

## Chapter 2

### Key issues

2.1 This chapter examines the evidence received by the committee in submissions to this inquiry.

2.2 Most submitters welcomed the proposed legislative framework contained in the bill and the efforts being made to ensure that gambling advertising is consistent with community standards across all viewing platforms. Some stakeholders made observations about the likely effects of specific provisions, and sought clarification or suggested changes in relation to the proposed regulatory framework.<sup>1</sup>

#### Overall views on the bill

2.3 The importance of ensuring that young Australians are not exposed to gambling promotional content was recognised in evidence. The Hon Kelvin Thomson, Alliance for Gambling Reform (AGR), drew the committee's attention to important new research on the participation of young Australians in gambling activities, noting that this generation is the first to be exposed to saturation marketing of online betting products.<sup>2</sup> Mr Thomson stated:

Since I started working for the Alliance for Gambling Reform, I have been blown away by the evidence of gambling harm. Australians are the largest gamblers per capita, by quite some margin, and the links with family violence, homelessness, mental health problems, crime and so on are quite striking. The alliance sees gambling as a public health issue analogous to smoking, alcohol and traffic accidents. As a nation, we can be quite proud of what's been achieved with government leadership and community support in reducing harm from smoking, alcohol and traffic accidents, but the picture with gambling harm is not the same. It's not one of reduction at all.<sup>3</sup>

2.4 In order address these significant issues, submitters recognised that, for restrictions on gambling promotional content to be effective, they must apply equally across all platforms. The Victorian Responsible Gambling Foundation commented:

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1 See for example Responsible Wagering Australia (RWA), *Submission 10*, p. 1; Tabcorp, *Submission 1*, p. 1; Coalition of Major Professional and Participation Sports (COMPPS), *Submission 3*, p. 3; Victorian InterChurch Gambling Taskforce, Alliance for Gambling Reform, and Victorian Local Governance Association (VICGT, AGR, and VLGA), *Submission 2*, p. 1; Victorian Responsible Gambling Foundation (VRGF), *Submission 5*, [p. 1]; Flinders Centre for Gambling Research (FCGR), *Submission 14*, [p. 2].

2 VRGF, *Gen Bet: Has Gambling Gatecrashed Our Teens?*, Discussion Paper, March 2017.

3 The Hon Kelvin Thomson, Campaign Organiser, Alliance for Gambling Reform (AGR), *Proof Committee Hansard*, 1 February 2018, p. 31.

The Foundation views the introduction of a ban on advertising and promotions during live sport as an important step in protecting children from the socialisation effects of widespread promotions and advertising of gambling that saturate all the media environment—a socialisation that changes the meaning of sport and encourages false ideas about both the normality of gambling and the risks associated with gambling.<sup>4</sup>

2.5 The Department of Communications and the Arts (the department) informed the committee that the bill breaks new ground by regulating online content. The department added:

For the first time, broadcast-like standards will be applied to online content service providers. The bill will ensure a platform-neutral, consistent approach to the restriction of gambling promotions. This responds to significant community concern over the amount of gambling advertising and the normalisation of gambling in children's eyes through its association with sport.<sup>5</sup>

2.6 The department added that without a consistent approach to broadcasters and online services:

...different rules could apply to coverage of the same sporting event, depending on the platform, and broadcasting services would potentially be subject to stricter rules than online platforms. At present, online platforms are not technically subject to any gambling promotion restrictions.<sup>6</sup>

2.7 The introduction of a level playing field was welcomed by several submitters, including Commercial Radio Australia (CRA).<sup>7</sup> However, it was noted that, in the interests of fairness and efficiency, the rules should come into effect across all platforms at the same time. Free TV Australia (Free TV) noted the Government's announcement indicating that the proposed changes would come into effect on 30 March 2018, and recommended that the bill should clearly stipulate a commencement date for the proposed new framework.<sup>8</sup>

2.8 The department stated that the restrictions for online content services will commence the day after royal assent of the bill. It noted that the Government's intention is that these restrictions will come into effect on 30 March 2018 and that the

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4 VRGF, *Submission 5*, p. 1.

5 Dr Carolyn Patteson, First Assistant Secretary, Department of Communications and the Arts (DOCA), *Proof Committee Hansard*, 1 February 2018, p. 34.

6 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 34.

7 Commercial Radio Australia (CRA), *Submission 7*, p. 1.

8 Free TV Australia (Free TV), *Submission 11*, p. 1.

indications are that changes to the broadcasting codes of practice will meet that deadline.<sup>9</sup>

2.9 Some submitters called for greater restrictions. For example, the Victorian Inter-Church Gambling Taskforce, Alliance for Gambling Reform, and Victorian Local Governance Association (VICGT, AGR, and VLGA) and UNICEF Australia expressed the view that gambling promotions should be restricted through a comprehensive prohibition that provides a clear and safe zone where parents can be confident children can watch live sport without experiencing messages that normalise gambling as a part of that sport.<sup>10</sup> The Australian Council on Children and the Media (ACCM) commented that the proposed system was 'overly timid' and 'skewed in favour of industry interests'.<sup>11</sup>

### *Industry codes of practice*

2.10 Matters related to gambling advertising are currently regulated via a number of instruments including broadcast industry codes of practice. The department commented that, for licensed broadcasting service providers, the Government intends that the broadcast industry codes of practice be amended to include the additional restrictions proposed by the bill. The department added that 'the co-regulatory process for making and enforcing industry codes of practice is governed by the regulatory framework established by the Broadcasting Services Act'.<sup>12</sup>

2.11 The Coalition of Major Professional and Participation Sports (COMPPS) and the Australian Subscription Television and Radio Association (ASTRA) noted that there is a framework already in place that regulates the broadcast of gambling advertising during live sporting events, and that this is being strengthened further through amendments to industry codes.<sup>13</sup> COMPPS encouraged the Australian Communications and Media Authority (ACMA) to use the existing industry codes of practice as a guide to the application of rules for online content service providers.<sup>14</sup>

2.12 VICGT, AGR, and VLGA expressed concern that the draft industry codes contain loopholes that are inconsistent with the Government's announced policy intentions in relation to gambling advertising restrictions.<sup>15</sup> The Hon Stephen Conroy,

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9 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 37.

