Chill and SBS PopAsia).

Digitally, SBS Online provides audio streaming (including in almost 70 languages other than English) and is home to the SBS On Demand video streaming platform. SBS Online also features a number of specific sporting websites, including: *SBS The World Game*, which provides comprehensive coverage of international and local football including the FIFA World Cup; and, *SBS Cycling Central*, the home of cycling in Australia, including the annual Tour de France.

SBS welcomes the opportunity to make a submission in relation to the Bill.

### ***Commitment to implementing appropriate rules***

As noted above, SBS remains committed to working constructively with the Government to implement new rules to restrict gambling advertising during live sporting events on online platforms in accordance with the Government's May 2017 policy announcement.

SBS will work with Government and industry to ensure that new restrictions in the SBS Codes are consistent with those applying to other providers.

### ***Preserving SBS's independence***

A key principle of public broadcasting in Australia is its independence from Government. Under section 10 of the SBS Act, it is the role of the SBS Board to maintain the integrity and independence of the SBS, and to develop codes of practice relating to programming matters.<sup>2</sup> In addition, section 11 of the SBS Act limits the matters on which SBS can be directed by the Minister.

The framework set out in the Bill is inconsistent with these sections of the SBS Act, and undermines the effectiveness of the safeguards therein.

In particular, section 11(3A) of the SBS Act provides that the Minister must not give a direction to the SBS Board in relation to the content to be provided on a digital media service (with a similar provision applying in relation to broadcast services under section 11(3)). The policy justification for section 11 is to ensure the independence of the public broadcasters.

The BSA also recognises SBS's independence. For example, section 13(5) of the BSA provides that except as expressly provided in the BSA, the regulatory regime established by that Act does not apply to national broadcasting services. The effects of this provision include that schemes such as those in Part 9 of the BSA—which provides for content rules, program standards and codes of practice applying to other sectors, in particular commercial television

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<sup>2</sup> The SBS Act provides for the SBS Board to manage the operations of SBS, authorising the Board to decide the strategies to be followed by SBS in performing its functions, and to ensure that SBS performs its functions in a proper, efficient and economical manner and with maximum benefit to the people of Australia (section 9). Under the SBS Act, SBS has sole responsibility for determining its content, with the SBS Board being empowered to make decisions about the kinds of advertising SBS may run on its services (see sections 45(4) and (6) and 45A(2) and (4)).

broadcasters—do not apply to SBS. This provision recognises the separate regulatory scheme established by the SBS Act.

As currently drafted, the Bill disturbs SBS's independence because it empowers the ACMA to make online service provider rules relating to advertising and sponsorship which would bind SBS.<sup>3</sup> Furthermore, the Bill provides the Minister with the power to direct the ACMA in the performance of these functions, including the making of online service provider rules and the issuing of exemptions.<sup>4</sup>

SBS must be exempt from the regulatory scheme set out in the Bill in order to maintain its independence and the role of the SBS Codes and Board-developed guidelines as the home of content rules applying to all SBS platforms.

It is noted in the Explanatory Memorandum (**EM**) to the Bill that:

*The Government recognises that there are a wide variety of online content services, with different business models and technical characteristics, and that the online content service provider rules [enabled under the Bill] will not need to regulate all content services.*<sup>5</sup>

SBS agrees and notes that while that section of the memorandum explains the mechanism set out in the Bill for the ACMA to exempt certain services or providers from online content service provider rules, this acknowledgement should also underpin an amendment to the Bill to expressly exempt SBS from its application entirely. Such an exemption would be consistent with the principle established in section 13(5) of the BSA.

### ***Implementing new restrictions in the SBS Codes***

While in other media sectors it may be the case that codes of practice are limited to regulating broadcast platforms, and not online platforms, this is not the case for SBS. The SBS Codes already cover both broadcast and online services (as relevant), and the SBS Board has the discretion to include new code restrictions on gambling advertising in live sports streamed online by SBS.

Establishing one set of rules in the SBS Codes that cover both broadcast and online platforms would be:

- **clearer for audiences** — given the unique nature of SBS as a public media organisation with specific regulatory mechanisms contained in the SBS Act, audiences expect a single source of content rules, not different rules and different complaint and compliance processes for different platforms;
- **efficient** — both for SBS and the ACMA — because only one complaints-handling process would need to be maintained; and
- **appropriate** — because, as noted above, it preserves SBS's editorial independence from Government, a fundamental principle and underpinning of Australia's successful public broadcasting framework.

The amended SBS Codes would be subject to the usual process of notification to the ACMA,<sup>6</sup> with complaints investigated by the independent SBS Ombudsman. As with existing

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<sup>3</sup> Clause 11 of proposed Schedule 8 to the BSA.

