Investigation report no.BI-679

| Summary |  |
| --- | --- |
| **Licensee/provider [services]** | Swan Television & Radio Broadcasters Pty Ltd – licensee of 9Gem in the Perth TV1 license area [9Gem]  Nine Digital Pty Ltd [9Now] |
| **Finding** | No contravention of clause 3.1 of Appendix 3 of the Code |
| **Relevant legislation** | *Broadcasting Services Act 1992* (BSA)  *Broadcasting Services (Online Content Service Provider Rules) 2018*  Commercial television industry code of practice 2015 (the [Code](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.acma.gov.au%2Fsites%2Fdefault%2Ffiles%2F2019-10%2FFree%2520TV%2520Commercial%2520Television%2520Industry%2520Code%2520of%2520Practice%2520without%2520cover%2520pa%2520docx%2520%25281%2529.docx&wdOrigin=BROWSELINK)) |
| **Live sporting events** | The Ashes, First Test, Day 3 |
| **Date of broadcast** | 18 June 2023 |
| **Type of services** | Commercial Television Broadcasting Service  Online Content Service |
| **Attachments** | **A –** Relevant code and legislative provisions |

Background

In September 2023, the Australian Communications and Media Authority (ACMA) commenced an investigation under the *Broadcasting Services Act 1992* (**the BSA**) into The Ashes, First Test, Day 3 (**The Ashes**), in response to a complaint that a gambling advertisement was shown before 8:30pm (AWST).

The Ashes was broadcast on 9Gem by Swan Television & Radio Broadcasters Pty Ltd and live streamed on 9Now by Nine Digital Pty Ltd (Nine) on 18 June 2023.

9Gem is a commercial television broadcasting service and therefore subject to the gambling advertising restrictions in Appendix 3 of the Code while 9Now is an online content service and therefore subject to the gambling advertising restrictions in the *Broadcasting Services (Online Content Service Provider Rules) 2018* (Online Rules) (made pursuant to Schedule 8 to the BSA).

The ACMA has investigated Nine’s compliance under Schedule 8 to the BSA and clause 3.1 of Appendix 3 to the Code.

Relevant extracts from Schedule 8 to the BSA are below, and from Appendix 3 of the Code are at **Attachment A**.

**Determining whether the gambling advertising restrictions applied to the Ashes and if those restrictions were contravened**

**Issue 1: Was the service delivered on 9Now an exempt simulcast service?**

Under Schedule 8 to the BSA, if a service meets the definition of an ‘exempt online simulcast service’ the Online Rules do not apply to the service. Rather, the gambling advertising restrictions in the relevant broadcasting code apply to the corresponding commercial television broadcasting service provided under the commercial television broadcasting licence.

Paragraph 3(1)(e) of Schedule 8 to the BSA excludes an ‘exempt online simulcast service’ from the definition of ‘online content service’. An ‘exempt online simulcast service’ is defined at clause 4 of Schedule 8 to the BSA as a service, or part of a service, that is provided to end-users using an internet carriage service and that:

* does no more than provide a stream of content that is identical to the stream of programs transmitted on a broadcasting service; and
* provides that stream of content simultaneously, or almost simultaneously, with the transmission.

Nine advised the ACMA that the sports event identified in the complaint which was streamed on 9Now ‘was a simulcast of Nine’s broadcast channel “9Gem” in the Perth TV1 licence area’.

The ACMA accepts Nine’s submission that the live stream in this investigation was a simulcast of the broadcast content and finds that 9Now was an exempt online simulcast service under clause 4 of Schedule 8 to the BSA for the purposes of this investigation.

Therefore, the gambling advertising restrictions in the Online Rules made pursuant to Schedule 8 to the BSA do not apply and the content on the online simulcast provided on the 9Now live stream has not been investigated further.

The gambling advertising restrictions in the Code do apply to the corresponding 9Gem commercial television broadcasting service provided under the commercial television broadcasting licence.

Issue 2: Assessment of the broadcast of the Ashes by 9Gem under the Code

The ACMA investigated whether the gambling advertisement, the subject of the complaint was shown during the broadcast of the Ashes on 9Gem during a prohibited time in contravention of clause 3.1 of the Code.

