Investigation report no. BI-654 and BI-655

| Summary |  |
| --- | --- |
| **Licensee [service]** | Foxtel Cable Television Pty Limited [ESPN] |
| **Findings** | No breach of clause 4 of Appendix A to the Code  No breach of clause 5 of Appendix A to the Code  No breach of clauses 6 and 7 of Appendix A to the Code |
| **Relevant legislation/Code** | *Broadcasting Services Act 1992* (the **BSA**)  *Broadcasting Services (Online Content Service Provider Rules) 2018* (**Online Rules**)  *Subscription Broadcast Television Codes of Practice 2013* (the **Code**) |
| **Program [type]** | *NBA Miami vs Boston* [live sport] |
| **Date of broadcast** | Game 1 was broadcast on 18 May 2022 [BI-654]  Game 6 was broadcast on 28 May 2022 [BI-655] |
| **Date finalised** | 18 August 2023 |
| **Type of service** | Subscription broadcasting – television |

**Background**

In September 2022, the Australian Communications and Media Authority (the **ACMA**) commenced an investigation under the BSA into the streaming of US National Basketball Association (**NBA**) finals on Kayo Sports between Miami and Boston on 18 May 2022 (**Game 1**) and on 28 May 2022 (**Game 6**).

Foxtel Cable Television Pty Limited (the **Licensee**) stated that the live streams of Game 1 and Game 6 on Kayo Sports were exact simulcasts of content on ESPN, as provided by ESPN Australia Pty Ltd (the **Channel Supplier**). The ACMA found that Game 1 and Game 6 on Kayo Sports were exempt online simulcast services as defined in clause 4 of Schedule 8 to the BSA and therefore not subject to the Online Rules.

As the streams of Game 1 and Game 6 were not subject to the Online Rules, the ACMA has investigated whether the subscription broadcasting service, provided by the **Licensee**, complied with the Code.

The Licensee confirmed that Game 1 and Game 6 were ‘live sporting events’ for the purposes of the Code.

Issue 1: Promotion of Betting Odds

Finding

The ACMA’s view is that the Licensee did not breach clause 5 of Appendix A to the Code for broadcasting betting odds promotions (**Promotion of Betting Odds**) by a commentator in connection with Game 1 and Game 6.

The ACMA’s view is that the Licensee did not breach clauses 6 and 7 of Appendix A to the Code for broadcasting a Promotion of Betting Odds by a clearly identifiable representative of a gambling or betting organisation in Game 6.

Reasons

To assess compliance, the ACMA asked the following questions:

1. Did Game 1 and Game 6 feature a Promotion of Betting Odds?

If yes, then:

1. What were the relevant Code provisions?
2. Was the Promotion of Betting Odds presented by a ‘commentator’, or by a ‘discrete or distinguishable contributor’ such as a ‘clearly identified’ representative of a gambling or betting organisation (see the Code definition for ‘commentator’ in clause 21 of Appendix A)?
3. Was a Promotion of Betting Odds shown at a prohibited time during the ‘Live Sporting Event’?

**Did Game 1 and Game 6 feature a Promotion of Betting Odds?**

The Licensee confirmed that a Promotion of Betting Odds was broadcast 8 minutes prior to the commencement of Play of Game 1 and Game 6.

Game 1

Game 1 was broadcast live on ESPN on 18 May 2022 at 10:28am (AEST). The complaint to the ACMA was that betting odds were provided by an ESPN commentator at the venue at around the 13-minute mark of the coverage and less than 30 minutes before the start of the game.

The complainant alleged:

The ESPN broadcast had an ESPN commentator from the host venue, presenting betting odds on a live broadcast around eight minutes before the start of the game. This breaches the… broadcasting rule due to being only eight minutes before play began.

The Promotion of Betting Odds was presented by Presenter 1 approximately 8 minutes prior to the commencement of Play of Game 1. Presenter 1 appeared in front of a basketball court wearing a suit and earpiece with an ESPN microphone and stated his intention to provide a ‘Sports Centre update brought to you by [international betting company] here from FTX Arena in Miami…’.

Presenter 1 then discussed the odds, and in particular, odds for the Australian market, for the upcoming game. Presenter 1’s segment was bookended with the [international gambling company] logo, which appeared intermittently throughout the segment.

Game 6

Game 6 was broadcast live on ESPN on 28 May 2022. The complaint to the ACMA was that 2 instances of betting odds were broadcast less than 10 minutes before the start of an NBA game, in breach of the Code. The game was broadcast on ESPN at 10:40am (AEST). The complainant also alleged a gambling representative appeared to be part of the commentary team at the venue.

