Investigation report no. BI-656

| Summary |  |
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| **Licensee [service]** | Foxtel Cable Television Pty Limited [beIN Sports 2] |
| **Finding** | No breach of clause 2 of Appendix A to the Subscription Broadcast Television Codes of Practice 2013 [Betting Advertising during a Live Sporting Event] |
| **Relevant legislation/Code** | *Broadcasting Services Act 1992* (the **BSA**)  Subscription Broadcast Television Codes of Practice 2013 (the **Code**) |
| **Program [type]** | WTA San Jose Quarter finals – Gauff vs Badosa [live sport] |
| **Date of broadcast** | 6 August 2022 |
| **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 *Broadcasting Services Act 1992* (the **BSA**) into the possible streaming of an advertisement for [Betting Company 1].

Theadvertisement appeared to have been streamed by Streamotion Pty Ltd (the **Provider**) on multiple occasions between 10:30 am to 11:30 am AEST during a live tennis match (WTA San Jose Quarter finals – Gauff vs Badosa) (the **Tennis Match**) on Kayo Sports on 6 August 2022.

The ACMA commenced the investigation after its monitoring activities identified that the advertisement had potentially been streamed in breach of the *Broadcasting Services (Online Content Service Provider Rules) 2018* (the **Online Content Rules**).

Specifically, the ACMA’s monitoring indicated that a gambling advertisement had been streamed between the first and second set, at approximately 10:30 am and at every change of ends during the second set.

During the course of the investigation, it became apparent that an advertisement for [Betting Company 2] was also streamed during the Tennis Match.

*Exempt simulcast service*

Following consideration of information submitted by the Provider, which stated that the live stream of the Tennis Match was an exact simulcast of Foxtel Cable Television Pty Limited’s(the **Licensee’s)** beIN Sports 2 subscription broadcasting service, the ACMA found that the live coverage of the Tennis Match on Kayo Sports was an exempt online simulcast service for the purposes of clause 4 of Schedule 8 to the BSA and therefore not subject to the Online Content Rules.

As the stream of the Tennis Matchon Kayo Sports was an exempt online simulcast service and not subject to the Online Content Rules, the ACMA decided to investigate whether the corresponding broadcasting service (the Licensee’s beIN Sports 2 subscription broadcasting service) complied with the relevant broadcasting code of practice which is, in this case, the Subscription Broadcast Television Codes of Practice 2013 (the **Code**).

*Live Sporting Event*

As noted above, the Tennis Match was broadcast live-to-air on beIN Sports 2 on 6 August 2022.

Under clause 21 of Appendix A to the Code, a Live Sporting Event means a live-to-air broadcast of a sporting event that includes Play, where Play is defined as the ‘period of the actual run of play or active progress of the sporting event or game which is the subject of the Live Sporting Event’.

The Licensee has provided submissions that the Tennis Match was broadcast live, therefore the ACMA is satisfied that the Tennis Match was a Live Sporting Event for the purposes of the Code.

The ACMA has investigated the Licensee’s compliance with Appendix A to theCode.

Issue 1: Broadcast of Betting Advertising

Finding

The ACMA finds that the Licensee did not breach clause 2 of Appendix A to the Code in relation to the broadcast of gambling advertisements during live coverage of the Tennis Match.

Reasons

The ACMA asked the following questions:

* Were advertisements that fell within the definition of Betting Advertising shown during the Tennis Match?
* What were the relevant restrictions?
* Was Betting Advertising shown at prohibited times during the Live Sporting Event?

1. **Were advertisements that fell within the definition of Betting Advertising shown during the Tennis Match?**

Betting Advertising is defined in clause 21 of Appendix A to the Code to include any writing, still or moving pictures, signs, symbols or other visual images or any audible message(s) (or any combination of those things) that comprises a distinct promotional reference to:

1. a gambling or betting service; or
2. a gambling or betting organisation (including generic information about a gambling or betting organisation’s brand, business or services).

The recording of the Tennis Match provided by the Licensee indicated that advertisements promoting services offered by [Betting Company 1]were broadcast during coverage of the Tennis Match.

[Betting Company 1] provides services for ‘sports and racing betting products as well as online and telephone clients via its online wagering platform and mobile applications’.[[1]](#footnote-2) [Betting Company 1]is listed on the ACMA’s Register of Licensed Interactive Wagering Services and is licensed by the Northern Territory Racing Commission as an online gambling service.

