

Investigation report no. BI-672

Summary

Provider [service]	Hubbl Pty Ltd [Kayo Sports app]
Type of service	Online content service (audio-visual)
Finding	Contravention of section 12 of the Online Rules and consequently a contravention of subclause 25(1) of Schedule 8 to the BSA No contravention of subsection 21(1) of the Online Rules.
Date finalised	13 May 2024
Relevant legislation	<i>Broadcasting Services Act 1992</i> (the BSA) <i>Broadcasting Services (Online Content Service Provider Rules) 2018</i> (the Online Rules)
Live sporting event	<i>AFL - Port Adelaide v West Coast Eagles</i>
Date of stream	22 April 2023
Attachments	A – Relevant legislative provisions

Background

In April 2023, the Australian Communications and Media Authority (the **ACMA**) received a complaint alleging that the complainant had viewed gambling advertisements during the live stream of the Port Adelaide v West Coast Eagles AFL match (the **AFL Match**) on Kayo Sports (**Kayo**) on 22 April 2023 prior to 8:30 pm.

The complainant alleged that they viewed gambling advertisements for [wagering company 1] during the quarter, half and three-quarter time breaks of the AFL Match, at approximately 1:45 pm, 2:15 pm and 2:45 pm respectively.

In response to the ACMA's initial correspondence regarding the complaint, the provider of Kayo, Hubbl Pty Ltd (**Hubbl**), advised that there were no gambling advertisements or betting odds promotions (including for wagering company 1) provided during the quarter, half, or three-quarter time breaks of the AFL Match. Hubbl did however report to the ACMA that its investigations revealed that, following the conclusion of the AFL Match at 4:30 pm, a gambling advertisement for [wagering company 2] was provided on Kayo in an advertising break which commenced at 4:31 pm Australian Eastern Standard Time (AEST).

In June 2023, the ACMA commenced an investigation into the matters referred to above, under the *Broadcasting Services Act 1992* (the **BSA**).

Assessment

Under clause 25 of Schedule 8 to the BSA, an online content service provider must comply with the *Broadcasting Services (Online Content Service Provider Rules) 2018* (the **Online Rules**).

An 'online content service provider' means a provider of an 'online content service' (clause 2 of Schedule 8 to the BSA).

An 'online content service' includes a service that allows end users to access content using the internet, where the service is provided to the public, has a geographical link to Australia and is not an excluded service listed in paragraphs 3(1)(e) to (r) of Schedule 8 to the BSA (see subclause 3(1) of Schedule 8).

The Kayo service allows end-users who are members of the public to access content using the internet. The service is targeted at individuals who are physically present in Australia, and therefore the service has a geographical link to Australia as defined in clause 5 of Schedule 8 to the BSA. The service is not an excluded service under paragraphs 3(1)(f) to (r) of Schedule 8 to the BSA.

Paragraph 3(1)(e) of Schedule 8 to the BSA excludes from the definition of 'online content service' an 'exempt online simulcast service', which is a service of the kind defined in clause 4 of Schedule 8 to the BSA. While Hubbl sometimes provides such a service, it advised the ACMA that the online stream of the sports event identified in the complaint was not an exempt simulcast of a broadcasting service under clause 4 of Schedule 8 to the BSA. The ACMA is satisfied that this was the case. Therefore, the relevant content was subject to the Online Rules.

The ACMA has investigated whether the advertisement, the subject of the complaint, and the advertisement identified by Hubbl fell within the definition of 'gambling promotional content' in clause 2 of Schedule 8 to the BSA and if so, whether the advertisements were provided at a prohibited time, in contravention of section 12 of the Online Rules (**Issue 1**).

The ACMA has also investigated whether Hubbl made records sufficient to enable its compliance with section 21 of the Online Rules to be readily ascertained (**Issue 2**).

Relevant provisions of the BSA and the Online Rules can be found at **Attachment A**.

Issue 1: Was gambling promotional content provided in contravention of section 12 of the Online Rules?

Finding

The ACMA finds that Hubbl contravened section 12 of the Online Rules, and therefore also contravened subclause 25(1) of Schedule 8 to the BSA.