<sup>4</sup> Clause 27 of proposed Schedule 8 to the BSA.

<sup>5</sup> *Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 – Explanatory Memorandum (EM)*, page 3.

<sup>6</sup> Section 10(1)(j) of the SBS Act provides that it is a duty of the SBS Board to develop codes of practice relating, among other things, to programming matters—and to notify those codes to the ACMA.

arrangements for broadcasting investigations, complaints which could not be resolved by the SBS Ombudsman could be, with minor amendment to the BSA, escalated to the ACMA for investigation. If enforcement was necessary the ACMA could select the appropriate mechanism from its existing tool kit.<sup>7</sup>

Indeed, implementation via a co-regulatory mechanism such as the SBS Codes is the Government's stated preference,<sup>8</sup> and is consistent with regulatory best-practice relating to co-regulatory mechanisms as promoted by both the ACMA and the Department of Communications over a number of years (see references at **Appendix A** to this submission).

The interaction of the BSA and the SBS Act ensures that SBS is accountable for its editorial and commercial decisions, whilst preserving its editorial independence. This structure works well, and will work just as effectively for regulation of gambling advertising on online services.

It is for this reason that new gambling restrictions applying to SBS should use well-established and effective legislative arrangements for development and enforcement of the SBS Codes.

### ***Adjustments to the Explanatory Memorandum***

The breadth of coverage of the SBS Codes, and the ability for the SBS Board to amend them to regulate gambling advertising during live sporting events on online platforms, is not acknowledged in the EM.

SBS requests that the EM be amended for accuracy in relation to SBS as follows:

- At page 12 the EM says that there is no recognised industry group or co-regulatory framework for online services. While this may be true for commercial providers, the EM should be adjusted in this section to note that the SBS Act provides for SBS to develop codes of practice and guidelines for its online platforms.
- At pages 16–17, the EM notes that the Government's preferred implementation pathway is to request industry change their respective codes, but suggests that no enforceable codes of practice exist for online services. This section should also be adjusted to note that the SBS Codes cover online platforms.

### ***Express exemption for SBS***

The exemption contemplated above could be inserted in clause 3(1) of proposed Schedule 8 of BSA, which already provides that for the purposes of the schedule 'online content service' does not include certain services which are listed in paragraphs (e) to (r). A new class of exempt service could be listed in clause 3(1) in the following terms:

a digital media service provided by the Special Broadcasting Service Corporation as defined in section 3A of the *Special Broadcasting Service Act 1991*.

SBS would be open to consideration of other ways to give effect to the exemption and would be pleased to discuss these with Government.

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<sup>7</sup> SBS is ultimately accountable to ACMA and to the public for adherence to the SBS Codes under Part 11 Division 2 of the BSA, specifically sections 150–153. This system works well and SBS is publicly accountable.

<sup>8</sup> EM, page 16.

### ***Comments on Bill drafting***

However, if the Government is minded to proceed with the structure contained in the Bill, and not expressly exempt SBS, a number of issues relating to drafting are set out below.

#### **Definition of 'gambling promotional content'**

Clause 2 of proposed Schedule 8 of the BSA includes the following definition of 'gambling promotional content':

*gambling promotional content* means:  
(a) advertising content; or  
(b) sponsorship content; or  
(c) promotional content;  
that relates to a gambling service.

The broad concept of 'promotional material' should be removed from the definition so that the provision focuses on advertising and sponsorship content.

SBS acknowledges that proposed clause 14 of the Schedule 8 provides that online content service provider rules would not apply in relation to accidental or incidental provision of gambling promotional content (subject to certain conditions).

This exemption may ensure that providers are not liable for references such as advertisements on team uniforms, on-ground signage and inadvertent references to gambling companies by commentators. However, it would be preferable to confirm this and to avoid unintended consequences by confining the provision to advertising and sponsorship content only. This would appropriately focus the restriction on content for which the service provider receives consideration.

#### **Online service provider rules**

Clause 11 of proposed Schedule 8 provides for the ACMA to make, by legislative instrument, online content service provider rules that prescribe matters required or permitted. The exercise of this power is guided by clause 13 in relation to gambling promotional content—the clause notes, among other things, that the ACMA may prohibit or regulate gambling promotional content provided on online content services in conjunction with live coverage of a sporting event. This could include time-based restrictions on the inclusion of gambling promotional content in live coverage.

While the ACMA would be empowered under clauses 15 and 16 to exempt certain services, all services from certain providers or entire classes of online content service from the operation of these online service provider rules (or parts of them), this remains a discretionary power.

Clause 27 of proposed Schedule 8 provides for the Minister to direct the ACMA in relation to the exercise of its powers under the parts of the schedule under which online content service provider rules and exemptions from those rules would be made. This means the ACMA's discretion to exempt certain services or service providers could be fettered by Ministerial direction.

