

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Online Content Service Provider Rules) 2018

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Online Content Service Provider Rules) 2018 (the instrument)* under clauses 11, 16(2), 19, 22 and 23 of Schedule 8 to the *Broadcasting Services Act 1992 (the Act)*.

Clause 11 of Schedule 8 to the Act permits the ACMA to make, by legislative instrument, online content service provider rules about gambling promotional content provided on an online content service in conjunction with live coverage of a sporting event.

Subclause 16(2) of Schedule 8 to the Act permits the ACMA, by legislative instrument, to determine that online content services included in a specified class of online content services are exempt from one or more specified provisions of the online content service provider rules.

Under clause 19 of Schedule 8 to the Act, the online content service provider rules may provide that a specified thing is taken to be, or taken not to be, a ***sporting event*** for the purposes of Schedule 8 to the Act.

Under clause 22 of Schedule 8 to the Act, the online content service provider rules may provide a meaning of ***scheduled start*** for the purposes of the application of Schedule 8 to the Act to a specified sporting event.

Under clause 23 of Schedule 8 to the Act, the online content service provider rules may provide a meaning of ***conclusion*** for the purposes of the application of Schedule 8 to the Act to a specified sporting event.

Purpose and operation of the instrument

On 6 May 2017, the Australian Government announced a package of broadcast and content reforms including restrictions on gambling advertising during coverage of live sporting events on broadcast and online platforms. The instrument applies these restrictions to ***online content services*** (as defined in clause 3 of Schedule 8 to the Act). The broadcasting restrictions are contained in broadcasting codes of practice.

The legislative basis for the instrument is Schedule 8 to the Act, which was established by the *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (in force from 12 April 2018).

The gambling promotional restrictions in the instrument are intended to be as consistent with the broadcasting codes of practice as is practicable.

The instrument applies to online content services that provide coverage of live sporting events.

Key concepts

The instrument relies on the following definitions and concepts as included in Schedule 8 to the Act and the instrument:

- ***Australian licensed wagering service*** is defined in section 6 of the instrument;
- ***commentator betting odds promotion*** is defined in clause 2 of Schedule 8 to the Act;

- **conclusion**, in relation to a sporting event, is defined in section 6 of the instrument;
- **gambling promotional content** is defined in clause 2 to Schedule 8 to the Act;
- **in conjunction with**, when used in relation to live coverage of a sporting event, has the meaning given by clause 21 of Schedule 8 to the Act, which provides that:
 - gambling promotional content that consists of a commentator betting odds promotion or a representative venue-based promotion is provided on an online content service in conjunction with live coverage of a sporting event if the promotion is provided on the online content service in the period beginning 30 minutes before the scheduled start of the sporting event and ending 30 minutes after the conclusion of the sporting event;
 - other gambling promotional content is provided on an online content service in conjunction with live coverage of a sporting event if the promotion is provided on the online content service in the period beginning 5 minutes before the scheduled start of the sporting event and ending 5 minutes after the conclusion of the sporting event;
- **live**, in relation to a sporting event, is defined in section 2 of Schedule 8 to the Act;
- **online content service** is defined in clause 3 of Schedule 8 to the Act;
- **promotion of odds** is defined in section 6 of the instrument;
- **representative venue-based promotion** is defined in clause 2 of Schedule 8 to the Act;
- **scheduled break**, in relation to a sporting event, is defined in subsection 15(4) of the instrument;
- **scheduled start**, in relation to a sporting event, is determined by reference to section 10 of the instrument;
- **sporting event** has the meaning affected by clause 19 of Schedule 8 to the Act and section 8 of the instrument;
- **unscheduled break** is defined in section 6 of the instrument.

The Explanatory Memorandum to the Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 (the EM to the Bill) provides additional information about intended application. Particular extracts are replicated below and the full EM is available here: www.aph.gov.au

The gambling promotional restrictions in the instrument are summarised below.

