

AUSTRALIAN COUNCIL ON CHILDREN AND THE MEDIA

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SUBMISSION

to the Senate Environment and Communications Legislation Committee

regarding the

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

1. Introduction

The ACCM is the peak not-for-profit national community organisation supporting families, industry and decision makers in building and maintaining a media environment that fosters the health, safety and wellbeing of Australian children.

ACCM has a national Board representing the states and territories of Australia, and a membership of individuals and organisations including Early Childhood Australia, the Australian Council of State Schools Organisations, the Association of Heads of Independent Schools of Australia, the Australian Primary Principals Association, the Australian Education Union, the Parenting Research Centre, the NSW Parents Council, the South Australian Primary Principals Association, and the Council of Mothers' Unions in Australia.

ACCM's core activities include the collection and review of research and information about the impact of media on children's development, and advocacy for the needs and interests of children in relation to the media.

In its work ACCM applies the United Nations Convention on the Rights of the Child 1990, which is the most authoritative document about how children and families fit into society. Para 3(1) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Further, Article 18 makes it very clear that governments have an obligation to support parents in fulfilling their responsibilities towards their children. This includes the responsibility of ensuring that they can access the mass media without being exposed to material that is injurious to their well-being (see article 17). We note further that the definition of 'child' in the Convention is a person under 18 years.

Nor are children's rights any longer the concern only of governments. The *Children's Rights and Business Principles* state that all businesses should:

- meet their responsibility to respect children's rights and commit to supporting the human rights of children' (Principle 1);
- use marketing and advertising that respect and support children's rights' (Principle 6); and
- reinforce community and government efforts to protect and fulfill children's rights (Principle 10).

Promoting healthy choices and stronger voices in children's media

Australian Council on Children and the Media

Patrons: Steve Biddulph Baroness Susan Greenfield
Pres: Elizabeth Handsley; Vice-Pres: Amelia Joyce; Hon CEO: Barbara Biggins, OAM

As the Committee will see, some of our observations cast doubt on whether these Principles are being observed in the context of this Bill and surrounding developments. While it is not strictly the Committee's brief to keep track of the broadcasting and other industries' fulfilment or otherwise of these Principles, ACCM submits that the existence of the Principles, and the attitude displayed thus far by the industry, are relevant considerations for the balancing of the public interest and children's interests on the one hand and industry interests on the other.

2. Comment on the exposure of children to ads for gambling, and in particular, ads for betting within sports events.

This issue is one of great and growing concern to Australian parents. Australians generally do not want to see their young people encouraged into early gambling. The encouragement takes many forms, including sports betting ads in live sport on TV, in apps that children play on phones and tablets, and in online games. This exposure to gambling advertising is contributing to future problem gamblers in Australia by setting up pathways that become the norm for adult behaviour.

The research on gambling advertising and on family co-viewing justifies strong government action on betting ads in both terrestrial and online media, up to and including an outright ban. Any lesser action should be calibrated to protect children and young people under 18, since that is the group for whom gambling is illegal, and the group protected by the Convention. The Explanatory Memorandum details clearly the evidence of gambling advertising's effects on the developing brain, but it does not make it sufficiently clear that the brain continues to develop throughout the teenage years.

ACCM wrote to the Minister for Communications, on the topic of sports betting on free- to air TV back in April 2017. This letter can be seen at Attachment 1.

3. Comment on this Bill

The 'package'

On the whole, the proposed system puts more obstacles in the way of regulation of gambling promotion than the existing provisions do on matters already listed in s 123(2) of the *Broadcasting Services Act 1992* (Cth) (*BSA*). We note in particular the requirement of a direction from the Minister before a program standard can be determined: there is no such requirement in relation to any of the other matters regulated under the *BSA*.

ACCM finds the installation of such an obstacle puzzling considering that restrictions on gambling promotion were part of a deal between industry and the government involving a significant reduction in the former's licence fees.¹ ACCM is disappointed that regulation is being considered only as a quid pro quo for that reduction; our preferred approach would be to recognise the public interest in regulation and introduce it without any need to offer any inducements to private, corporate interests. If the industry has received a significant financial benefit in return for being subject to

¹ We note that the Explanatory Memorandum does not make any mention of this benefit to industry when discussing the costs of the various proposals. Nor does it refer to the cost to the Commonwealth of abolishing fees, or the potential savings on problem gambling treatment and related matters, when assessing the financial impact of the measures. While nothing stated in this connection is factually inaccurate, the overall picture painted is misleading.

these new regulations, the imperative for regulation to receive a political fiat is all the less apparent. Rather, a robust process for introducing regulations should be expected, and accepted. For all the Explanatory Memorandum's recognition of real evidence that children's development is being adversely influenced by exposure to gambling promotions, the scheme itself seems overly timid, which in turn leads us to question the Government's commitment to protecting children from the adverse influence that it has identified.