10 VICGT, AGR, and VLGA, *Submission 2*, p. 1; UNICEF Australia, *Submission 13*, pp. 4 and 7; EM, pp. 15–16.

11 Australian Council on Children and the Media (ACCM), *Submission 8*, p. 2.

12 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 34.

13 COMPPS, *Submission 3*, pp. 2–3; Australian Subscription Television and Radio Association (ASTRA), *Submission 4*, p. 16.

14 COMPPS, *Submission 3*, p. 5.

15 VICGT, AGR, and VLGA, *Submission 2*, pp. 1 and 5–7.

Executive Director, Responsible Wagering Australia (RWA) commented on the inadequacy of the draft codes in relation to long sports broadcasts. Mr Conroy stated:

We were quite shocked when we saw the carve outs and the exemptions. We've worked hard with the department, the government and the sector to come up with a reasonable and responsible definition of long form sports. I grappled with that myself in the past, and I think that the government got the balance right. I was disappointed that the draft code seemed to backslide away from community expectations.<sup>16</sup>

2.13 The department commented that provisions in the bill which provided a mechanism for the Minister to act should the industry codes not be amended as required. The department stated:

The bill also includes a regulatory mechanism that can be used to apply the new gambling promotions restrictions to broadcasting services, should the industry codes of practice not be amended appropriately. The proposed new section, 125A, would provide the minister with the power to direct the ACMA to apply the new gambling promotions restrictions to relevant broadcasting services, by way of a program standard. However, I do need to acknowledge that the broadcast sectors are working closely with the ACMA to ensure that their codes are appropriately amended. At this stage it seems unlikely that the minister will need to use this discretionary power to ensure the new gambling promotions restrictions are applied to relevant broadcasting services.<sup>17</sup>

2.14 In relation to codes of practice in the online environment, the Digital Industry Group Incorporated (DiGi) raised the potential for inconsistent regulation between rules enforced by the regulator as opposed to industry codes of practice, and recommended that the department work with DiGi and other relevant industry associations to develop self-regulatory codes of practice similar to those for broadcasters. DiGi also stated that there had been limited consultation with the digital industry on the implementation of these restrictions and the proposed new Schedule 8.<sup>18</sup>

2.15 The department commented on reasons for a co-regulatory approach for broadcasters and the use of codes of practice and a direct regulation approach for online content services. It stated that unlike the broadcast sector, there is no clear peak industry group or co-regulatory framework for online services. The department stated that, as a consequence:

...our decision was that to make sure that it is very clear what the rules are and who they apply to, our best opportunity was actually to put the enabling

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16 The Hon Stephen Conroy, Executive Director, RWA, *Proof Committee Hansard*, 1 February 2018, p. 28.

17 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 35.

18 Digital Industry Group Incorporated (DiGi), *Submission 12*, [pp. 1, 2].

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framework in legislation, but then have the service provider rules that the ACMA will develop, that are in some sense akin to the broadcasting codes of practice, to actually give effect to the overarching legislation.<sup>19</sup>

2.16 The department also responded to DiGi's recommendation for self-regulatory codes of practice. The department commented that there are a finite number of licenced broadcasters and a code can be established to cover all the participants. However, in the online environment there are many providers and groups representing those providers. The department commented that 'this would have put the ACMA in a position of having to negotiate a multitude of codes and still not have anywhere near the coverage required to enforce the rules'. It explained that the bill provides an enabling framework approach which allows the ACMA to develop service provider rules in consultation with the industry, with provision to exempt responsible online service providers from the scheme.<sup>20</sup>

### ***Special Broadcasting Service Corporation (SBS) request for exemption***

2.17 In its submission to the committee, SBS expressed concern with the way in which the proposed regulation is to be implemented. SBS argued the regulatory mechanisms proposed are inconsistent with the provisions of the *Special Broadcasting Service Act 1991* (SBS Act) which safeguard SBS's editorial independence from Government. In addition, SBS drew attention to the statement in the EM that there is no recognised industry group or co-regulatory framework for online services, nor enforceable codes of practice for online services. However, SBS pointed out that SBS Codes of Practice already cover both broadcast and online services.<sup>21</sup> Ms Clare O'Neil, Director, Corporate Affairs, stated that:

Our codes currently hold restrictions on advertising for our broadcast services, and it is through the SBS codes that any new gambling-advertising restrictions on TV and radio services will be imposed. To have a separate regime just for online services while our other services are dealt with by codes is inefficient, confusing for viewers and inconsistent with the public-broadcasting frameworks that are well established and effective.<sup>22</sup>

2.18 To address this concern, SBS proposed that the bill be amended so that SBS is expressly exempt from the operation of proposed Schedule 8. In addition, it proposed that the new restrictions be implemented by the Board of SBS establishing a set of

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19 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 36.