Finding

The ACMA finds that Nine contravened clause 3.1 of Appendix 3 to the Code.

Reasons

To assess compliance with the prohibition, in clause 3.1 of Appendix 3 of the Code, on commercials relating to betting and gambling being shown during the broadcast of live sporting events between 5.00am and 8.30pm, the ACMA asks the following questions:

1. Was the relevant broadcast a Live Sporting Event for the purposes of the Code?
2. Did the gambling advertisement, the subject of the complaint, shown during the Live Sporting Event fall within the definition of a ‘Commercial relating to Betting or Gambling?

If yes, then,

1. What were the relevant gambling advertising restrictions that applied to the coverage of the Live Sporting Event?
2. Was the Commercial Relating to Betting or Gambling shown at prohibited times during coverage of the Live Sporting Event?

**Was the relevant broadcast a Live Sporting Event for the purposes of the Code?**

Under the Code, ‘Live Sporting Event’ means live-to-air coverage of a sporting event that includes Play. A Live Sporting Event includes a Long Form Live Sporting Event.

Live-to-air includes:

(a) a delay of less than 90 minutes where broadcast as plausible live without reformatting; and

(b) replay material during Play and any Unscheduled Break in Play

Relevantly, ‘Long Form Live Sporting Events’ include, amongst other things, sporting events of extended duration, such as golf, cricket (excluding 20/20 cricket) and motor sports events.

The ACMA is of the view that the Ashes falls within the definition of a ‘Long Form Live Sporting Event’ for the purposes of the Code because it was live-to-air coverage of a sporting event, namely, Test Cricket - the third day of the First Ashes Test, on 9Gem on 18 June 2023, that included ‘Play’, namely the period of the actual run of play, commencing at the formal commencement of the third day of the Ashes match and ending at the conclusion of active play of that day.

**Did the gambling advertisement shown during the Live Sporting Event fall within the definition of a ‘Commercial relating to Betting or Gambling?**

Under the Code, a ‘commercial relating to Betting or Gambling’ means a distinct promotional reference to a gambling or betting service or a gambling or betting organisation that provides generic information about the organisation’s brand, business or services.

Nine acknowledged that ‘an in-program commercial relating to betting or gambling’ was shown and submitted that it was ‘…11 seconds of a 30 second in-program gambling promotional material’.

The ACMA viewed a copy of the footage of the Ashes, that included the gambling advertisement, supplied by Nine, and agrees that it is an in-program commercial relating to betting and gambling. The beginning of the commercial has the branding [of wagering company] and then cuts to an ‘NRL Market Analyst’, with the branding [of wagering company] on screen, who commences to provide ‘stats & insights’ relating to the State of Origin. After approximately 11 seconds, the vision goes to a static screen with text which states that ‘the material currently being broadcast during this cricket coverage is not permitted to be shown in this state or territory at this time. Your cricket coverage will re-commence shortly. Thank you for your patience’.

The ACMA is therefore satisfied that the content of the gambling advertisement, the subject of the complaint, included promotional references to the wagering company and therefore fell within the definition of a 'Commercial relating to Betting or Gambling’ for the purposes of the Code.

**What were the relevant gambling advertising restrictions that applied to the coverage of the Live Sporting Event?**

Clause 3.1 of Appendix 3 of the Code essentially prohibits Commercials relating to Betting or Gambling during the coverage of Live Sporting Events from 5.00am to 8.30pm starting from:

* five minutes before the Scheduled Start of Play of the Live Sporting Event, where live-to-air coverage of Play commences no earlier than the Scheduled Start of Play;
* in all other cases, five minutes before the broadcast of the first Program that includes the Live Sporting Event;

to

* five minutes after the conclusion of live-to-air coverage of Play by the Licensee or 8.30pm, whichever is sooner.

Further, clause 3.20 provides that where a Live Sporting Event is broadcast simultaneously across more than one licence area, the relevant time-zone is the time-zone that applies in the licence area.