The first Promotion of Betting Odds was presented by Presenter 1 approximately 8 minutes prior to the commencement of Game 6. Presenter 1 wore a suit, held an ESPN microphone and appeared courtside at FTX Arena. Presenter 1 stated:

‘Hey there punters [Presenter 1] here from Game 6 of the Eastern Conference finals. And this is your sports centre update brought to you by [Australian betting company] where the Celtics are massive favourites in this close out game…’.

Presenter 1 then discussed the odds for the Australian market for the upcoming game. The [Australian betting company] logo appeared throughout the segment.

The second promotion in Game 6 was presented by Presenter 2 approximately 3 minutes before the game commenced. Presenter 2 appeared as a ‘NBA Market Specialist’ and provided game analysis and discussed the odds for the Australian market for the upcoming game.

**What were the relevant Code provisions?**

*Promotion of Betting Odds by a Commentator*

Clause 5 of Appendix A to the Code provides that a Licensee must not broadcast a Promotion of Betting Odds by a Commentator of a Live Sporting Event any time: a) from 30 minutes before the commencement of Play; and b) until 30 minutes after the conclusion of Play.

Clause 5 of Appendix A to the Code is applicable irrespective of whether ESPN is considered a ‘Low Audience Share Channel’.

The Code defines a ‘commentator’ as a person who is a host, guest or otherwise participating in a Live Sporting Event and includes a person calling, or providing analysis on the sporting event or game, but does not include discrete or distinguishable contributors, including clearly identified representatives of gambling or betting organisations.

*Promotion of Betting Odds other than by a Commentator*

Clause 3 of Appendix A to the Code provides a restriction on the Promotion of Betting Odds ‘other than by a Commentator’. However, clause 10 provides that clause 3 does not apply to the broadcast of a Live Sporting Event on a Low Audience Share Channel except in a broadcast of a Listed Event.[[1]](#footnote-1) ESPN is a Low Audience Share Channel and the NBA is not a listed event. Therefore clause 3 does not apply to Game 1 and Game 6.

Clause 11 of Appendix A to the Code provides that clause 4 of Appendix A to the Code applies to a Licensee in relation to the broadcast of a Live Sporting Event on a Low Audience Share Channel (such as ESPN).

Clause 4 provides that from 8.30pm to 5:00am, a Licensee must not broadcast a Promotion of Betting Odds during Play in a Live Sporting Event but may broadcast a Promotion of Betting Odds, other than by a Commentator, before Play has commenced or after Play has concluded; and during Play in a Long Form Live Sporting Event, as part of a distinct break of at least 90 seconds, and in the Permitted Frequency, provided that the Promotion of Betting Odds is not for a race, match or game that has already commenced.

Clauses 6 and 7 of Appendix A to the Code require representatives of gambling or betting organisations, at all times, to be clearly identifiable as such and not to appear as part of the commentary team and they must not be around (or appear to be around) the ground or sport venue where the event is taking place.

**Were the Promotions of Betting Odds in Game 1 and Game 6 presented by a ‘commentator’, or by a ‘distinguishable contributor’** **or a ‘clearly identified’ representative of a gambling or betting organisation, within the meaning of the Code definition?**

Presenter 1’s appearance in Game 1 and Game 6

The Licensee submitted that Presenter 1 appeared as a ‘distinguishable contributor’ and not a ‘commentator’ in Game 1 and Game 6, as summarised below:

* Presenter 1’s only involvement in the broadcast of Game 1 and Game 6 was to present 4 discrete and distinguishable sponsored updates on behalf of advertisers once per quarter, each lasting approximately 1 minute, during breaks in play of Game 1 and Game 6.
* Presenter 1’s segments were clearly branded as commercially sponsored segments.
* Presenter 1 does not appear with the commentary team nor have any interaction with them. Presenter 1 does not participate in the calling of the game and his contribution is discrete and distinguishable from those of the actual game commentators.

The ACMA accepts the Licensee’s submission that Presenter 1 presented sponsored updates (for insurance and food companies) during scheduled breaks in play.

However, as discussed above, Presenter 1 also provided betting odds sponsored by betting companies prior to Game 1 and Game 6. The question for the ACMA is whether Presenter 1 was a ‘commentator’ (as defined in Appendix A) for ESPN who provided Promotions of Betting Odds.