20 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018 pp. 36–37.

21 Special Broadcasting Service Corporation (SBS), *Submission 9*, p. 4; EM, pp. 12 and 16–17; see also Internet Service Provider Industry Codes, Communications Alliance Ltd, <http://www.commsalliance.com.au/Activities/ispj> (accessed 22 January 2018).

22 Ms Clare O'Neil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 1 February 2018, p. 1.

rules in the SBS Codes of Practice for both broadcast and digital platforms, which would be subject to the usual process of notification to the ACMA.<sup>23</sup>

2.19 The department responded to SBS's concerns by acknowledging the importance of independence for the public broadcasters. However, Dr Carolyn Patteson added that 'this doesn't mean that rules that limit social harm arising from exposure to gambling promotion should not apply to the SBS'. It was noted that SBS is subject to other legislation aimed at preventing social harm from advertising, such as the ban on tobacco advertising.<sup>24</sup>

### **Comments on specific measures—Schedule 8 (Online content services)**

2.20 Some submissions expressed opposition to, raised drafting concerns about, or sought clarification on particular proposed amendments. This evidence is examined in the following sections.

#### ***Definitions***

2.21 Clause 2 of the bill provides for the definition of 'gambling promotional content' as advertizing, sponsorship and promotional content that relates to a gambling service. SBS proposed that the broad concept of 'promotional content' should be removed from the definition so that the provision focuses on advertising and sponsorship content. SBS argued that 'promotional content' was a 'vague concept' and its removal from the definition would avoid unintended consequences, such as the capture of advertisements on team uniforms, and confine the provision to advertising and sponsorship content only.<sup>25</sup>

2.22 In relation to 'promotional content', the department commented that the bill will ensure a platform neutral, consistent approach so that the same rules that currently apply to the restriction of gambling promotions for broadcasters will apply in the online environment.<sup>26</sup>

2.23 Clause 3 of Schedule 8 provides the definition of 'online content services'. DiGi submitted that this definition conflates three separate functions—online content service providers, online content creators and online advertising platforms. It

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23 SBS, *Submission 9*, pp. 2–3; see also Ms Lesley Power, General Counsel, SBS, *Proof Committee Hansard*, 1 February 2018, p. 2.

24 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 38.

25 Ms Clare O'Neil, Director, Corporate Affairs, SBS, *Proof Committee Hansard*, 1 February 2018, p. 3; SBS, *Submission 9*, p. 5.

26 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 34.

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recommended that further work be undertaken to identify and address the different roles and responsibilities in the context of the proposed amendments.<sup>27</sup>

### ***Exemption of online simulcast services***

2.24 Proposed clauses 3(1)(e) and 4 of Schedule 8 provide that rules determined under Schedule 8 would not apply to 'exempt online simulcast services' under certain circumstances.

2.25 This was seen as a significant exemption for the commercial radio industry as it would otherwise 'face substantial practical difficulties'.<sup>28</sup> Free TV proposed that categories of permissible watermark-type content in proposed clause 4 be extended beyond logos and insignia to include other watermark-type graphics or textual material that may be relevant to the fixture, such as closed captioning, providing that they did not contain gambling promotional content.<sup>29</sup>

2.26 A further matter raised in relation to simulcasts was that the public would have to know that the event was being broadcast as an online simulcast. The ACCM considered that it should not fall on members of the public to determine whether a breach has taken place.<sup>30</sup>

### ***Geographical link to Australia***

2.27 Proposed clause 5 of Schedule 8 would set out when a service has a geographical link to Australia, that is, a reasonable person would conclude that the service is targeted to Australians or the content is likely to appeal to the public or a section of the public in Australia. Three matters in relation to proposed clause 5 were raised.

2.28 First, ASTRA argued that this clause should provide an express exception for services which are geoblocked to Australia.<sup>31</sup> The department responded to this proposal by stating that the ACMA would decide on exemptions. It went on to explain that, 'if a stream is successfully geoblocked, then it is not something that should be available to viewers. But, ultimately, it provides the ACMA with discretion to ensure that they're not covered by the rules'.<sup>32</sup>

2.29 Secondly, DiGi considered that the application of clause 5 was too vague, and creates an 'incredibly wide link to Australia'. DiGi recommended either removing the

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27 DiGi, *Submission 12*, [p. 3].

28 CRA, *Submission 7*, p.1.

29 Free TV, *Submission 11*, pp. 1–2.

30 ACCM, *Submission 8*, p. 5.

31 ASTRA, *Submission 4*, p. 12.

32 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 40.

criterion that 'any of the content provided on the service is likely to appeal to the public, or a section of the public, in Australia', or specifically identifying the targeted sporting codes and making the legislation applicable to .com.au domains only.<sup>33</sup>

2.30 The department noted that the definition of 'geographical link to Australia' includes any of the content provided on the service that is likely to appeal to the public, or a section of the public, in Australia. The department further explained that 'likely to appeal' would have its ordinary meaning in the legislation, and that every case would depend on the particular circumstances. The approach taken in the bill is to provide for broad coverage, and enable the ACMA to determine exemptions 'with the best possible chance of capturing all the providers that it considers appropriate to capture'.<sup>34</sup>