Accordingly, the ACMA considers that [Betting Company 1] is a gambling or betting service, and that advertisements for it fall within the definition of Betting Advertising under Appendix A to the Code.

1. **What were the relevant restrictions?**

Clause 1 of Appendix A sets out the restrictions on the broadcast of betting advertising during a Live Sporting Event between 5:00 am and 8:30 pm, which covers the period of time that the Tennis Match was broadcast. However, clause 10 of Appendix A states that the clause 1 restrictions do not apply to Low Audience Share Channels, as defined in clause 21 of Appendix A.

For Low Audience Share Channels, clause 11 of Appendix A states that the restrictions set out in clause 2 of Appendix A, covering the period 8:30 pm to 5:00 am, apply at all times.

For the restrictions on Low Audience Channels to apply, the Licensee must have informed prospective viewers that this was the case (clause 13 of Appendix A) and the Live Sporting Event must not be a Listed Event (clause 11 of Appendix A).

Therefore, to determine which restrictions applied to the Tennis Match, the ACMA has considered whether:

1. beIN Sports 2 was a Low Audience Share Channel.
2. the Licensee fulfilled the conditions in clause 13 of Appendix A of the Code by informing viewers about the Low Audience Share Channel exemptions that apply to beIN Sports 2.
3. the Tennis Match was a ‘Listed Event’.
4. Was beIN Sports 2 a ‘Low Audience Share Channel’ for the purposes of the Tennis Match?

Under clause 21 of Appendix A to the Code, a ‘Low Audience Share Channel’ is a television sports channel that has an average share of the metropolitan broadcast television (free-to-air television and subscription television) audience of 0.5% or smaller, over a period of the three previous consecutive financial years.

Under subclause 20(c) of Appendix A, the audience share of beIN Sports 2 is taken to be the aggregate of all Related Channels (in this case, all co-branded beIN Sports channels). The Licensee provided audience data that demonstrated that aggregate has been below 0.5% for the last three financial years. Therefore, for the purposes of Appendix A to the Code, beIN Sports 2 is a Low Audience Share Channel.

1. Did the Licensee inform beIN Sports 2 audiences about the Low Audience Share Channel exemptions?

In order to rely on the rules that apply to Low Audience Share channels, under clause 13 of Appendix A to the Code:

The Licensee must draw to the reasonable attention of prospective viewers of any Low Audience Share Channel that the restrictions in clauses (1) and (3) do not apply to that channel, including through notification:

a) on its website; and

b) in any promotional material that includes the Licensee’s pricing and packaging for any Low Audience Share Channel(s).

The Licensee has advised the ACMA that it complies with the requirements set out under clause 13 of Appendix A to the Code in relation to Low Audience Share Channels.

The Licensee stated that it informs beIN Sports 2 audiencesabout the advertising restrictions that apply to it as a Low Audience Share Channel by providing this information on its [website](https://www.foxtel.com.au/about/legal-stuff/astra-codes.html) and in promotional materials that include the pricing and packaging for beIN Sports 2 (via this [link](https://www.foxtel.com.au/content/dam/foxtel/shared/pdf/foxtel-price-guide-tv-apr-2022.pdf)).

Taking this information into account, the ACMA is satisfied that the Licensee has complied with the requirements under clause 13 of Appendix A to the Code.

1. Was the Tennis Match a ‘Listed Event’?

The Code defines a Listed Event as a live sporting event that is included in the *Broadcasting Services (Events) Notice (No. 1) 2010* (the **Notice**) (as amended or replaced from time to time).

The ACMA reviewed a version of the Notice*[[2]](#footnote-3)* in place at the time of the broadcast and the Tennis Match was not included.

Therefore, the Tennis Match was not a ‘Listed Event’ as defined in the Code.

1. **Was Betting Advertising shown at prohibited times during the Live Sporting Event?**

Based on the answers to the three questions in the preceding section, the betting advertising restrictions in clause 1 of Appendix A of the Code (rules for 5:00 am to 8:30 pm) did not apply to live coverage of the Tennis Match, with the rules specified in clause 2 of Appendix A of the Code (the rules for 8:30 pm to 5:00 am) being applicable.