Presenter 1’s segments indicate that he was an ESPN commentator who also provided Promotions of Betting Odds in sponsored updates:

* Prior to Game 1, Presenter 1 introduced himself by name and his Twitter handle was displayed on screen. Presenter 1 stated that he was providing a ‘sports centre update brought to you by [international betting company] here from FTX Arena in Miami…’. Presenter 1 also stated that he was providing a ‘sports centre update’ prior to Game 6. The ACMA considers that Presenter 1’s reference to a ‘Sports Centre update’ indicates that he was appearing or affiliated with ESPN, as Sports Centre is a major ESPN sports news TV program.[[2]](#footnote-2)
* The ACMA notes the Licensee’s observation that Presenter 1 did not appear alongside ESPN commentators. However, prior to Game 1 and Game 6, Presenter 1 appeared in front of a basketball court wearing a suit and earpiece with ESPN-branded equipment. Presenter 1’s attire in Game 1 was like other ESPN courtside commentators who were featured in Game 1.
* Game 1 was held at FTX Arena and Presenter 1 appeared to be at or around the venue when discussing the odds for the Australian market. Ahead of Game 1, Presenter 1 stated he was ‘…here from FTX Arena in Miami’. Presenter 1 also appeared courtside before Game 6 (‘[Presenter 1] here from Game 6’). Presenter 1 was not sufficiently distinguished from ESPN courtside commentators when he appeared at or around the venue of Game 1 and Game 6.
* As noted above, the Code definition of a ‘commentator’ includes a person calling, or **providing analysis on** (our emphasis) the sporting event or game. It is clear from the terms of clause 5 and the definition of ‘Live Sporting Event’ that the broadcast of a live sporting event, such as these NBA games, includes both the actual run of play, and commentary and analysis provided for up to 30 minutes before, and 30 minutes after, the actual run of play. Presenter 1 analysed the previous performance of players while giving the odds prior to Game 1 and Game 6. For example, prior to Game 1, Presenter 1 stated:

‘Jalen Brown to go over 6 and a half rebounds. He’s gone over 7 in 4 or 5 games in this series too. And the Celtics, 2 close out games thus far he’s gone for 8 in each of those…’

* Presenter 1 also analysed the performance of players in Game 1 during breaks in play: ‘Each of these first 2 quarters of the series so far have been an absolute nightmare for Miami offensively. They started the game over seven from the floor. Worst of any team in any starting first quarter in any game thus far this post season…’ Presenter 1’s analysis indicates that Presenter 1 was also appearing as a ‘commentator’ before the game, when he provided the betting odds.

The Licensee and the Channel Supplier further submitted that Presenter 1’s segments did not reflect that he was a ‘commentator’ within the meaning of the Code. These submissions are summarised below:

* Presenter 1’s attire and equipment are not relevant to the question of whether he qualifies as a ‘discrete or distinguishable contributor’, as an ESPN commentator would still be considered an ESPN commentator if they were providing analysis on a game and not using or wearing ESPN branded equipment.
* The ACMA’s reference to ‘ESPN’s courtside commentators’ indicates that Presenter 1’s appearance was discrete and distinguishable from the courtside commentators.
* Presenter 1’s commentary was distinguishable from that of the ESPN courtside commentators.
* The ACMA’s interpretation of what constitutes a ‘discrete or distinguishable contributor’ would incorrectly only cover a representative of a gambling or betting organisation, when the Code definition of a commentator provides that a discrete or distinguishable contributor ‘includes’ (but is not limited to) a representative of a gambling or betting organisation.

The ACMA is not persuaded by these submissions. The ACMA’s view is that:

* Presenter 1’s attire and use of ESPN-branded equipment were strong visual cues as to how viewers would determine whether Presenter 1 was a ‘commentator’. As outlined above, the complainant’s view was that Presenter 1 was an ESPN commentator in connection with Game 1, likely due to his use of ESPN-branded equipment.
* Many viewers would not conceive of a commentary team as consisting of only ‘courtside commentators’ and would likely consider that any individual who was presented as being part of the ESPN team and who provided analysis would be considered part of the commentary team.
* These rules were introduced with the aim of making a clear distinction between commentary teams and sports betting promotions. Presenter 1’s appearance and presentation are considerations directly relevant to whether viewers could make that distinction.
* Presenter 1’s analysis on the games cannot be distinguished in the manner proposed by the Licensee. Whether Presenter 1’s analysis of the game was like other commentators is not relevant, as the definition of a ‘commentator’ includes someone ‘providing analysis on the game’, as outlined above.

On this basis, the ACMA maintains its view that Presenter 1 appeared as a ‘commentator’, rather than a ‘discrete or distinguishable contributor’, when giving the Promotion of Betting Odds in Game 1 and Game 6.