2.31 The department also provided examples of what 'targeted to Australia' would mean, including circumstances where a domestic broadcaster targets a predominantly Australian audience; where a broadcast involves an Australian team; where the broadcast is available for access by subscription to Australian residents; or where it carries gambling promotional content for Australian gambling services or other content relevant to people who reside in Australia.<sup>35</sup>

2.32 Thirdly, Free TV noted that it has traditionally been difficult to enforce local laws on international operators. It submitted that the bill should provide the ACMA with sufficient power to enforce the rules on international operators using mechanisms such as those identified in the *Review of Illegal Offshore Wagering* (O'Farrell Review).<sup>36</sup>

2.33 The department acknowledged that 'the vast majority of online content would be provided by mainstream providers who would be keen to comply'. However, it also noted that the ACMA already has powers in relation to foreign providers, such as those contained in the *Interactive Gambling Act 2001* and the *Enhancing Online Safety Act 2015*.<sup>37</sup>

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33 DiGi, *Submission 12*, [p. 4].

34 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 40.

35 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 40.

36 Free TV, *Submission 11*, p. 3; see *Review of Illegal Offshore Wagering*, December 2015, [https://www.dss.gov.au/sites/default/files/documents/04\\_2016/review\\_of\\_illegal\\_offshore\\_wagering\\_18\\_december\\_2015.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2016/review_of_illegal_offshore_wagering_18_december_2015.pdf) (accessed 17 January 2018).

37 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 41.



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### *Cut-off time for restrictions*

2.34 The ACCM noted that the bill does not specifically refer to an 8:30 pm cut-off time for the proposed restrictions, even though the EM contains a lengthy discussion about a proposed 'safe zone' between 5:00 am and 8:30 pm for children to watch sporting content.<sup>38</sup> In any case, it argued that the restrictions should apply to the full duration of any live transmission of a sporting event scheduled to start before 8:30 pm, as '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'.<sup>39</sup>

2.35 Professor Elizabeth Handsley, President, ACCM stated:

It's disingenuous to suggest that children would just go to bed at 8.30, or that the family would just switch off the TV, or that children, if they remain watching, would somehow be inoculated from the impact of this content and this gambling promotion in a way that they weren't before 8.30 pm. We just think it's far more realistic and it's going to be far more effective in protecting children if these restrictions last right through a program that we know there's a strong child audience for.<sup>40</sup>

2.36 The department noted that each sporting code would be able to set its own scheduling and that there will be no guidelines in relation to such scheduling.<sup>41</sup> In addition, the EM comments that:

The current 5.00 am to 8.30 pm time slot is accepted in the industry as the standard benchmark for existing content restrictions aimed at protecting children. For example the advertising of alcohol and intimate products, and the airing of mature classified content like MA15+ programming, are all permitted after 8:30pm. Extending the prohibition to all platforms that transmit live sport will mitigate against gambling advertising migrating to other platforms which may distort the market for sports rights, and risk exposing child audiences to gambling advertising on services that are being rapidly embraced by audiences.<sup>42</sup>

2.37 COMPPS assured the committee that its members will adhere to the respective codes of practice once finalised by the ACMA, and that it will continue to work with broadcasters, wagering bodies and regulators on these codes.<sup>43</sup>

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38 EM, pp. 16 and 20.

39 ACCM, *Submission 8*, p. 7.

40 Professor Elizabeth Handsley, President, ACCM, *Proof Committee Hansard*, 1 February 2018, p. 8.

41 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 41.

42 EM, p. 16.

43 COMPPS, *Answers to questions taken on notice* (received 5 February 2018), p. 1.

### *Individual and class exemptions*

2.38 Proposed clauses 15 and 16 of Schedule 8 would allow the ACMA to determine certain exemptions from the online content provider rules and set out criteria the ACMA must have regard to when making such an exemption.<sup>44</sup>

2.39 Some submitters argued that the proposed exemptions may lead to 'regulatory bypass' for sections of the online industry and suggested that clear decision-making criteria be included to guide the ACMA's decisions and ensure consistency between all platforms.<sup>45</sup> Ms Bridget Fair, Free TV, expressed concern that the legislation potentially provides for a broad range of content services to be exempted from the rules. Ms Fair commented:

This type of broad mechanism for exemptions will not apply under the codes of practice for television or radio. To avoid regulatory bypass, which we think is already problematic under the existing framework, these matters should be addressed.<sup>46</sup>

2.40 The department explained that the decision-making criteria for class exemptions will be provided for through legislative instruments and subject to parliamentary scrutiny and disallowance, while criteria for individual exemptions will be done through administrative action. Dr Patteson stated that 'the ACMA will be required to undertake appropriate and reasonably practical consultation before making a class exemption'.<sup>47</sup>

2.41 VICGT, AGR, and VLGA proposed that the ACMA should be required to consider the likelihood that an exemption will result in gambling related harm and the number of children likely to be exposed to the gambling promotion as a result of the exemption.<sup>48</sup>

2.42 The department explained that responsible online service providers who have been exempted from the restrictions by the ACMA would not be required to prohibit gambling advertisements. It noted that the ACMA would deal with a provider who acted contrary to the policy intent of the Government through the complaints process but that, where an exemption is in place, the person or company receiving the

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44 EM, pp. 3–4.

45 Free TV, *Submission 11*, p. 2; CRA, *Submission 7*, p. 4; ASTRA, *Submission, 4*, p. 3; COMPPS, *Submission 3*, p. 5.

46 Ms Bridget Fair, Chief Executive Officer, Free TV, *Proof Committee Hansard*, 1 February 2018, p. 14.

47 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 40.