Nine has confirmed that the Ashes was broadcast live on 9Gem on 18 June 2023 in Nine’s Perth TV1 licence area and that live play commenced at 8.00pm AEST and with several interruptions due to rain, was suspended at 1.03am AEST. At this time, the Australian Western Standard time zone applies. Accordingly, the ACMA is of the view that the relevant gambling advertising restrictions applied to the coverage of the Ashes.

**Was the Commercial Relating to Betting or Gambling shown at prohibited times during coverage of the Live Sporting Event?**

Nine acknowledges that part of the gambling advertisement, the subject of the complaint, was broadcast at approximately 8.24pm AWST. This is broadly consistent with the timing given by the complainant of 8.25pm AWST.

Noting that the prohibited time during which Commercials relating to Betting and Gambling cannot be shown during a Live Sporting Event is from 5.00am to 8.30pm, the ACMA is satisfied that the gambling advertisement, the subject of this complaint, being a Commercial Relating to Betting and Gambling was shown at the prohibited time of 8.24pm AWST during coverage of the Live Sporting Event, the Ashes.

Accordingly, the ACMA is of the view that Nine contravened clause 3.1 of Appendix 3 of the Code.

While Nine acknowledged that the gambling advertisement, the subject of the complaint, was not compliant with clause 3.1 of Appendix 3 of the Code, it argued that it was not a breach of the Code, as clause 1.1.4 of the Code applied in this matter.

**Reliance on clause 1.1.4 of the Code**

Clause 1.1.4 of the Code sets out factors which excuse a breach of the Code in certain circumstances. It states as follows:

Licensees will seek to comply fully with the Code, but a Licensee will not be in breach of the Code if the non-compliance was in respect of a minor, peripheral, incidental or trivial matter, or was due to:

1. a reasonable mistake;
2. reasonable reliance by the Licensee on information supplied by another person;
3. the broadcast of material which was accidental, provided that the Licensee took reasonable precautions and exercised due diligence; or
4. an act or failure to act of another person which was outside of the Licensee’s control, or an accident, technical/engineering issue, or some other cause which was outside the Licensee’s control.

**Nine’s submissions providing background to the Gambling Commercial**

Submissions by Nine addressing the process of blocking certain gambling commercials:

*Since around 1 July 2018, the Licensee has contracted with an external service provider,* [Service Provider]*, to, amongst other things, monitor Live Sporting Events and administer gambling advertising content blackout screens prior to the broadcast of Commercials relating to Betting or Gambling (Gambling Commercials) to prevent the broadcast of those Commercials in a given broadcast licence area at a time at which doing so is prohibited.*

*This is typically necessary when a Gambling Commercial is to be incorporated into the integrated live broadcast of a sporting event that is aired nationally (i.e. is not a pre-made commercial that is interposed into the live feed during a given break or juncture).*

In regard to the incident, the subject of the complaint, Nine submitted that:

*At about 8:24pm AWST, during the Broadcast, one of the presenters announced that the programme would be crossing to a ‘market update from* [wagering company]*’. This was the signal, discussed between the director’s assistant from Nine and the Responsible Person* [at the Service Provider] *in advance of the Broadcast, for the Responsible Person to apply a content blackout screen to prevent the Advertisement from airing to audiences in Perth TV1 (given that it was prior to 8:30pm AWST).*

*When attempting to administer a content blackout screen, the Responsible Person accidentally pressed [their] finger between two buttons on [their] control panel. The Responsible Person then sought to correct the error, but accidentally pressed the ‘switch to protect’ button, being the button directly neighbouring the ‘pre-roll active’ button that initiates a content blackout screen. As a consequence, instead of administering a content blackout screen in the feed transmitted in Perth TV1, the live feed was switched from the primary feed to a backup feed.*

*Due in part to the approximately two-and-a-half second delay between commands initiated by operating the control panel and the manifestation of the commands in the broadcast feed, the Responsible Person only observed that the content blackout screen had not been administered part way into the broadcast of the Advertisement. Upon noticing this, the Responsible Person promptly pressed the correct button to initiate the replacement of the live feed with a content blackout screen in Perth TV1.*

*Consequently, the Licensee inadvertently broadcast the beginning of the Advertisement for approximately eleven seconds before a content blackout screen prevented the remaining 19 seconds from airing in Perth TV1.*