Restrictions on the provision of gambling promotional content

- At all times:
 - no commentator betting odds promotion or representative venue-based promotion is permitted in conjunction with a live coverage of a sporting event (sections 11 and 13 of the instrument).
- Between the hours of 5.00 am and 8.30 pm:
 - no gambling promotional content is permitted in conjunction with live coverage of a sporting event (see section 12 of the instrument). This includes the five minutes before the scheduled start of the sporting event and the five minutes following the conclusion of the sporting event (see clause 21 of Schedule 8 to the Act).
- Between the hours of 8.30 pm and 5.00 am:
 - promotion of odds is not permitted during coverage of a live sporting event, except:
 - in the five minutes before the scheduled start of the sporting event (see paragraph 14(2)(a) of the instrument);
 - in the five minutes after the conclusion of the sporting event (see paragraph 14(2)(b) of the instrument); and

- in limited circumstances during specified events of extended duration, such as the Olympics (see subsection 14(3) of the instrument).
- gambling promotional content (other than a commentator betting odds promotion, a representative venue-based promotion or a promotion of odds) is not permitted during coverage of a live sporting event, except:
 - during an unscheduled break in play (see paragraph 15(2)(a) of the instrument);
 - in the five minutes before the scheduled start of the sporting event (see paragraph 15(2)(b) of the instrument);
 - in the five minutes after the conclusion of the sporting event (see paragraph 15(2)(c) of the instrument);
 - during a scheduled break in the sporting event (see subsection 15(3) of the instrument).

Exceptions and safeguards

The instrument includes certain requirements in relation to the provision of gambling promotional content in conjunction with coverage of a live sporting event (where that coverage is permitted by the instrument). Specifically:

- section 16 sets out restrictions in relation to representatives of gambling organisations; and
- section 17 sets out certain requirements for gambling promotional content to be socially responsible.

Exceptions to the restrictions also exist:

- for certain circumstances which are outside the control of the relevant online content service provider (see section 18 of the instrument); and
- in relation to some limited kinds of gambling promotional content (see section 19 of the instrument).

An exception for accidental or incidental provision of gambling promotional content is also provided for in clause 14 of Schedule 8 to the Act.

Record-keeping rules

Record-keeping rules apply to all online content service providers who provide gambling promotional content in conjunction with live coverage of a sporting event (see Part 6 of the instrument).

Class exemption

The instrument also sets out a class exemption for Australian licensed wagering services. These services are exempt from the gambling promotional restrictions in the instrument but must still meet other obligations, including record-keeping and the safeguards in sections 16 and 17 of the instrument.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

A number of expressions used in the instrument are defined in the Act. The instrument does not apply, adopt, or incorporate any other matter by reference.

The Act may be obtained from the Federal Register of Legislation (www.legislation.gov.au). The Act, as in force from time to time, is incorporated in accordance with section 10 of the *Acts Interpretation Act 1901* and subsection 13(1) of the LA.

Consultation

Before the instrument was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

The ACMA undertook an initial round of consultation between 12 April 2018 and 10 May 2018 on a draft instrument. During this period, the ACMA also met with representatives of several stakeholders that would be affected by the instrument. As a result of this consultation, the ACMA received fourteen submissions (one of which was confidential). The non-confidential submissions were published on the ACMA's website.

In response to the submissions, the ACMA revised the draft instrument and conducted a second round of consultation between 11 July 2018 and 26 July 2018. The revised draft instrument took into account stakeholder comments received during the initial consultation in relation to the following areas:

- enhanced flexibility for providers in notifying end-users of the scheduled start of a sporting event
- removal of a previously proposed class exemption for small online content service providers
- restriction of a proposed exemption for age-restricted services to providers that are Australian-licensed wagering operators
- a new exception from a breach in certain circumstances that are beyond the control of the provider
- an extended 30 day implementation period before the new rules come into force
- inclusion of additional notes to provide greater clarity about application of the instrument
- an amendment to align listed scheduled breaks for netball with other similar sports
- inclusion of a one-hour qualification to the exception in relation to time changes which replicates the corresponding exception/qualification in broadcasting codes.