48 VICGT, AGR, and VLGA, *Submission 2*, p. 2.

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exemption would no longer have to comply with the rules. The circumstances under which an exemption would be provided are set out in the bill.<sup>49</sup>

2.43 The department also noted that the bill sets out the overall regulatory framework, including service provider rules, in order to provide flexibility and agility for exemptions under the rules, recognising that the internet changes 'almost on a daily basis'.<sup>50</sup>

### ***Age-gating***

2.44 COMPPS and RWA noted that there is no explicit reference in the bill to 'age-gating', where users are required to verify their age, as a criterion for the ACMA granting an exemption to the online content service provider rules. They noted that Australian-licensed online wagering providers are required to verify the identity of their customers, including name and age, as a key protection against financial fraud, money laundering and terrorism financing. COMPPS and RWA submitted that the bill should allow for exemptions where an online content service provider has an age-gating mechanism in place.<sup>51</sup>

2.45 Mr Alex Alderson, General Manager, Digital, National Rugby League (NRL), made further comment on behalf of COMPPS:

But as a general proposition online services today tend to be consumed through some form of registration process. That's different for FOX SPORTS than it is for, for example, a streaming service that the NRL offers. But, typically, people who are hoping to consume a service are asked to provide some personal information: their name, often some contact information and, increasingly, other information about themselves, including their birthdate in some cases, and in some cases just an indication, positive or negative, of whether they are over the age of 18. With that information provided by a user, the technology is available for us to provide them with a different experience in almost every respect, be that advertising or even showing them a different feed of the match if that was something that we were able to do. So the nature of our point around age-gating is that, where we can identify that someone is over the age of 18, we think that there should be an opportunity to incorporate wagering advertising in the live stream where that's in the interest of our respective business models—and that, I'd hasten to add, is not necessarily the case always, or at all. But we think that the ability to identify someone who is over 18 does achieve the kind of policy aim of what's proposed here.<sup>52</sup>

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49 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 38.

50 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 40.

51 COMPPS, *Submission 3*, p. 4; RWA, *Submission 10*, p. 2.

52 Mr Alex Alderson, General Manager, Digital, National Rugby League (NRL), *Proof Committee Hansard*, 1 February 2018, p. 21.

2.46 The department responded by stating that the matter of age verification was discussed with a number of industry groups. However, it acknowledged that age verification is 'really, really difficult without going through a formal 100-point ID check' and that, ultimately, it would be for the ACMA to determine if the age verification is sufficient to ensure that children are not likely to be part of the audience.<sup>53</sup>

2.47 Mr Chris Rummery, Social Justice Researcher, Uniting Church/Victorian Inter-Church Gambling Taskforce pointed to a weakness in the proposed exemption for simulcasts viewed via sporting codes applications or websites, citing the Cricket Australia website as an example.

Under the current exemption this application would be exempt, because all you're doing is simulcasting what Channel 9 is simulcasting themselves. But what we do have down below is a bet365 advertisement. If you click on that advertisement, you are asked whether you're 18 or not, you click yes and it will take you straight to the bet365 website, taking you to all the live odds for that sport, including cricket but also horseracing and other sports. The point is that age gating doesn't prevent the advertisements. While it may prevent someone going on and actually creating an account and betting via the bet365 website, it doesn't actually prevent a minor or someone under 18 from using that application and then accessing the live sports website.<sup>54</sup>

2.48 The department explained that gambling advertisements could be run on a page within a broader domain that is live broadcasting. The department added 'so it's the button that you click on or the window that you click on to open up the viewing—what you are viewing and around that—that is the streaming of the live sport'.<sup>55</sup>

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

2.49 Proposed clause 17 of Schedule 8 is intended to clarify when a part of an online content service is taken to be an online content service in its own right in relation to a sporting event.

2.50 COMPPS sought clarification as to whether this clause is intended to limit the proposed ban to the page on which the livestream is shown, rather than a broader application across the entire website. Specifically, COMPPS sought clarification that the ban would apply only within the live stream of a sports match and around the live stream, such as banner advertising or other imagery that is visible to the viewer from

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53 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 39.

54 Mr Chris Rummery, Social Justice Researcher, Uniting Church/Victorian Inter-Church Gambling Taskforce, *Proof Committee Hansard*, 1 February 2018, p. 31.

55 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 39.

within the live stream view port/landing page.<sup>56</sup> Mr Alex Alderson, NRL, provided a further explanation on behalf of COMPPS.

What I would say is that the nature by which some advertisements—for example, a visual appearance of the odds on an event—are included in the code for a website or an application tends to be what's described as hard-coded. The challenge that we have today, as we sit here, is that that is not an easy thing to switch on and off. It involves a technical process, and, with live matches commencing and a series concluding over a weekend in the case of my sport, that would be quite a labour-intensive process and I would say that the risk of error in stepping down or switching off an advertisement during a live period would be so high that we might not do it at all.<sup>57</sup>

2.51 The department noted this concern and explained that the bill clearly envisaged that banner advertisements would be captured by the online content service provider rules by referring to banner ads shown 'in conjunction with' live sporting events. In circumstances where an age-gating mechanism is in place, the ACMA would be likely to exempt the whole service 'because, at the end of the day, children aren't part of that audience, which would then allow banner ads or other clickable internet material surrounding the sports broadcast'.<sup>58</sup>