Clause 2 of Appendix A allows for betting advertising during Scheduled Breaks in Play. Scheduled breaks in tennis are defined in clause 21 of Appendix A to the Code as ‘between each set’ and ‘a distinct break of at least 90 seconds (including when during a Session the broadcast switches from one match still in Play to another match in Play at the same time), such break to occur not more than once every hour’.

The Licensee confirmed that the [Betting Company 1] advertisement was broadcast between the first and second set of the Tennis Match at 10:36 am, noting ‘between each set’ is a Scheduled Break in Play. The ACMA accepts this submission.

The Licensee also noted that the channel supplier, beIN Sports Australia Pty Ltd (**beIN Sports**), which produces and supplies beIN Sports 2, confirmed that there were six [Betting Company 1] advertisements broadcast between 10:30 am and 11:30 am.

Three of these advertisements were broadcast after Play of the Tennis Match had concluded, which is allowed under clause 2 of Appendix A to the Code. The other three advertisements were broadcast during advertisement breaks at three change of ends during the second set of the Tennis Match, which is not a defined Scheduled Break in tennis. The ACMA’s review of the copy of the broadcast has confirmed this information.

The Licensee also provided information from beIN Sports that eight additional advertisements were broadcast during the first set of the Tennis Match, in contravention of the Code:

• Three [Betting Company 2] Betting Advertisement billboards were broadcast during advertisement breaks at the change of ends after game 3(09:47), game 5(09:58) and game 7(10:07) of the first set of the Tennis Match which is not a defined Scheduled Break of Play in tennis.

• Five [Betting Company 1] Betting Advertisements were broadcast during advertisement breaks at the change of ends after game 3(09:47), game 5(09:58), game 7(10:07), game 9(10:15) and game 11(10:25) in the first set of the Tennis Match which is not a defined Scheduled Break of Play in tennis.

These additional instances have also been confirmed by the ACMA by examining the recording of the broadcast provided by the Licensee.

As a change of ends is not a defined Scheduled Break in tennis, from the evidence provided by the Licensee, the [Betting Company 1] advertisement was broadcast on a total of eight occasions, throughout the Tennis Match, at times not permitted under clause 2 of Appendix A. Accordingly, the ACMA’s view is that the broadcast of these eight advertisements was in contravention of the prohibition on the broadcast of betting advertisements in the Code.

The ACMA also notes, and has verified, the admission by the Licensee that betting advertisements in the form of three [Betting Company 2] billboards were broadcast in contravention of the Code.

[Betting Company 2] is also listed on the ACMA’s Register of Licensed Interactive Wagering Services. The ACMA considers that [Betting Company 2] is a gambling or betting service, and that the billboard advertisements for it fall within the definition of Betting Advertising under Appendix A to the Code. The ACMA’s view is that the broadcast of the three [Betting Company 2] advertisements contravened the prohibition on the broadcast of betting advertisements in the Code.

Reliance on clause 1.2 of the Code

The Licensee has submitted:

In the event the ACMA finds that the broadcast of the Tennis Match on the Channel did not comply with the ASTRA Codes, Foxtel submits that the failure to comply is not a breach of the ASTRA Codes by operation of clause 1.2

specifically, with respect to subclauses 1.2(a) and 1.2(c).

Relevantly, clause 1.2 of the Code states:

**1.2 Compliance with the Codes**

Licensees undertake to comply fully with the Codes, but a failure to comply will not be a breach of the Codes if that failure was due to:

(a) a reasonable mistake;

[…]

(c) an act or default of another person, or an accident or some other cause beyond the Licensee's control, and the Licensee took reasonable precautions and exercised due diligence to avoid the failure.

Did the Licensee make a reasonable mistake?

In relation to subclause 1.2(a) of the Code, the Licensee stated:

With respect to the [Betting Company 1] advertisements that were broadcast during advertisement breaks of the Tennis Match, Foxtel submits that any failure to comply with the ASTRA Codes was due to a reasonable mistake by the Channel Supplier’s recently appointed third party channel playout services provider […].

Rather than executing a single amendment to broadcast a [Betting Company 1] advertisement once after conclusion of Play of the Tennis Match (which was compliant with the ASTRA Codes), as a result of a single human error [the playout services provider] mistakenly executed it as a multiple amendment, which resulted in the [Betting Company 1] advertisement airing in multiple advertisement breaks during the Tennis Match.