The ACMA received twelve further submissions which were published on the ACMA's website.

The final instrument took into account stakeholder comments received during the second round of consultation in relation to the following areas:

- exceptions for certain circumstances beyond the control of the service provider – to address concerns that the original drafting created an onerous test; and
- record-keeping rules – to introduce additional flexibility in relation to requirements to keep audio-visual and written records.

Both consultation rounds were publicised via a media release, on social media and via direct contact with a broad range of stakeholders.

Regulatory impact assessment

A Regulation Impact Statement (**RIS**) was prepared by the Department of Communications and the Arts to accompany the Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017. On 22 November 2017, the Office of Best Practice Regulation advised that the RIS requirements had been met by the Department and no further action is required from the ACMA (OBPR reference number: 21986).

The RIS is available at: www.aph.gov.au

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below in **Attachment B** has been prepared to meet that requirement.

Notes to the

Broadcasting Services (Online Content Service Provider Rules) 2018

Part 1–Preliminary

Section 1 Name

This section provides for the instrument to be cited as the *Broadcasting Services (Online Content Service Provider Rules) 2018*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day that is 30 days after it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed at www.legislation.gov.au.

Section 3 Authority

This section identifies the provisions of the Act that authorise the making of the instrument, namely clauses 11, 16(2), 19, 22 and 23 of Schedule 8 to the *Broadcasting Services Act 1992 (the Act)*.

Section 4 Application of this instrument

This section provides that Parts 2 to 6 of the instrument apply to online content service providers who provide gambling promotional content on online content services in conjunction with live coverage of a sporting event. A class exemption from Parts 3 and 4 of the instrument is included in Part 7.

Clause 7 of Schedule 8 to the Act sets out when content is provided on an online content service. The EM to the Bill relevantly explains that:

Proposed clause 7 of new Schedule 8 would set out when content is *provided on* an online content service. ...

Subclause 7(1) would provide that, for the purposes of proposed Schedule 8, content is *provided on* an online service if the content is delivered by, or accessible to end-users **using**, the online content service.

Subclause 7(2) would provide that, for the purposes of proposed Schedule 8, content is *provided on* an online content service to a particular end-user if the content is delivered to the end-user **using**, the online content service.

References to content being ‘delivered by’ the service and ‘accessible to’ the end-user are intended to cover both a situation where the service may actively deliver content to the end-user (for example, through push-technology), and where the service may not deliver content to any particular end-user, but merely make it available on a service in a form which allows end-users to access it should they wish.

[emphasis added]

Clause 9 of Schedule 8 provides that an extended meaning of ‘using’ applies for the purposes of Schedule 8. The extended meaning is applicable when determining when content is provided on an online service (see above). As the EM to the Bill explains:

Proposed clause 9 is based on section 24 of the [*Telecommunications Act 1997*], and would provide that a reference in Schedule 8 to *using* a thing is a reference to using the thing either in isolation, or in conjunction with one or more other things.

This is intended to overcome potential difficulties in attributing instrumentality to a single element of a system, where the whole system is required to perform an act.

[...]

Clause 17 of Schedule 8 clarifies when an online content service is taken to be an online content service in its own right. This is relevant where live coverage of a sporting event is provided on a distinct part of an online content service. In such circumstances, the effect of clause 17 is that the instrument only applies to the distinct part(s) of the online content service which are providing live coverage of a sporting event.

It is also relevant to note that Schedule 8 sets out limitations to the applicability of the instrument. In particular:

- clause 4 of Schedule 8 to the Act provides that the instrument does not apply to an exempt online simulcast service; and
- clause 14 of Schedule 8 to the Act provides that the instrument does not apply in relation to the provision of gambling promotional content on an online content service if that content is provided as an accidental or incidental accompaniment to the provision of other content, in circumstances where the provider of the online content service does not receive any direct or indirect benefit (whether financial or not) for providing the gambling promotional content.