### ***Gambling service***

2.52 Proposed clause 18 of Schedule 8 would allow the ACMA to have the discretion to make rules prohibiting or regulating gambling promotional content that relates only to some types of gambling services, with the effect of excluding gambling promotional content in relation to other particular gambling services (e.g. lotteries) from the rules.<sup>59</sup>

2.53 Several submissions welcomed the proposed exemption from gambling advertising restrictions for racing broadcasts and government related lottery draws, which would be consistent with current regulations.<sup>60</sup>

2.54 Tabcorp expressed concern that the bill may provide an avenue for the granting of a class exemption for synthetic lotteries (where bets are placed on the outcomes of overseas lotteries), noting that several state governments are taking steps to ban synthetic lotteries.<sup>61</sup> Tabcorp and ASTRA proposed that advertisements for fantasy sports betting products should be specifically excluded from the gambling

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56 COMPPS, *Submission 3*, pp. 3–4.

57 Mr Alex Alderson, General Manager, Digital, NRL, *Proof Committee Hansard*, 1 February 2018, p. 20.

58 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 39.

59 EM, p. 50.

60 CRA, *Submission 7*, p. 4; Tabcorp, *Submission 1*, p. 1; Free TV, *Submission 11*, p. 2.

61 Tabcorp, *Submission 1*, p. 1.

advertising restrictions on the basis that the market is small, the products have different messaging and incentives and, unlike traditional wagering products, they are based on skill rather than chance.<sup>62</sup>

2.55 The Flinders Centre for Gambling Research (FCGR) expressed concern regarding any proposal to exclude fantasy sports, noting that they share the same psychological mechanisms as traditional wagering products.<sup>63</sup> Concerns have been raised by researchers about the emergence of daily fantasy sports platforms in Australia and their potential for creating gambling-related problems.<sup>64</sup>

2.56 The Hon Stephen Conroy, RWA, also commented on these proposed exemptions and stated:

I think gambling companies that have advocated that they should be exempt for certain products, whether it's fantasy sports—if you want to watch a growth gambling sector, fantasy sports is coming. We've already seen the extraordinary response to the synthetic lotteries like Lottoland, but with Tabcorp and Lottoland looking to carve themselves out I think that's undermining the government's policy, and I believe it's supported across the parliament. I think these exemptions have undermined the government's policy objectives, and they all ensure that kids are not protected from them.<sup>65</sup>

2.57 Mr Thomson, Alliance for Gambling Reform, similarly argued that the 'risk of loopholes in this area is real and I don't think the case for exemption is strong. I think it's weak and we'd prefer to see them covered'.<sup>66</sup>

2.58 The department noted that the size of the audience is just one of the factors that the ACMA would take into account when considering exemptions.<sup>67</sup>

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62 Tabcorp, *Submission 1*, p. 1.

63 FCGR, *Submission 14*, [p. 3].

64 Chris Isidore, 'Fantasy sports: What is it, anyway?', *CNN*, 6 October 2015, <http://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/index.html>; Dylan Pickering, 'What the rise of daily fantasy sports will mean for problem gambling', *The Conversation*, 5 July 2017, <https://theconversation.com/what-the-rise-of-daily-fantasy-sports-will-mean-for-problem-gambling-79998> (all accessed 12 January 2018).

65 The Hon Stephen Conroy, Executive Director, RWA, *Proof Committee Hansard*, 1 February 2018, p. 28.

66 The Hon Kelvin Thomson, Campaign Organiser, AGR, *Proof Committee Hansard*, 1 February 2018, p. 33.

67 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 41.

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### *Live coverage of a sporting event*

2.59 Proposed subclauses 21(1) and (3) provide that gambling promotional content will be regarded as an online content service in conjunction with live coverage of a sporting event if:

- the content is provided on the service during the period beginning five minutes before the scheduled start of the sporting event, and ending five minutes after the conclusion; and
- the content is broadcast on the service during the period beginning 30 minutes before the scheduled start of the sporting event, and ending 30 minutes after the conclusion.<sup>68</sup>

2.60 VICGT, AGR, and VLGA proposed that the restriction on gambling advertising and promotion be amended to apply to the period from when the broadcast of the sporting event starts and ends, or five minutes before the event starts and five minutes after it ends, whichever is the longer.<sup>69</sup> Victorian Responsible Gambling Foundation (VRGF) argued that consideration needs to be given to extending the restrictions to from the scheduled start of play to include pre- and post-match activity. Mr Phillips commented:

It seemed to us that, if you thought about, say, an AFL grand final or an NRL grand final, once they cross to the ground, from the customer's point of view and particularly from the children's point of view, that is when they're sitting down to watch. In fact, they may be watching and the parents may still be busy at the barbecue or whatever. They are not doing very much. The children are watching. They've crossed to the ground, so the event's begun. Likewise, at the end—so, again, imagine the end of the tennis or the end of a grand final—the players do not leave the arena immediately. Again, from the point of view of the children watching, that is still the event. That is still exciting. That is why we suggested that in fact it should work that way, so that basically—again, normally, just from the point of view of the consumer—what are they seeing and what for them constitutes the live event.<sup>70</sup>

2.61 However, DiGi noted that it may not be possible to place time-based restrictions on the delivery of all online content, and recommended a self-regulatory code-based model where online content providers enforce their own policies to ensure timely takedown of infringing content.<sup>71</sup>

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68 EM, pp. 51–2.