Reasons

To assess compliance with the prohibition on gambling promotional content during live coverage of sporting events in section 12 of the Online Rules, the ACMA asks the following questions:

1. Did the content fall within the definition of 'gambling promotional content'?

If yes, then,
2. What were the relevant restrictions that applied to the live coverage of the sporting event?
3. Was gambling promotional content provided at prohibited times during live coverage of the sporting event?

Did the content fall within the definition of 'gambling promotional content'?

'Gambling promotional content' means advertising, sponsorship or promotional content that relates to a gambling service (clause 2 of Schedule 8 to the BSA). For the purposes of Schedule 8, 'gambling service' is defined in clause 18 (relevantly for present purposes) and includes a service for the placing, making, receiving or acceptance of bets (see paragraph 18(a) in Schedule 8 to the BSA).

Having examined the records of streamed content provided to it, the ACMA is satisfied, and Hubbl accepts, that the advertisement identified by Hubbl for [wagering company 2] that was provided one minute after the conclusion of the AFL Match, was an advertisement which related to a service for the placing, making, receiving or acceptance of bets, and hence was gambling promotional content for the purposes of the Online Rules.

What were the relevant restrictions that applied to the live coverage of the sporting event?

Section 12 of the Online Rules provides that:

an online content service provider must not provide gambling promotional content on an online content service in conjunction with live coverage of a sporting event in the period beginning at 5:00 am and ending at 8:30 pm.

Subclause 21(1) of Schedule 8 to the BSA relevantly provides that gambling promotional content is provided on an online content service in conjunction with live coverage of a sporting event if it is provided 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. The advertisement for [wagering company 2] that was streamed one minute after the conclusion of the AFL Match was provided during that period.

Was gambling promotional content provided at prohibited times during live coverage of the sporting event?

Hubbl submitted to the ACMA that gambling promotional content from [wagering company 2] was provided and gave the following details:

Contrary to the complainant's allegation, we confirm that no gambling advertisements or betting odds promotions (including for wagering company 1) were shown during the quarter time, half time, or three quarter time of the Port Adelaide v West Coast Eagles AFL match on Kayo on 22 April 2023. However, our investigations have revealed that following the conclusion of the match a [wagering company 2] gambling advertisement was inserted on Kayo in an advertising break which commenced at 4:31pm (AEST).

...

Our investigations have revealed that the [wagering company 2] gambling advertisement was scheduled in compliance with the Online Rules, as the match was due to finish at 4:20pm and the relevant break commenced 11 minutes after the expected match finish time (which was anticipated to be well outside the 5 minutes post-match blackout period). However, the match unexpectedly ran for ten minutes longer than scheduled, which is unusual for AFL matches.

Noting the discrepancies between the content streamed in the course of the AFL Match as described by the complainant and as described by Hubbl, the ACMA, with the permission of the complainant, provided the complainant's User ID to Hubbl requesting that Hubbl provide information to confirm what the complainant would have seen while viewing the AFL Match.

Hubbl submitted information that listed the duration of each advertisement provided, and the details of the other content the complainant would have seen during the break in gameplay where advertisements did not fill the entire break. There was no gambling promotional content listed other than the gambling advertisement for [wagering company 2] reported by Hubbl that was provided into the live stream at the conclusion of the AFL Match.

The ACMA noted that Hubbl advised times as AEST and the complainant was located in Adelaide, when Australian Central Standard Time (ACST) was in operation, however the time zone difference does not account for the discrepancy.

The ACMA cannot account for the discrepancy in the information submitted by Hubbl about when a gambling advertisement was provided and that provided by the complainant about allegedly viewing a gambling advertisement during the AFL Match. However, on balance, the ACMA accepts the information submitted by Hubbl, based on their records of advertisements provided to the complainant's User ID, during the live stream, and accepts Hubbl's submission that only one gambling advertisement was provided prior to 8:30 pm.

Accordingly, the ACMA finds that providing the gambling advertisement for [wagering company 2] one minute after the conclusion of the AFL Match, at 4:31 pm (AEST), during the prohibited times of 5.00 am to 8:30 pm, as reported by Hubbl, was in contravention of section 12 of the Online Rules.