SBS is concerned that the ACMA's ability to exempt SBS may be restricted by Ministerial direction and, should SBS not be exempted entirely from the operation of Schedule 8, requests that amendments be made to confirm that this cannot occur.

#### **'Reasonable efforts' exemption**

Clause 25 of proposed Schedule 8 provides that an online content service provider must not contravene online content service provider rules.

SBS submits that a “reasonable efforts” exemption should be added to this clause such that a failure to comply would not be a breach where the service provider had taken all reasonable steps or made all reasonable efforts to ensure compliance.

An exemption of this type is appropriate given the nature of programmatic advertising used on online services and because live streaming can be subject to technological and operational vulnerabilities which can affect a provider’s ability to control the placement of advertisements.

### **Enforcement**

Clause 25(2) of proposed Schedule 8 provides that failure to comply with online content service provider rules can attract civil penalties.

SBS has significant concerns about the prospect that the ACMA would be empowered to impose financial penalties on SBS in relation to online content services and requests, should SBS not be entirely exempt from the operation of proposed Schedule 8, that the Bill be amended so that civil penalties cannot be applied to SBS.

### **Complaints-handling**

Proposed clause 24 of Schedule 8:

- provides for a person who has reason to believe that an online content service provider has contravened an online content service provider rule to complain to the ACMA; and
- empowers the ACMA to conduct an investigation into the complaint.

This establishes different complaint pathways for the same content provided on broadcast television and via an online content service. Whereas audiences must, under the current co-regulatory approach, complain first to the provider of broadcast content before escalating a complaint to the ACMA, for online services they are not required to attempt to resolve the complaint with the online content service provider before complaining to the regulator.

This is confusing for audiences and, in the case of online content services, denies the provider of the content the opportunity to engage directly with their audiences to attempt to resolve the complaint. In the case of SBS, this confusion will be avoided if the Bill is amended to exempt SBS from the operation of proposed Schedule 8, allowing SBS to deal with all complaints under the SBS Codes.

As noted earlier, this approach is not only more logical for audiences but is more efficient, meaning ACMA resources would only need to be expended on complaints that were not resolved by the service provider.

### **Explanatory content**

Clause 13(2) of proposed Schedule 8 provides that the online service provider rules may contain requirements that certain explanatory content is provided on a service. It should be confirmed in explanatory material that service providers should retain flexibility as to how this is provided, so that the presentation is relevant to their platforms and audiences, and not unduly prescriptive.

## Recent examples of Government support for self- and co-regulation

- The ACMA has done a body of work on optimal conditions for self- and co-regulatory (the occasional paper *Optimal conditions for effective self- and co-regulatory arrangements* was first published in June 2010, and updated in September 2011 and April 2015). Citing *The Australian Government Guide to Regulation*, the 2015 edition noted that:

*self- and co-regulation are promoted by key international and government organisations as alternatives to direct regulation. The Australian Government encourages the use of light-handed regulatory options, such as self- and co-regulatory mechanisms as part of its best-practice regulation agenda [emphasis added].*<sup>9</sup>

- In 2014 the Department of Communications (as it then was) published *Regulating harms in the Australian communications sector – Observations on current arrangements*, a policy background paper which noted that the telecommunications and broadcasting legislative frameworks both enunciate a preference for co-regulation, and that there is an industry-wide assumption that co-regulation should be the first port of call when new concerns emerge. Furthermore, in relation to the broadcasting industry, the paper noted that:

*[i]t may be timely for industry to ask itself about how it could make greater use of self-regulation.*<sup>10</sup>

- In the Department of Communications and the Arts' recent *Review of the Australian Communications and Media Authority – Final report* it was noted that:

*[b]est practice regulatory design...suggests that in the communications sector, with its fast pace of change and innovation, greater reliance on co-regulatory and self-regulatory models should lead to better outcomes for consumers and industry.*<sup>11</sup>

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<sup>9</sup> *Optimal conditions for effective self- and co-regulatory arrangements*, 2015 edition, page 8 – available at <https://www.acma.gov.au/-/media/Regulatory-Frameworks-and-International-Engagement/Report/PDF/Optimal-conditions-for-effective-self-and-co-regulatory-arrangements-2015-edition.pdf?la=en>.

<sup>10</sup> *Regulating harms in the Australian communications sector*, page 17 – available at <https://www.communications.gov.au/file/824/download?token=drQ4TZSr>.

<sup>11</sup> *Review of the Australian Communications and Media Authority – Final report*, page 90 – available at <https://www.communications.gov.au/file/27286/download?token=eKDxvclv>.