The ACMA does not agree with the proposition, which is inherent in the Licensee’s submission, that the reference in subclause 1.2(a) of the Code to a 'reasonable mistake’, includes a reasonable mistake of a third party.

The natural and ordinary meaning of the words used in clause 1.2 is that the failure to comply referred to in the chapeau is a failure by a licensee caused by (a) a reasonable mistake of the licensee, or (b) reasonable reliance by a licensee on information supplied by another person, or (c) an act or default of another person, or an accident or some other cause beyond a licensee's control. The express references in paragraphs (b) and (c) of clause 1.2 to the acts or defaults of persons other than the licensee, and the absence of any similar express reference in paragraph (a), supports this interpretation.

In any event, the Licensee’s submissions to the ACMA merely assert that a mistake was made by an employee of a company retained by the Licensee’s channel supplier. No case has been advanced as to why that mistake was a reasonable mistake.

The ACMA is not satisfied that the Licensee has made out a case for reliance on paragraph (a) of subclause 1.2 to assert that the contraventions identified above were not breaches of the Code.

Was the breach due to an act or default of another party or some other cause beyond the Licensee’s control and did the Licensee take reasonable precautions and exercise due diligence to avoid the failure?

In relation to subclause 1.2(c) of the Code, the Licensee stated:

With respect to both the [Betting Company 1] advertisements and the [Betting Company 2] billboards that were broadcast during advertisement breaks of the Tennis Match, Foxtel submits that any failure to comply with the ASTRA Codes was due to an act of another person (being the Channel Supplier and/or [playout services provider]), that this failure was beyond Foxtel’s control and that Foxtel took reasonable precautions and exercised due diligence to avoid the failure.

The Licensee stated that beIN Sports operates as an independent and separate business from the Licensee and that the Licensee had no involvement in the appointment of beIN Sport’s playout services provider.

The Licensee also submitted that it had agreements in place with the Channel Supplier to ensure Code compliance and further:

… The Channel Supplier is supported by its own legal team. In such circumstances, Foxtel submits that it has taken reasonable precautions and exercised due diligence to avoid any failure to comply with the ASTRA Codes.

However, from its submissions, it is unclear what additional precautions the Licensee took or what further due diligence it exercised with respect to preventing betting advertisements from being broadcast in contravention of the Code, beyond accepting a general contractual undertaking from beIN Sports that it would comply with applicable rules.

The ACMA considers that reasonable precautions and due diligence, with respect to accepting live sports content from a third party that might contain betting advertising, should include a number of actions or undertakings that were specific to that type of content and the associated risks. This means not simply relying on contractual obligations but taking actions such as:

* ensuring content providers are familiar with the Code’s requirements and providing training or instructional materials
* requesting detailed playlists of advertising content in advance of live broadcasts,
* conducting audits of live broadcasts to assess compliance.

The list above is not prescriptive but simply provides examples of actions that could have been taken to comply with clause 1.2(c) of the Code. So far, the ACMA has not seen evidence of such actions.

As the Licensee has provided no submissions about tailored actions it took with beIN Sports, specifically in relation to ensuring compliance with the requirements in the Code about betting advertising and live sports, the ACMA is not satisfied that the Licensee took reasonable precautions and exercised due diligence to avoid the failure by beIN Sports to provide content that complied with the Code.

In relation to the above, the Licensee stated that the ACMA’s expectations that it take additional precautions to prevent a breach of the Code, placed a ‘higher compliance burden’ on them than was required under the Code.

In addition, the Licensee stated:

We submit that clause 1.2(c) of the Code does not require “tailored actions” to be taken in respect of individual channels, and to expect as such (e.g. “requesting detailed playlists of advertising content in advance of live broadcasts”, in circumstances where Kayo Sports streams such a high volume of live sport each week) would be unreasonable and impracticable. Rather, we submit that relying on arms’ length, clear contractual obligations is an entirely reasonable precaution to take in the circumstances, especially where the channel supplier is supported by its own legal team.

The ACMA does not accept these submissions. The ACMA’s reference to ‘additional precautions’ referred to precautions in addition to general contractual provisions, not precautions additional to those required under the Code.

A licensee’s responsibility to comply with the Code cannot be discharged simply through contractual arrangements with a channel supplier that purport to allocate responsibility to the channel supplier to broadcast compliant gambling advertisements through programs broadcast by the licensee.