The three grounds that Nine relied on as a basis for arguing that non-compliance with clause 3.1 of Appendix 3 of the Code should not be treated as a breach of the Code were:

1. the non-compliance was an ‘act or failure to act of another person which was outside of the Licensee’s control, or an accident, technical/engineering issue, or some other cause which was outside the Licensee’s control’;
2. the non-compliance was ‘accidental, provided that the Licensee took reasonable precautions and exercised due diligence’; and
3. the non-compliance was ‘minor’ or ‘trivial’.
4. **Was the non-compliance a result of an act or failure to act of another person which was outside of the Licensee’s control, or an accident, technical/engineering issue, or some other cause which was outside the Licensee’s control’? (****Paragraph 1.1.4(d) of the Code)**

In relation to this ground, Nine submitted that:

*The transmission of the Advertisement to viewers in Perth TV1 was, despite the Licensee’s and the Responsible Person’s best efforts and diligent preparation, accidental and inadvertent. Neither the Licensee’s conduct nor any failures or flaws in its procedures contributed to the accident.*

*The* [Service Provider] *and its personnel are outside of the Licensee’s direct and immediate control. The Licensee had reasonably delegated responsibility for content blackout screening to* [Service Provider] *and had taken precautions to ensure that* [Service Provider] *would be amply capable of administering content blackout screens when necessary to ensure compliance with the Code...*

*Further, the ability to operate the control panel responsible for the administration of content blackout screens during the Broadcast was uniquely in the control of the Responsible Person at* [Service Provider] *(i.e. was outside of the Licensee’s control).*

The ACMA accepts Nine’s submission that the broadcast of the gambling advertisement, the subject of the complaint, was due to ‘an aberration caused by momentary lapses in hand-eye coordination’ by an employee of the Service Provider.

While the ACMA acknowledges the involvement of a third party in the broadcast, it does not accept that this arrangement on its own (the fact that the relevant function or activity was outsourced), means that the actions of the Service Provider and its employees are outside of Nine’s control.

The ACMA considers that in the context of the Code, a licensee, regardless of whether it has outsourced its obligations, should remain accountable and responsible for the acts or omissions of its external service provider. Thus, the ACMA considers that paragraph 1.1.4(d) of the Code did not apply in these circumstances.

Instead, the ACMA is of the view that the relevant grounds of clause 1.1.4 that may apply are the other two grounds raised by Nine, as explained below.

1. **Was the non-compliance accidental, provided that the Licensee took reasonable precautions and exercised due diligence? (Paragraph 1.1.4(c) of the Code)**

In relation to this ground, Nine submitted that:

*…the Licensee submits that the broadcast of the Advertisement was caused by the accidental act, or alternatively the accidental failure to act effectively, of a third party and was therefore not a ‘breach’ of the Code.*

*…*

*The process for content screening in the context of Live Sporting Events, where the relevant Gambling Commercial is integrated into the live programme, is a manual process that is subject to human error…. This is necessarily so, owing to the dynamic and unpredictable nature of live broadcasts, particularly those that incorporate advertising into the live programming and are broadcast across different time zones.*

*On this occasion, as a result of the human error … a fraction of a Gambling Commercial was inadvertently broadcast before a content blackout screen could be (manually) applied.*

*The precautions instituted by the Licensee and* [Service Provider]*, acting on the Licensee’s behalf … were adequate and proportionate. However, even the most meticulously implemented precautions could not have prevented the unintended outcome in question, an aberration caused by momentary lapses in hand-eye coordination.*

In considering what ‘reasonable precautions’ and ‘due diligence’ had been undertaken, the ACMA notes Nine’s explanation that working with its service provider, it had implemented content screening processes directed at compliance with the Code.