Section 5 References to other instruments

This section provides that in the instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force at the commencement of the instrument.

Part 2–Interpretation

Section 6 Definitions

This section defines a number of key terms used throughout the instrument.

A number of other expressions used in the instrument are defined in clause 2 of Schedule 8 to the Act, and elsewhere in that Schedule.

Section 7 References to time

Section 7 provides that for references to time, the applicable time is the time where the end-user of the content service is located. This is required because many of the restrictions in the instrument rely on particular time periods.

This interpretation is designed to provide maximum safeguards for end-users. Subsection 18(4) provides an exception for circumstances where, based on all the information reasonably ascertainable by the online content service provider, the end-user appeared to be at a particular location (the purported location) and the provision of gambling promotional material would not have contravened Parts 3 and 4 had the end-user been at the purported location.

Section 8 Sporting events

Section 8 defines sporting event. Subsection 8(1) clarifies that the following things are a sporting event:

- a single sports event, match or game;

- a single sports event, match or game that extends over multiple days;
- tournaments for a single sports event that involves concurrent or consecutive games or matches, whether over a single or multiple days;
- an electronic games competition.

Subsection 8(2) clarifies that horse racing, harness racing and greyhound racing are not a sporting event for the purposes of the instrument.

For the purposes of this provision, a tournament will not be read to mean a complete season of a sporting competition, where non-consecutive games or matches of a single sport are played across multiple days, weeks or months, with substantial periods between games or matches.

This section of the instrument should be read in conjunction with subclause 19(1) of Schedule 8 to the Act, which sets out that the Summer Olympic Games, Winter Olympic Games, Commonwealth Games and any similar games are a sporting event.

Section 9 Play

Section 9 defines play. Under subsection 9(1) play covers the actual play or active progress of a sporting event, as well as stoppages for injuries, adjudications by game officials, time outs and substitutions. Subsection 9(2) makes clear that play can extend over multiple days/events if the sporting event runs over multiple days/events, even if a provider uses multiple streams to deliver content. Subsection 9(2) may apply to single sporting events of standard duration, as well as sporting events that span multiple matches, games, races or similar or multiple days of play.

Section 10 Scheduled start of a sporting event

Section 10 provides that the scheduled start of a sporting event will be:

- the specified time live coverage of play will commence (which cannot be earlier than actual play) as publicised or notified in a manner that is clear and prominent to potential end-users of the online content service, at least 24 hours before commencement of the coverage, or
- otherwise, the time the live coverage of a sporting event commences.

Part 3—Prohibition on gambling promotional content – 5.00 am to 8.30 pm

Section 11 Prohibition of gambling promotional content that consists of commentator betting odds promotions or representative venue-based promotions

Section 11 prohibits online content service providers from providing gambling promotional content that consists of a commentator betting odds promotion or a representative venue-based promotion in conjunction with live coverage of a sporting event, between 5:00 am and 8:30 pm. The effect of clause 21 of Schedule 8 to the Act is that this prohibition begins 30 minutes before the scheduled start of the sporting event and ends 30 minutes after the conclusion of the sporting event. Both commentator betting odds promotions and representative venue-based promotions are defined at clause 2 of Schedule 8 to the Act.

Section 12 Prohibition of gambling promotional content (other than a commentator betting odds promotion or a representative venue-based promotion)

Section 12 sets out the general prohibition between 5.00 am and 8.30 pm on gambling promotional content (other than a commentator betting odds promotion or a representative venue-based promotion) in conjunction with live coverage of a sporting event. The effect of clause 21 of Schedule 8 to the Act is that this prohibition begins five minutes before the scheduled start of the sporting event and ends five minutes after the conclusion of the sporting event.