The ACMA notes that the gambling rules relevant to this investigation are specific to a particular type of promotional content in the context of a particular type of content, being live sport, and have been put in place to address a particular social harm. As such, they warrant particular action on the part of licensees.

Rather than imposing a ‘higher compliance burden’ with ‘respect to individual channels’, the ACMA considers that ‘reasonable precautions’ and ‘due diligence’, especially in this context, should be understood as a requirement to take positive actions to avoid contraventions of the Code.

While contractual provisions may form part of a suite of preventative actions, they cannot, by themselves, be all that compliance requires. Whether other actions include regular auditing or some other quality assurance measures is a matter for each licensee but the ACMA’s position is that licensees must be active in seeking to prevent contraventions and the ACMA does not consider that contractual provisions alone satisfy that requirement.

The Code requires a licensee to have systems in place to assure itself that programming supplied by another person for broadcast by the licensee is compliant with the Code and to take prompt remedial steps if it is not.

A failure by a licensee to make adequate provision for such systems in contractual arrangements and its own oversight arrangements, may mean that the ACMA (having regard also to any other relevant circumstances) could not be satisfied that the cause of a breach was beyond the licensee’s control, or that the licensee took reasonable precautions and exercised due diligence to avoid the failure to comply with the Code.

Ultimately, responsibility for compliance must rest with the Licensee. In this matter, the Licensee has not provided sufficient information to satisfy the ACMA that the failures to comply with the Code identified in this report, were due to causes beyond the Licensee’s control, or that the Licensee took reasonable precautions and exercised due diligence to avoid the failures.

The ACMA is not satisfied that the Licensee has made out a case for reliance on paragraph (c) of clause 1.2 to assert that the contraventions identified in this investigation were not breaches of Appendix A to the Code.

Reliance on clause 17 of Appendix A to the Code

Clause 17 of Appendix A to the Code states:

(17) It will not be a breach of this Appendix if:

a) a failure to comply arises from a Live Sporting Event originating from outside Australia; and

b) the Licensee has not added the Promotion of Betting Odds or Betting Advertising; and

c) 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

d) it is not reasonably practicable for the Licensee to remove the Promotion of Betting Odds or Betting Advertising.

The Licensee submitted:

1. the Tennis Match was played in the United States and the coverage originated from outside Australia;
2. Foxtel did not add the Betting Advertising into the Tennis Match;
3. although Foxtel Media (another entity in the Foxtel Group) is the Channel Supplier’s advertising representative in Australia, the Licensee (Foxtel Cable Television Pty Limited) did not receive any direct or indirect benefit for the broadcast of the Betting Advertising. We also confirm that Foxtel Media did not receive any financial consideration for the broadcast of the Betting Advertising; and
4. […] it was not reasonably practicable for Foxtel to remove the Betting Advertising from the broadcast of the Tennis Match.

The ACMA accepts the Licensee’s submissions that the Tennis Game originated from outside Australia (subclause 17(a)) and that the Licensee did not add betting advertising into the Tennis Match (subclause 17(b)).

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 the broadcast of the betting advertising (subclause 17(c)).

In relation to subclause 17(d), the Licensee further submitted:

Foxtel does not have a technical or operational capability to remove advertising or any other material from a continuous linear pass through channel. This is not a capability or function available or used for any pass through linear channel on Foxtel satellite or cable distribution products.

The licensee 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 gambling advertisements 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 that the contraventions identified in this investigation were not breaches of Appendix A to the Code.

**Summary**

Taking into account the preceding analysis, the ACMA is of the view that in broadcasting:

* three [Betting Company 2] betting advertisement billboards during advertisement breaks at the change of ends after game 3, game 5 and game 7 of the first set of the Tennis Match, and
* eight [Betting Company 1] betting advertisements during advertisement breaks at the change of ends after game 3, game 5, game 7, game 9 and game 11 in the first set, and at the change of ends after game 3, game 5 and game 7 of the second set, of the Tennis Match

the Licensee did not breach clause 2 of Appendix A to the Code.

1. The ACMA viewed the [Betting Company 1] Pty Ltd ‘Annual report – 30 June 2020’, 21 December

   2022. [↑](#footnote-ref-2)
2. <https://www.legislation.gov.au/Details/F2017C00987>, accessed 21 December 2022. [↑](#footnote-ref-3)