The Explanatory Memorandum acknowledges, at least implicitly, that the broadcasting industry has failed to take the steps the Australian community would have liked it to take to protect children from gambling promotion during coverage of sporting events. This is another reason why we find it puzzling that the package still seems so skewed in favour of industry interests. As noted elsewhere, the Explanatory Memorandum indicates that the Minister's power to order the determination of a standard is intended to be exercised only if the industry fails to self-regulate – even though it recognises industry's failure up until now to do so and indeed its interest in continuing to fail to do so (p13). We note further that the list on p17 of bodies consulted to date is limited to industries potentially affected by the proposed restrictions and government bodies, and does not include any that represent public health or the interests of children, for example the Public Health Association of Australia, UNICEF Australia or indeed ourselves.

Objective risks and community concerns

The Explanatory Memorandum contains cogent and compelling evidence that Australian children's development is being adversely influenced by exposure to gambling promotion during sports coverage. It is a shame, considering all the objective evidence that is provided, that the issue is then repeatedly framed as one of 'community concern' or 'community standards'. While these matters are important too, use of such language can mask the existence of an actual risk that exists whether the community is aware of it or not. Such a risk provides a stronger justification for regulatory intervention, so it should be given full visibility.

Ministerial involvement

It is not clear why a ministerial direction is needed to trigger the process of determining a standard, and the Explanatory Memorandum does not address this aspect of the proposed legislation. It states that a program standard 'is intended to only be made if existing codes of practice are not amended to include the new gambling promotions restrictions' (p4) but there are a number of difficulties with this. First, the statement just quoted, by referring to 'the new ... restrictions' (emphasis added), implies that a decision has already been made as to the desired content of the restrictions but does not indicate what that content is, or would be. The legislation, or at least the Explanatory Memorandum, should clarify this, and the public should be given a further opportunity to comment. Second, if it is intended that amendments be made to existing codes of practice, it would be a simple enough matter to require licensees (or their industry bodies) to make those amendments and not leave the matter to a non-binding statement of an expectation. This seems particularly appropriate in light of the fact that the industry has already had for some time, and not taken, the opportunity to self-regulate in accordance with community expectations. Third, the non-amendment of the codes of practice could easily be made a formal trigger for the determination of standard. The currently proposed legislation leaves too much power in the Minister's hands to frustrate the process of introducing new restrictions (either deliberately or simply by omission).

In any case, ACCM can see no reason why it would be inappropriate to apply the same trigger for a standard determination on gambling promotion as exists in relation to other kinds of content that are regulated in the public interest, namely that an industry code does not provide appropriate community safeguards for the matter or there is no code for the matter (ss 125(1)(a) and (2)(a), *BSA*, respectively). Material in the Explanatory Memorandum gives strong reason to believe that the point has already been reached where the requirement in s 125(1)(a) is met (or would be, if sports gambling promotion were listed in s 123(2)): see especially the statement that ‘the increasing quantity of gambling advertisements, and their scheduling within time periods and sports programs viewed by children, has resulted in the existing code no longer ... including adequate community safeguards.’ (p11) The current *Commercial Television Industry Code of Practice* does include a provision for betting and gambling (cl 6.5), so s 125(2)(a) cannot apply, but the statement just quoted puts this situation firmly within the bounds of s 125(1)(a) (or, again, would do so if gambling promotion were listed in s 123(2)).

It is true that s 125(1)(a) refers to safeguards only on matters referred to by s 123(2), so the ACMA currently has no power to determine a standard on gambling promotion. The remedy to this is to include gambling promotion in the list of matters in s 123(2), not to create a separate standard determination process involving a direction by the Minister. Then, as noted, it would be appropriate for the ACMA to act on the observation that adequate community safeguards are not provided in relation to gambling promotion and exercise its power under s 125(1) to determine a standard.