Part 4—Rules for gambling promotional content – 8.30 pm to 5.00 am

Section 13 Prohibition of gambling promotional content that consists of commentator betting odds promotions or representative venue-based promotions

Section 13 prohibits online content service providers from providing gambling promotional content that consists of a commentator betting odds promotions or representative venue-based promotions in conjunction with live coverage of a sporting event, between 8:30 pm and 5:00 am. The effect of clause 21 of Schedule 8 to the Act is that this prohibition begins 30 minutes before the scheduled start of the sporting event and ends 30 minutes after the conclusion of the sporting event. Both commentator betting odds promotions and representative venue-based promotions are defined at clause 2 of Schedule 8 to the Act.

Section 14 Restrictions on promotion of odds

Section 14 sets out the restrictions between 8.30 pm and 5.00 am on promotion of odds provided on an online content service in conjunction with live coverage of a sporting event.

Subsection 14(1) prohibits, subject to subsections 14(2) and 14(3), promotion of odds between 8.30 pm and 5.00 am on an online content service in conjunction with live coverage of a sporting event.

Subsection 14(2) permits promotion of odds in the following limited circumstances:

- in the five minutes before the scheduled start of the sporting event; and
- in the five minutes after the conclusion of the sporting event.

Subsection 14(3) permits promotion of odds during play in multiple day and multiple event sporting events in accordance with the listed frequency.

Section 15 Restrictions on other gambling promotional content

Section 15 sets out the restrictions between 8.30 pm and 5.00 am on gambling promotional content provided in conjunction with live coverage of a sporting event that is not otherwise dealt with in Part 4 of the instrument. Namely, this section deals with gambling promotional content that is not commentator betting odds promotions, representative venue-based promotions or promotions of odds.

In general, relevant gambling promotional content is prohibited (subsection 15(1)), but is permitted in the following limited circumstances:

- during an unscheduled break in play (see paragraph 15(2)(a));
- in the five minutes before the scheduled start of the sporting event (see paragraph 15(2)(b));
- in the five minutes after the conclusion of the sporting event (see paragraph 15(2)(c)); and
- during scheduled breaks in play, as listed (see subsections 15(3) and (4)).

Part 5—Safeguards and exceptions

Section 16 Restrictions relating to representatives of gambling organisations

Section 16 provides that if an online content service provider provides permitted gambling promotional content, any representative of a gambling organisation who features in that content must:

- be clearly identified;
- not appear as a commentator; and
- not appear at or around the venue, or be represented as being at or around the venue, where the sporting event is taking place.

Section 17 Gambling promotional content to be socially responsible

Section 17 sets out, for permitted gambling promotional content, certain requirements relevant to social responsibility, including that the content should:

- not be directed to children or portray children as participating in betting or gambling;
- not make exaggerated claims or promote betting or gambling as a way to success or achievement; and
- not associate betting or gambling with alcohol.

Subsection 17(2) requires that permitted gambling promotional content must conclude with a responsible gambling message. Responsible gambling message is defined at section 6 of the instrument.

Section 18 Exceptions for certain circumstances beyond the control of the service provider

Section 18 sets out circumstances when an online content service provider will not contravene specified parts of the instrument where certain circumstances are beyond the control of the provider.

The exception at subsection 18(1) states that a provider will not contravene Parts 3 or 4 of the instrument if all of the following occur:

- the sporting event commences at a different time to the scheduled start of a sporting event, as publicised in accordance with paragraph 10(a) of the instrument;
- the provider was only made aware less than one hour prior to the scheduled commencement of the sporting event that the actual commencement would be different to the scheduled start as publicised; and
- the provision of gambling promotional content would not have contravened Parts 3 or 4 had the sporting event commenced at the scheduled start as publicised.

The exception at subsection 18(2) states that a provider will not contravene Parts 3, 4 or 5 where all of the following occur:

- the sporting event originated from outside Australia;
- the provider did not add the gambling promotional content;
- it was not reasonably practicable for the provider to remove the gambling promotional content; and
- the provider did not receive any benefit (whether direct or indirect) from that gambling promotional content.

The exception at subsection 18(3) states that a provider will not contravene Parts 3, 4 or 5 where the reference occurs as part of live coverage of the sporting event and consists of the name of the sporting venue, player's or official's uniform or advertising at the venue if the provider does not receive any benefit for showing that content.