Nine advised that to prevent the broadcast of gambling advertisements during prohibited times, it had previously implemented a ‘protocol’, in conjunction with the Service Provider which involved the following:

1. *Nine provides* [the Service Provider] *with program scheduling for the Live Sporting Event, up to around one week in advance of the relevant broadcast;*
2. *the relevant personnel at* [the Service Provider]*, including the Supervising Presentation Coordinator for the programme, are notified by Nine Personnel that a Gambling Commercial is scheduled to be aired as part of the live broadcast and that administering a content blackout screen in place of the live feed may be required to prevent a contravention of the Code;*
3. *Nine and the Licensee formally instruct* [the Service Provider] *to apply a content blackout screen over the broadcast if the Gambling Commercial falls at a time proscribed by the Code (and the programme coordinator at* [the Service Provider] *is provided with a means by which to determine when a content blackout screen will be required, for example, by waiting to hear a presenter read a particular line of script); and*
4. *a series of checks and preparatory protocols are conducted, including some collaboratively done by the Licensee and* [the Service Provider] *and others done internally at* [the Service Provider]*, in preparation for a Live Sporting Event broadcast that may require content blackout screening.*

The written materials provided to the ACMA as part of the investigation indicate that the protocol referred to above was followed. In this circumstance, Nine submitted that the transmission of the advertisement took place despite the licensee’s and the Service Provider’s best efforts and diligent preparation and that it was accidental and inadvertent. Neither Nine’s conduct or any failures or flaws in its procedures contributed to the accident.

In response to the ACMA’s question about why its manual process (to insert blackout slides to prevent the broadcast of in-program non-complying gambling advertisements) is not automated, Nine advised that:

*Because the timing of breaks in play, during which a Gambling Commercial might be broadcast, are subject to change contingent on the Live Sporting Event itself, it is necessary to manually monitor and initiate content screening to ensure that it is coordinated with the live programming (and fully conceals any live, integrated Gambling Commercials). This is not something that can be pre-arranged prior to the broadcast nor automated due to the unpredictable nature of live broadcasts and the need for dynamic judgment and reaction as the broadcast unfolds.*

And in response to the ACMA’s question asking how Nine has satisfied itself that this issue will not recur, Nine advised:

*To minimise the likelihood of future accidents …* [the Service Provider] *has physically reconfigured its control panels so that the placement of the button responsible for initiating content blackout screens is not situated near other buttons … The Licensee submits that the measure taken to refine the equipment operated by* [the Service Provider] *personnel will further minimise the very low chance of an operator accidentally pressing the wrong button or otherwise failing to press the button necessary to administer a content blackout screen in future.*

The ACMA notes that a process that involves human input lends itself to accidents of this type but accepts Nine’s submission that this particular process cannot be automated and, on that basis, accepts that this was an accident. The ACMA also notes the work that Nine had previously undertaken (working with its Service Provider) to put processes in place to address the Code requirements.

The ACMA therefore accepts that paragraph 1.1.4(c) of the Code applies in this case to excuse the non-compliance of clause 3.1 of Appendix 3 of the Code and accordingly should not be treated as a breach of the Code.

1. **Was the non-compliance “minor” or “trivial”? (clause 1.1.4 of the Code)**

In relation to this ground, Nine submitted that the non-compliance should not be classified as a breach for the following two reasons:

*First, the Advertisement was broadcast for approximately eleven seconds before it was replaced by a content blackout screen, concealing the remainder of the Advertisement in Perth TV1. It was a transitory failure of compliance, which was quickly identified and rectified. The fact that the proportion of the Advertisement that was shown to viewers was short, and that it was disrupted, ensured that the impact of the Advertisement (if any) was minimised.*

*Secondly, the proportion of the Advertisement that was aired did not contain (a) any substantive information about accessing or using* [wagering company’s] *gambling platforms, (b) wagering odds or markets, or (c) explicit promotion of wagering. That is, the non-compliant broadcast was not of a severe or grave nature, according to the ostensible policy objectives of Appendix 3.*

Nine further stated that:

*Although the Broadcast did contain a Gambling Commercial (as defined in Appendix 3) in a technical sense, the infraction should be characterised as no more than minor given the short duration of the Advertisement that aired and the absence of explicit promotion of any products or services during that time. The likelihood of the harm or significant detriment to the policy objectives of the Code is low.*

The ACMA acknowledges that only a portion of the gambling advertisement was shown, and that the mistake was identified and remedied relatively quickly. However, while the full 30 seconds of the advertisement was not shown, in the 11 seconds shown, the branding of a recognisable wagering company is clearly visible and recognisable. It is the ACMA’s view that this should not be classified as minor or trivial.