The discussion above interprets the Minister’s role as an obstacle to regulation; it may be that it is intended the opposite way, that is, as a way of overcoming the possibility that the ACMA would not exercise its power under s 125. The Explanatory Memorandum does not give any indication either way of the intent behind the Ministerial direction requirement. ACCM submits that a better way of overcoming a risk of inaction by the ACMA is for the legislation to require the ACMA to determine a standard on gambling promotion, the same way it currently does for children’s television and Australian content (s 122, *BSA*). The Explanatory Memorandum makes it clear that there are special policy imperatives here, and inclusion in s 122 would be in keeping with the strong, and justified, concerns the community holds about gambling promotion. Moreover, it would do so without introducing the vagaries of political decision-making into this important area of policy.

Necessity and reasonableness

Clause 4(3AB)(a) states that Parliament’s intent is to avoid ‘unnecessary financial and administrative burdens on the providers of online content services’. ACCM submits that the word ‘unnecessary’ here should be replaced with ‘unreasonable’. The former word sets too high a standard for the regulations in relation to their impact on providers. In a strict sense, no regulation at all is ‘necessary’, but rather the community views regulation as reasonable and justified in the public interest, specifically in the interests of children’s healthy development. If the legislation is to operationalise this justification for regulation, it should adopt at the very least a balancing approach between the public interest and children’s interests on the one hand and the interests of providers on the other. This is all the more so considering Australia’s obligation under art 3(1) of the UN Convention on the Rights of the Child to make children’s interests ‘a primary consideration’ – or, in this case, at least equally important as those of content providers. Imposing a requirement that regulation be ‘necessary’ does not involve such an approach, rather it treats providers’ interests as the primary consideration.

Unjustified complications

There are a number of reasons why a scheme such as the one being proposed should be as simple as possible, and as free as possible from exemptions, exceptions and provisos. First, if the system's enforcement is 'largely complaints driven'² members of the public need to be able easily to judge whether a breach has taken place or not and therefore whether it is worth their while to complain. Second, a simpler system will better help parents and carers to predict whether content will have gambling promotion and therefore to decide whether to allow their children to see it. Third, exemptions, exceptions and provisos tend to open up loopholes, that industry will surely exploit. It cannot be faulted for doing so; it is quite appropriate (subject to the *Children's Rights and Business Principles*) for it to push its activities to the limits of regulation. However, this is all the more reason, if regulation is to protect the public interest and the interests of children, to fashion robust rules that perform the intended function. Simplicity is the best way of achieving that aim.

Provisions of the proposed scheme that complicate it unjustifiably include:

- Exemptions for online simulcasts (cl 3(e) of Schedule 8): a member of the public should not be required to determine whether the event is being broadcast at the same time. (And in any case this exemption is justified as a matter of policy only if the simultaneous broadcast is subject to robust rules protecting children – which may or may not be the case in the foreseeable future: see above.)
- The availability of exemptions for certain services and providers under cll 15-16 of Schedule 8: it will not be easy for members of the public to know whether an exemption is in place. Furthermore, ACCM submits that the specified grounds for exemptions (including the size of the service; the financial impact of the rules on the provider; the impact of the rules on the quality or quantity of content provided on the service) do not provide a justification, in principle, for an exemption. If gambling promotions are against the public interest and children's interests, then all businesses, of all sizes, should be required to find models that allow the provision of quality content without such promotions. We note that the *Children's Rights and Business Principles* apply to all businesses, irrespective of size.
- The power to determine that a certain event (eg a horse race)³ is not a sporting event (c 19 of Schedule 8): if the 'ordinary meaning' of 'gambling service' can be used in that definition, the ordinary meaning of 'sporting event' should also apply, and not be subject to exceptions.
- The different treatment under cl 21 of Schedule 8 of commentator betting odds promotion and representative venue-based promotion compared to promotion in general (eg in-program promotions, program sponsorship announcements and spot advertisements). A member of the public may find it difficult to determine whether a particular promotion fell into one of these categories. If it is possible, and justifiable, to extend the restrictions on commentator promotion and venue-based promotion for 30 minutes before and after the event, the same should apply to all forms of promotion.
- The power to set special meanings for 'scheduled start' and 'conclusion' (cll 22-23 of Schedule 8). The Explanatory Memorandum justifies this based on the

² Explanatory Memorandum, p4.

³ Explanatory Memorandum, p3.

fact that the rules may cover a 'wide variety' of events, but ACCM sees no justification here for departing from ordinary meanings.

Geographical link

The 'geographical link' definition should be reconsidered. Concepts such as 'targeted at' are usually interpreted to require that delivery to the relevant group be the primary or sole objective; so if a service were targeted at Australians and also at people in another country or countries, it would not fall within the definition. A more realistic definition would at least be broad enough to cover such a situation. In any case, ACCM questions whether 'geographical link' is an appropriate standard; at face value it could not support a definition based on what is likely to be *of interest to* Australians, but this is the concept most likely to provide significant protection to Australian audiences (and especially children).