The exception at subsection 18(4) states that a provider will not contravene Parts 3 or 4 where all of the following occur:

- based on all the information reasonably ascertainable by the provider, the end-user appeared to be at a particular location (*the purported location*); and
- the provision of the gambling promotional content would not have contravened Parts 3 or 4 had the end-user been at the purported location.

Section 19 Exceptions for certain kinds of gambling promotional content

Section 19 provides that an online content service provider will not contravene Parts 3, 4 or 5 of the instrument in respect of any gambling promotional content that:

- relates solely to Government sanctioned lotteries, lotto, keno or competitions;
- relates to entertainment or dining facilities at places where betting or gambling takes place, provided that the promotional content does not draw attention to betting or gambling; or
- relates to tourism, provided that the promotional content does not draw attention to betting or gambling.

Part 6–Record-keeping

Section 20 Copies of commercial arrangements relating to gambling promotional content

Section 20 requires an online content service provider who provides gambling promotional content on an online content service in conjunction with live coverage of a sporting event to:

- keep a copy of any contracts or written arrangements under which the provider agrees to provide gambling promotional content in conjunction with live coverage of the sporting event; and
- ensure that copies of all such contracts or written arrangements are kept while the contract or agreement is in place and for six months following its expiry.

Section 21 Record of placement of gambling promotional material to be kept

Subsection 21(1) requires an online content service provider who provides gambling promotional content on an online content service in conjunction with live coverage of a sporting event to make records sufficient to enable the provider's compliance with the instrument to be readily ascertained, including without limitation:

- written records of the date and duration of the content stream of the live coverage of the live sporting event, and the location of relevant end-users where known; and
- audio or audio-visual records, as the case may be, of the stream of the live coverage of the sporting event.

Subsection 21(2) requires a written record made in accordance with this section to be kept for at least six months after the day the live coverage of the sporting event to which the record relates was provided on the online content service.

Subsection 21(3) requires an audio or audio-visual record made in accordance with this section to be kept for at least six weeks after the day of the live coverage or, if the provider becomes aware before the end of the six weeks that a complaint has been made about compliance with the instrument, for at least 90 days after the day the live coverage was provided.

The ability for the ACMA to require that detailed records be kept to demonstrate compliance with the instrument is clearly contemplated by subclause 13(3) of Schedule 8 to the Act. The record-keeping requirements in Part 6, and in paragraphs 21(1)(a) and (b) in particular, are the minimum records the ACMA expects a provider to make. However, the obligation is on the provider to ensure that all necessary records are made to enable their compliance to be ascertained. Therefore, depending on the circumstances, the provider may need to make other written and/or audio or audio-visual records to demonstrate compliance with the instrument. This allows some flexibility for the provider to determine which records, or combination of records taken together, given the particular features of their service, will help to demonstrate their compliance with the instrument.

Section 22 Make records available to the ACMA

This section requires online content service providers to make available to the ACMA, within 10 business days of receipt of a written request from the ACMA, any record retained under Part 6 of the instrument.

Part 7—Class Exemption

Section 23 Exemption for Australian licensed wagering services

This section provides a class exemption for *Australian licensed wagering services*. These services are exempt from the restrictions on gambling promotional content at Parts 3 and 4 of the instrument if the provision of the service is limited to customers of that wagering service who are adults and who are logged into their wagering account before access to the content stream is available.

In order for the exemption to apply, the terms of use for all content streams of these services must provide a notification that the service is exempt from Parts 3 and 4 of the instrument and a reminder that the customer must take all reasonable steps to prevent a child from viewing the content stream.

Further, any advertisement that promotes live coverage of a sporting event on an exempt service must include a notice that the service is exempt from Parts 3 and 4 of the instrument.

Services that qualify for an exemption under this section are still subject to the other requirements in the instrument including record-keeping (see Part 6) and safeguards (see Part 5).