69 VICGT, AGR, and VLGA, *Submission 2*, p. 2.

70 Mr Tony Phillips, Strategic Adviser, Knowledge and Policy, VRGF, *Proof Committee Hansard*, 1 February 2018, p. 11.

71 DiGi, *Submission 12*, [pp. 5–6].

2.62 The department explained that online companies would remain subject to regulation by the ACMA even though they may demonstrate they have adequate mechanisms in place to prohibit advertising during live sport on their platforms.<sup>72</sup>

### *Definition of 'live' coverage*

2.63 VICGT, AGR, and VLGA recommended that the definition of 'live' in relation to sporting events in the bill should be amended so as to capture any replay of a sports event within a 24 hour period. This means that, if a sporting event is happening overseas at 3:00 am in the morning Australian time and then it is replayed in Australia at 7:30 am, it would be captured by the restrictions.<sup>73</sup>

2.64 VICGT, AGR, and VLGA also specifically supported proposed subsection 125A(10) that states that any matter broadcast in an unscheduled break in play during a sporting event would be taken to be part of the live coverage for a sporting event, and gambling advertising restrictions would apply to the material broadcast in that unscheduled break.<sup>74</sup>

2.65 However, ASTRA did not consider that any replacement program matter transmitted by a broadcaster during unscheduled breaks in play should be deemed to be part of the live coverage of the sporting events.<sup>75</sup>

2.66 Free TV submitted that '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 even has taken place.<sup>76</sup> Ms Sarah Waladan stated:

We just wanted to make absolutely sure, because I think the definition refers to the conclusion of an event. We wanted to make absolutely sure that, because there might be several days in between the start of an event and the conclusion of an event and, in relation to those types of events, there may be programming such as news or other programs that are broadcast, the policy should only apply to live sporting events. It shouldn't apply to other programming that may be broadcast in between.<sup>77</sup>

2.67 The department explained that 'the bill defines "live sport" as sport that is live in the ordinary meaning of that word, as happening in real time, and delayed coverage, provided that that coverage commences when the event itself is still in progress'. It

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72 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 41.

73 VICGT, AGR, and VLGA, *Submission 2*, p. 2.

74 VICGT, AGR, and VLGA, *Submission 2*, p. 4.

75 ASTRA, *Submission 4*, pp. 10–11.

76 Free TV, *Submission 11*, p. 2.

77 Ms Sarah Waladan, Head of Legal and Regulatory Affairs, Free TV, *Proof Committee Hansard*, 1 February 2018, p. 16.



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added that this is done to prevent a loophole where somebody might delay a game for five minutes and is no longer live in the ordinary meaning of that word and therefore outside the scope of the rules. It noted that instant replays are categorised as also part of the live sports event but, if it has been delayed by two hours, for example, then it would not be regarded as 'live'.<sup>78</sup>

2.68 The department also noted that, under the provisions of the bill, the ACMA would determine the rules that apply in relation to different time zones across Australia. It noted that time zone issues have been raised by subscription television providers in particular, because they have a single national signal and are unable to 'split out' their signals to different licence areas. Mr David Jansen added 'we expect that the rules will reflect the compromise positions reached in the codes.'<sup>79</sup>

### *Complaints and enforcement*

2.69 Proposed clause 24 of Schedule 8 would provide that a person who has reason to believe that an online content service provider has contravened the rules may complain to the ACMA. Proposed clause 25 of Schedule 8 would set out the mechanisms that may be used by the ACMA to enforce compliance with online content service provider rules. It is anticipated that investigating potential breaches of the rules would be largely complaints-driven.

2.70 VICGT, AGR, and VLGA proposed that broadcasters and online content providers should be required to submit all gambling advertising and promotion content and scheduling covered by the standards to the ACMA to ensure compliance prior to broadcasting.<sup>80</sup> Dr Mark Zirnsak, Chair, VICGT, commented that:

In terms of this bill, we support it and its passage, although we would prefer to see some amendments which are outlined in the submission. Particularly, we take the view similar to what already happens with alcohol advertising that there be a requirement for gambling advertising to be submitted to ACMA prior to the advertising taking place and advertising plans be submitted to ACMA in advance of the broadcast. We think that the complaints system effectively means the harm has already occurred, and then you're potentially looking at placing sanctions on people after they've already been able to get away with whatever they shouldn't have been doing.<sup>81</sup>

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78 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018 p. 39.

79 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018 p. 41.

80 VICGT, AGR, and VLGA, *Submission 2*, pp. 1 and 4.

81 Dr Mark Zirnsak, Chair, VICGT, *Proof Committee Hansard*, 1 February 2018, p. 30.

2.71 The department noted that, ultimately, it is up to the online service providers to ensure that they are compliant with the regulations in the content that they provide.<sup>82</sup>

2.72 SBS noted that the proposed complaints-handling process would establish different complaint pathways for the same content provided on broadcast television (where audiences must complain first to the provider before complaining to the ACMA) and via an online content service (where audiences are not required to attempt to resolve the complaint with the online content service provider).<sup>83</sup> It also had significant concerns about the provision for the ACMA to impose financial penalties on SBS in relation to online content services and requested that, should SBS not be entirely exempted from the operation of Schedule 8, the bill be amended so that civil penalties cannot be applied to SBS.<sup>84</sup>

2.73 The department responded to this concern by noting that SBS is a significant player in the live sports game and that the application of the proposed amendments to SBS is 'consistent with the government's intention to ensure parity across all the players'. It noted that the ACMA would be the point of contact for any complaints arising on potential contraventions of rules, rather than SBS which is currently the case.<sup>85</sup>

### **Comments on specific measures—Section 125A (Program standards)**

2.74 Proposed section 125A would provide the Minister with the power to direct the ACMA to determine a program standard about the broadcasting of gambling promotional content, should existing industry codes of practice not be amended to include the new gambling promotions restrictions.