Presenter 2’s appearance in Game 6

The ACMA’s view is that Presenter 2 was a clearly identifiable representative of a betting organisation and did not appear as a ‘commentator’ during the Promotion of Betting Odds in Game 6. The ACMA notes that:

* Presenter 2 did not appear to be at or around the sporting venue.
* Presenter 2 appeared in casual attire in front of a black background.
* Presenter 2 was not using any ESPN-branded equipment.
* The [Australian betting company] promotion was clearly branded and the [Australian betting company] logo was included throughout the promotion.
* The responsible gambling message was shown throughout the advertisement.
* Presenter 2 concluded the segment with a verbal responsible gambling message.

**Was the Promotion of Betting Odds shown at prohibited times during the Live Sporting Event?**

Clause 4

The Promotion of Betting Odds by Presenter 2 occurred prior to the commencement of Game 6 and was permitted under clause 4 of Appendix A to the Code. As noted above, the ACMA’s view is that Presenter 2 was clearly identified as a representative of a betting organisation and did not appear as a ‘commentator’.

Clause 5

The Promotion of Betting Odds by Presenter 1 in Game 1 and Game 6 occurred less than 30 minutes prior to the commencement of play, which is not permitted under clause 5 of Appendix A to the Code.

Clauses 6 and 7

Presenter 2 was clearly identified as a representative of a betting organisation and did not appear to be at or around the sporting venue. The ACMA’s view is that Licensee did not breach the restrictions in clauses 6 and 7 of Appendix A of the Code.

**Exception to liability**

The Licensee has raised clause 17 of Appendix A to the Code which states that it will not be a breach of Appendix A if:

* a failure to comply arises from a Live Sporting Event originating from outside Australia; and
* the Licensee has not added the Promotion of Betting Odds or Betting Advertising; and
* the Licensee does not receive any direct or indirect benefit for the Promotion of Betting Odds or the broadcast of the Betting Advertising in addition to any direct or indirect benefit received from broadcasting the Live Sporting Event; and
* it is not reasonably practicable for the Licensee to remove the Promotion of Betting Odds or Betting Advertising.

The Licensee submitted that such failure is not a breach of the Code by operation of clause 17 of Appendix A because:

(i) the Games originated from outside Australia;

(ii) Foxtel did not add the Promotions of Betting Odds presented by either

Presenter 1 or Presenter 2 into the streams of the Games;

(iii) Foxtel did not receive any benefit for transmitting these Promotions of

Betting Odds; and

(iv) it was not reasonably practicable for Foxtel to remove these

Promotions of Betting Odds from the streams of the Games as the

Promotions of Betting Odds were included in the broadcast feed

provided by the Channel Supplier to Foxtel. Foxtel has no practical

control over the broadcast feed of ESPN, which is distributed by the

Channel Supplier to multiple licensees in Australia.

The ACMA accepts the submissions that the Games originated from outside Australia and that the Licensee did not add the Promotions of Betting Odds into the streams of Game 1 and Game 6.

Following an assessment of contractual arrangements and other commercial in-confidence information between the Licensee and the Channel Supplier, the ACMA accepts that the Licensee did not receive any direct or indirect benefit for transmitting the Promotions of Betting Odds in Game 1 and Game 6.

While the ACMA accepts the Licensee's submissions that the Promotions of Betting Odds were ‘live from the event outside broadcast' this does not indicate that the material was broadcast live in the normal sense of the expression (i.e. not pre-recorded).

The Licensee also submitted that it does not currently have the technical capacity to remove advertising or other material from a ‘pass through channel’ such as ESPN and provided additional information specific to its ICT infrastructure and operational arrangements between itself and the content supplier.

Having reviewed this additional detail, the ACMA accepts the submission that the Licensee would incur considerable financial costs to create, implement and maintain a bespoke system to remove or replace gambling promotional content from live broadcasts originating overseas.

Based on all the available information, the ACMA’s view is that it was not reasonably practicable for the Licensee to remove the Promotions of Betting Odds that were the subject of this investigation.

Therefore, the ACMA accepts that the Licensee has made out a case for reliance on clause 17 of Appendix A, and therefore the contraventions identified in this investigation were not breaches of Appendix A to the Code.

**Conclusion**

Accordingly, the ACMA’s view is that the Licensee did not breach clause 5 of Appendix A to the Code in relation to the Promotions of Betting Odds by Presenter 1 that were shown in connection with Game 1 and Game 6.

1. <https://www.foxtel.com.au/about/legal-stuff/astra-codes.html> viewed 19 January 2023. [↑](#footnote-ref-1)
2. <https://www.facebook.com/SportsCenter> viewed on 12 January 2023. [↑](#footnote-ref-2)