The 8:30 pm watershed

The Explanatory Memorandum contains lengthy discussions of an 8:30 pm cutoff time for the proposed restrictions. However we have been unable to find any reference to such a cutoff in the legislation. Therefore we make the following comments tentatively, without having been able to check the precise wording and therefore the precise operation of the cutoff. We note that there is an inconsistency between the statement of Option Four ('Prohibit gambling advertising around the broadcast of live sports from five minutes before the start of play until five minutes after play concludes before 8:30 pm, across platforms') and the commentary on that same option ('prohibit gambling advertising in live sports events to five minutes after the conclusion of play where the event commences before 8:30 pm but play extends past this time').

Overall, discussion in the Explanatory Memorandum hints that the cutoff will apply the same way as time zone limitations do to other advertising restrictions: that is, the advertising restrictions will cease to apply at the nominated time, irrespective of the starting time for the program or the expected audience for the program. The Explanatory Memorandum states that the 8:30 pm cutoff (presumably along the lines just described) is accepted by industry as the benchmark (p16) but this does not necessarily make it correct or appropriate for advertising regulation generally or for gambling promotion (a new policy area) in particular, especially considering the reasons to define 'children' as under 18 here, whereas they are defined as under 14 in other areas of broadcasting policy. Nor is the (average) 'peak time' for child audiences (p14) to the point.⁴ An approach that is more consistent with community expectations and the rights of the child would be more along the lines of the commentary quoted above: continue the restrictions until the end of programs where it has been determined that children need, and deserve, protection.

Cutting off restrictions at 8:30, rather than at the end of certain programs, seems to assume that children always jump up and go to bed at 8:30, no matter what is going on in the program they have been watching or how long it has to run. This is an unrealistic expectation, especially when one bears in mind the fact that 'children' in this context includes adolescents up to and including the age of 17; and all the more unrealistic in relation to a live sporting program. The length of such programs can be unpredictable, and families who have chosen to watch a program, expecting it to be over by 8:30 pm, cannot be expected to switch off the television at that time if play goes on for longer.

⁴ We note that it is not explained how 'child audience' was defined for the purposes of the research quoted in the Explanatory Memorandum: based on experience we expect it was not as those under 18 years.

Even if the scheduled finish is after 8:30 pm, many parents would reasonably plan for children to stay up until the end of play; and many adolescents would have a later usual bedtime in any case. Either way, we can expect that children and adolescents who have invested the time to start watching a program or an event will keep watching to the end, even if it goes past their usual bed time. For these reasons, a regulatory system that wished to treat their interests as a primary consideration would apply the protections until the end of any relevant program.

As to how one would determine children's need for, and deservingness of, protection in relation to any particular program, time may not be the most relevant factor. The nature of the program could override temporal considerations, for example many children might stay up until the middle of the night to watch a celebrity athlete's performance at the Olympic Games or the Socceroos in the World Cup. The importance that Australian culture places on sport and loyalty means that this would not be considered an unreasonable practice, therefore in principle children should be protected from inappropriate advertising during such programs.

However in the interests of simplicity and predictability, a temporal basis for the cutoff may be justified as a compromise. ACCM suggests it would be appropriate to apply the restrictions for the full duration of any live transmission of a sporting event scheduled to start before 8:30 pm. Basing the cutoff on scheduled start rather than actual start is important to remove any incentive to circumvent the rules by delaying the commencement of a broadcast. Such a delay is unlikely to change a family's determination to watch an event, once the decision has been made to do so.

Clarity and accuracy

As mentioned elsewhere in this submission, we have been unable to find anything in the Bill to support the Explanatory Memorandum's assertions about the time zones during which the restrictions would apply. It is troubling that such confident statements should be made in an official commentary about the legislation's effect without there being corresponding provisions in the legislation.

We note further that when the Explanatory Memorandum states that 'A program standard made under section 125A is intended to only be made if existing industry codes of practice are not amended to include the new gambling promotions restrictions' (p4; emphasis added) it does not explain which 'new gambling promotions restrictions' are being referred to. The implication seems to be that the code provisions should be the same as the online rules, but if this is the expectation it should be stated clearly, not just in the Explanatory Memorandum but in the legislation. The same goes for the 'anticipat[ion] that a program standard made under section 125A would, to the extent appropriate, be similar to the service provider rules':⁵ this should not be 'anticipated', it should be expressly provided. Any other approach leaves too much space for industry lobbying to influence the outcome, when the industry has already shown itself fundamentally unwilling to confront the public interest surrounding these matters.