**Conclusion**

The ACMA accepts that while the gambling advertisement, the subject of this complaint, being a Commercial relating to Betting or Gambling, was shown at the prohibited time of 8.24pm AWST, during coverage of the Live Sporting Event, the Ashes, in contravention of clause 3.1 of Appendix 3 of the Code, the non-compliance, in these particular circumstances, was accidental and Nine had taken reasonable precautions and exercised due diligence that was directed at compliance. Therefore, the ACMA accepts Nine’s reliance on paragraph 1.1.4(c) of the Code, which excuses the non-compliance of clause 3.1 of Appendix 3 of the Code, such that it will not be treated as a breach of the Code.

Attachment A

Relevant provisions

**1 Application & Commencement**

1.1.4 Licensees will seek to comply fully with the Code, but a Licensee will not be in breach of the Code if the non-compliance was in respect of a minor, peripheral, incidental or trivial matter, or was due to:

1. a reasonable mistake;
2. reasonable reliance by the Licensee on information supplied by another person;
3. the broadcast of material which was accidental, provided that the Licensee took reasonable precautions and exercised due diligence; or
4. an act or failure to act of another person which was outside of the Licensee’s control, or an accident, technical/engineering issue, or some other cause which was outside the Licensee’s control.

**Appendix 3: Commercials relating to Betting or Gambling during a Live Sporting Event**

**5:00am to 8:30pm**

3.1 From 5:00am to 8:30pm a Commercial relating to Betting or Gambling during the broadcast by the Licensee of a Live Sporting Event is not permitted:

from:

3.1.1 five minutes before the Scheduled Start of Play of the Live Sporting Event, where live-to-air coverage of Play commences no earlier than the Scheduled Start of Play;

3.1.2 in all other cases, five minutes before the broadcast of the first Program that includes the Live Sporting Event;

to:

3.1.3 five minutes after the conclusion of live-to-air coverage of Play by the Licensee or 8:30pm, whichever is sooner.

**Time Zones**

3.20 Where a Live Sporting Event is broadcast simultaneously across more than one licence area, the relevant time-zone for the application of this Appendix 3 is the time-zone that applies in the licence area.

**Appendix 3: Definitions**

**Commercial relating to Betting or Gambling** means a distinct promotional reference to:

(a) a gambling or betting service; or

(b) a gambling or betting organisation that provides generic information about the organisation’s brand, business or services.

A Commercial relating to Betting or Gambling does not include:

* a commercial relating to such things as Government sanctioned lotteries, lotto, keno or competitions;
* a commercial relating to entertainment or dining facilities at places where betting or gambling takes place, or a tourism commercial which incidentally refers to betting or gambling, provided in each case that the contents do not draw attention to betting or gambling in a manner calculated to directly promote their use;
* a reference that is Accidental; or
* a reference that is an Incidental Accompaniment.

**Live Sporting Event** means live-to-air coverage of a sporting event that includes Play. A Live Sporting Event includes a Long Form Live Sporting Event.

**Play** means the period of the actual run of play or active progress of the sporting event which is the subject of a Live Sporting Event. It commences at the formal commencement of the relevant match/game, race or similar (for example, first siren, whistle, coin toss or the commencement of active play as applicable), and concludes at the formal conclusion of play (for example, final siren, whistle or the conclusion of active play) for the relevant match, game, race or similar. In respect of Long Form Live Sporting Events over multiple days and/or involving multiple concurrent matches or events, Play commences at the formal commencement of the first match, game or race or each day, and ends at the conclusion of active play of each day.

Play includes ad hoc unscheduled breaks such as:

• stoppages for injuries; and

• stoppages for adjudication by third or TV umpires/referees; and

• time outs and substitutions in games such as basketball.

**Scheduled Start of Play** means the scheduled commencement of live-to-air coverage of Play as:

a) listed in the Licensee’s EPG at least 24 hours prior to the broadcast of the program; or

b) published by the Licensee on its website at least 24 hours prior to broadcast and notified to the Licensee’s EPG provider(s) at least 24 hours prior to broadcast.