Australian licensed wagering service is defined at section 6 of the instrument.

Statement of compatibility with human rights

Prepared by the Australian Communications and Media Authority under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Broadcasting Services (Online Content Service Provider Rules) 2018

Overview of the instrument

The instrument seeks to reduce the exposure of children to gambling promotional content during online coverage of live sporting events. The particular focus on the child audience is demonstrated by having stronger protections during times when children will be more likely to be part of the audience (5.00 am to 8.30 pm), and the availability of a class exemption for Australian licensed wagering services that do not permit persons under 18 to access the service.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia. It is noted that the Department of Communications and the Arts also developed a statement of compatibility with human rights to accompany the Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017, which introduced the legislative amendments that, once passed, enabled the ACMA to make this instrument. That statement is available at: www.aph.gov.au

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument engages the following rights or freedoms:

- Best interests of the child: Article 3(1) of the Convention on the Rights of the Child (**CRC**)
- Freedom of expression: Article 19 of the International Covenant on Civil and Political Rights (**ICCPR**)

Best interests of the child

Article 3(1) of the CRC provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Legislative, administrative and judicial bodies are to take active measures to protect children's rights, promote their wellbeing and consider how children's rights and interests are or will be affected by decisions and actions.

The instrument supports the best interests of the child by providing mechanisms to ensure that online content service providers respect community standards and reduce the exposure of children to gambling promotional content during coverage of live sports. The instrument includes stronger restrictions during 5.00 am to 8.30 pm, when children are more likely to be part of the audience. The restrictions in the instrument reflect community concern that exposing children to gambling advertising could position gambling as a normal part of the sports viewing experience, which is contrary to the best interests of the child.

Freedom of expression

Article 19 of the ICCPR provides for the right to freedom of expression, which is one of the essential foundations of a democratic society. Article 19(2) of the ICCPR recognises the right to receive and impart information and ideas through any medium, including written and oral communication, the media and commercial advertising. The guarantee of freedom of expression extends to protecting

expression that may be regarded as offensive, but it is not an absolute or unfettered right and it carries special responsibilities. The right may be restricted, as provided by law, where it is necessary to do so to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations on the right must be necessary and proportionate to achieve the desired policy purpose.

The instrument engages the right to freedom of expression by restricting gambling promotional content provided on online content services in conjunction with live coverage of a sporting event. This will engage the rights of online content services that are provided by individuals (rather than corporations) and the rights of audiences by restricting their freedom to access gambling promotional material while accessing online streaming of live sport.

The purpose of the restrictions in the instrument is to protect vulnerable Australians, particularly children, from access to potentially harmful gambling promotional content. This is relevant to the protection of public morals within the meaning of Article 19 of the ICCPR. The powers of the ACMA to impose the restrictions are defined narrowly, and targeted clearly at this policy outcome, as is the instrument.

For example, the definition of online content service in clause 3 of Schedule 8 to the Act requires such a service to have a geographical link to Australia and excludes various services such as services in relation to voice calls, video calls, instant messaging, SMS, MMS, facsimile and others. In addition, clause 6 of Schedule 8 to the Act clarifies that a person does not provide an online content service merely because they supply an internet carriage service that enables content to be delivered or accessed, or provide a billing or fee collection service.

Further, clause 32 of Schedule 8 to the Act provides that neither the Schedule nor the instrument have effect to the extent (if any) that their operation would infringe any constitutional doctrine of implied freedom of political communication. This ensures that the relevant provisions are consistent with the right to freedom of expression as it relates to freedom of political communication.

Conclusion

The instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent to which the instrument engages Article 3(1) of the CRC, it promotes the best interests of the child by providing a mechanism to regulate access to potentially harmful gambling promotional content that is provided in conjunction with coverage of live sport online. To the extent that it engages Article 19 of the ICCPR, any limitation on the right to freedom of expression is reasonable, necessary and proportionate to the objective of protecting public morals by reducing the exposure of vulnerable Australians, including children, to such content.