The Explanatory Memorandum is blatantly inaccurate in at least one respect: at p11 it states that s 123(4)(b)(i) of the *BSA* requires the ACMA to ensure that an industry code of practice 'reflects appropriate community standards'. Rather, that paragraph of the *BSA* says that 'the ACMA [must be] satisfied that ... the code of practice *provides appropriate community safeguards* for the matters covered by the code' (emphasis added). These are obviously two quite different matters: the first relates to the values

⁵ Explanatory Memorandum, p 4.

and expectations that the community holds, whereas the second involves the ACMA's judgment as to the degree of protection the community should have from certain matters determined, not by the community itself, but by legislation and by industry.

Moreover, in the same paragraph the Explanatory Memorandum states that codes of practice are 'negotiated between industry and the ACMA'. We cannot state categorically that this is inaccurate, but the *BSA* says nothing about negotiation.

Generally, we find that the Explanatory Memorandum is insufficiently clear as to the (lack of) certainty that anything will change at all. The ACMA has the power to draw up rules, and the Minister has the power to order a standard be determined, but there is no guarantee that either power will be exercised, and we can be certain that the industry will continue to lobby heavily against such exercise, at least of the latter power. As the Explanatory Memorandum itself recognises, gambling promotions are highly profitable for the industry, and it is unlikely to self-regulate of its own volition (p13) – but there is nothing in this Bill that would provide any kind of compulsion on them to do so, or to guarantee that government regulations will be introduced. ACCM is concerned that members of the community could be misled as to the nature and import of the legislation.

Conclusion

The Explanatory Memorandum describes children as a vulnerable audience (p13) and ACCM agrees. This is why it is disappointing to see a proposed scheme that ultimately puts so little weight on their needs and interests. We hope that the Committee will recommend amendments to the Bill to ensure that new regulations are introduced that will be clear and effective, protect the rights and interests of children and parents, and keep faith with the community's expectations following the licence fee relief that the broadcasting industry has already received.

We should be pleased to discuss these matters further at the Committee's convenience.

Attachment 1: Letter from ACCM to Minister Fifield

21 April 2017

Senator the Hon Mitch Fifield
Minister for Communications
Parliament House
Canberra ACT 2600
By email senator.fifield@aph.gov.au

Dear Minister,

Subject: the removal of ads for betting within sports programs on TV.

We note the recent media discussions on proposals to remove ads for betting from sports programs on TV. We wish to provide our comments on this issue, which is one of great and growing concern to Australian parents. Australians generally do not want to see their young people encouraged into early gambling.

Australian families love their sport, and enjoy watching their favourite teams play on TV. Doing so may be one of only a few activities in which many families regularly engage together, in a world where parents and children often consume separate content on their separate devices. But it is one that increasingly has been marred by the intrusion of ads for sports betting.

ACCM has gained a high awareness of gambling promotion to children through its app review service *Know before you load*. This service identifies those apps which involve children in simulated gambling activities, and places them on its *Children and Gambling Watchlist*: <http://childrenandmedia.org.au/app-reviews/watchlist> We have noted that some of the sporting code apps such as *AFL Live Official App-Telstra Corp* and *Cricket Australia Live* provide children with easy links to betting sites.

Recent Australian research has found that a range of socialisation factors, particularly family and the media (predominantly via marketing), may be shaping children's gambling attitudes, behaviours and consumption intentions. (Pitt, Hannah et al (2017) <https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-017-0136-3>)

The research on gambling advertising and on family co-viewing (Rasmussen et al 2016) <https://childrenandmediaman.com/2016/11/28/new-research-shows-that-parent-child-tv-viewing-changes-kids-brain-body-connection/>

would justify strong government action on betting ads in sports broadcasts and programs, up to and including an outright ban. Any lesser action should be calibrated to protect children and young people under 18, since that is the group for whom gambling is illegal.

The suggestions from sporting bodies of an 8.30pm watershed would provide insufficient protection, as teenagers habitually stay up a good deal later than that. We can also envisage that many parents would allow younger children to stay up later, especially at weekends, to watch their team play. Regulation should not expect them to do otherwise.

Further, ACCM is opposed to suggestions that TV licence fees be reduced to compensate for lost betting ad revenue. There is no justification for compensating licensees in relation to profits they have been making out of something that is not in the public interest.

We urge the Government to step in and lower these risks to Australian children.

Yours sincerely