#### ***Minister's power to direct the ACMA***

2.75 Some submitters were concerned that the bill does not set out the conditions under which the Minister would trigger such a process, and proposed that the ACMA should be required to determine a standard consistent with current requirements for children's television and Australian content.<sup>86</sup>

2.76 ASTRA proposed that the Minister's power in the proposed subsection 125A(1) should reflect the existing standards power in the BSA so that, in

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82 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 40.

83 SBS, *Submission 9*, p. 6; see also DiGi, *Submission 12*, [p. 6].

84 SBS, *Submission 9*, p. 6.

85 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 38.

86 ACCM, *Submission 8*, pp. 3–4; Flinders Centre for Gambling Research (FCGR), *Submission 14*, [p. 2].

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order for the ACMA to be empowered to make standards, it must be satisfied that there is convincing evidence that a code has failed to meet policy objectives, and/or if an appropriate code has not been developed by a specified date or within a specified time period. Such a direction should be subject to disallowance, and any timeframe specified by the Minister for the ACMA to determine a standard should not precede any period under which either House of Parliament may disallow such a legislative instrument.<sup>87</sup>

2.77 CRA noted that the existing section 125 already provides a broad power for the ACMA to determine standards in certain circumstances, and recommended that commercial radio broadcasters be specifically excluded. CRA added that if there are areas of section 125A that the committee believes are not already covered by the existing section 125, then these aspects could be expressly applied to commercial radio broadcasts.<sup>88</sup>

2.78 The department explained that the bill does not set any conditions under which the Minister would direct the ACMA to determine a program standard under proposed section 125A but that, if the government formed a view that the code process is failing, then the Minister would be free to issue a direction. The department commented further that 'every indication that we have at the moment is that the code process is working effectively and there will be no need either to issue a direction or for the ACMA consequently to determine a program standard'.<sup>89</sup>

### ***Explanatory matter and record keeping***

2.79 Proposed subsection 125A(6) would provide for certain explanatory matter to be provided in a manner specified in the standard. Proposed subsection 125A(7) states that a gambling promotion program standard may make provision for record keeping. A similar clause exists in relation to online content service provider rules in clause 13(3) of Schedule 8.

2.80 Several submitters expressed concern about the proposed requirement for providers to publish rules on-air and recommended that the bill ensure that they retain flexibility as to how explanatory content is provided to ensure that it is relevant to their platforms and audiences. They also submitted that the record keeping requirements would impose an additional compliance burden on both broadcasters and online content service providers, and submitted that they exceed record keeping requirements in existing codes of practice.<sup>90</sup>

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87 ASTRA, *Submission 4*, p. 7.

88 CRA, *Submission 7*, p. 2.

89 Mr David Jansen, Director, Broadcasting Content, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 38.

90 ASTRA, *Submission 4*, pp. 9–10; SBS, *Submission 9*, p. 6; Free TV, *Submission 11*, p. 3; Communications Alliance, *Submission 6*, p. 1; CRA, *Submission 7*, p. 1.

2.81 The department stated that the ACMA is mindful of concerns raised by stakeholders regarding unnecessary financial and administrative burdens on online content service providers as part of the compliance regime. It noted that the cost of applying government regulation is a matter for online content service providers to ensure that their services are in line with government regulation as part of their business models.<sup>91</sup>

### **Committee view**

2.82 The committee welcomes the Government's commitment to protecting children from exposure to gambling advertising during the broadcast of live sporting events. It is clear that the amendments proposed in the bill are consistent with the Government's policy intent to establish a clear and practical zone for families and children to watch live sports.

2.83 The committee notes that the proposed amendments in the bill would establish a legislative framework for applying gambling promotions restrictions during live coverage of sporting events to online content services. It would also establish a regulatory mechanism that could be used to apply the new gambling promotions restrictions to relevant broadcasting service providers should existing industry codes of practice not be amended to include the restrictions. The committee considers this to be a significant initiative and one which will ensure that community expectations in relation to restrictions on gambling advertising in the online environment are met.

2.84 The committee agrees with the overall approach and drafting of the bill. It notes that online services are not currently subject to any gambling promotion restrictions, and that the amendments are intended to extend the restrictions that currently apply to the broadcast of gambling promotional content during live sport to the online environment. In doing so, it would ensure that there is a level playing field between competing services and platforms, and that the ACMA becomes the single, independent regulator for both broadcasters and online content service providers in relation to gambling promotional content.

2.85 The committee notes that the department has engaged with industry during the preparation of this bill, although it acknowledges that some stakeholders have recommended specific exemptions, raised technical issues or sought clarification on specific matters during this inquiry.

2.86 In this report the committee has highlighted drafting matters raised by stakeholders, and it has specifically drawn some issues to the Government's attention for consideration. These technical drafting matters do not change the committee's overall view on the bill. The committee notes that parts of the explanatory memorandum could be revised to provide the clarification sought by stakeholders.

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91 Dr Carolyn Patteson, First Assistant Secretary, DOCA, *Proof Committee Hansard*, 1 February 2018, p. 37.

**Recommendation 1**

**2.87 The committee recommends that the bill be passed.**

**Senator Jonathon Duniam**

**Chair**