Contravention of subclause 25(1) of Schedule 8

Subclause 25(1) of Schedule 8 to the BSA provides that an online content service provider must not contravene the Online Rules. The ACMA finds that Hubbl has contravened section 12 of the Online Rules, and has therefore also contravened subclause 25(1) of Schedule 8 to the BSA.

Issue 2: Did the online content service provider make records sufficient to enable the provider's compliance with the Online Rules to be readily ascertained?

Finding

The ACMA finds that Hubbl did not contravene subsection 21(1) of the Online Rules.

Reasons

Under subsection 21(1) of the Online Rules, the provider is required to make records sufficient to enable its compliance with the Online Rules to be readily ascertained, including 'without limitation':

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

Hubbl submitted the following records that are relevant to compliance with subsection 21(1) of the Online Rules:

- > a document with the date and start and end times of the break, the break name (such as Half Time or After Play), the duration of the advertisement, the title and a description of the advertisement streamed to the complainant; and
- > an audio-visual recording of the live stream of the AFL Match.

The ACMA considers that, in these circumstances, Hubbl did make records sufficient to enable its compliance with the Online Rules to be readily ascertained. This included producing a recording of the live stream and a record to show the gambling promotional content streamed in contravention of the Online Rules. Accordingly, the ACMA finds that Hubbl did not contravene subsection 21(1) of the Online Rules.

Relevant provisions

Schedule 8 to the *Broadcasting Services Act 1992*

2 Definitions

gambling promotional content means:

- (a) advertising content; or
- (b) sponsorship content; or
- (c) promotional content;

that relates to a gambling service. [...]

online content service has the meaning given by clause 3.

online content service provider means a person who provides an online content service.

Note: See clause 6.

3 Online content service

(1) For the purposes of this Schedule, **online content service** means:

- (a) a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of an internet carriage service; or
- (b) a service that allows end-users to access content using an internet carriage service;

where the service:

- (c) is provided to the public (whether on payment of a fee or otherwise); and
- (d) has a geographical link to Australia;

but does not include a service to the extent to which it is:

- (e) an exempt online simulcast service; or
- (f) an exempt Parliamentary content service (within the meaning of Schedule 7); or
- (g) an exempt court/tribunal content service (within the meaning of Schedule 7); or
- (h) an exempt official-inquiry content service (within the meaning of Schedule 7); or
- (i) a service that enables end-users to communicate, by means of voice calls, with other end-users; or
- (j) a service that enables end-users to communicate, by means of video calls, with other end-users; or
- (k) a service that enables end-users to communicate, by means of email, with other end-users; or
- (l) an instant messaging service that enables end-users to communicate with other end-users; or
- (m) an SMS service that enables end-users to communicate with other end-users; or
- (n) an MMS service that enables end-users to communicate with other end-users; or
- (o) a service that delivers content by fax; or
- (p) an exempt data storage service (within the meaning of Schedule 7); or
- (q) an exempt back-up service (within the meaning of Schedule 7); or

(r) a service determined under subclause (2).

Note 1: SMS is short for short message service.

Note 2: MMS is short for multimedia message service.

(2) The ACMA may, by legislative instrument, determine one or more services for the purposes of paragraph (1)(r).

4 Exempt online simulcast service

(1) For the purposes of this Schedule, **exempt online simulcast service** means a service, or a part of a service, that is provided to end-users using an internet carriage service, and that:

(a) does no more than provide a stream of content that is identical to the stream of programs transmitted on:

(i) a commercial television broadcasting service provided under a commercial television broadcasting licence; or

(ii) a commercial radio broadcasting service provided under a commercial radio broadcasting licence; or

(iii) a subscription television broadcasting service provided under a subscription television broadcasting licence; or

(iv) a subscription radio narrowcasting service; or

(v) a subscription television narrowcasting service; or

(vi) a broadcasting service provided by the Special Broadcasting Service Corporation; and

(b) provides that stream of content simultaneously, or almost simultaneously, with the transmission of that stream of programs.

(2) For the purposes of subclause (1), in determining whether a stream of content is identical to a stream of programs, disregard any differences that are attributable to the technical characteristics of the provision or transmission (for example, video resolution or sound quality).

(3) For the purposes of subclause (1), in determining whether a stream of content is identical to a stream of programs, disregard the presence or absence of:

(a) a watermark-type logo; or

(b) a watermark-type insignia;

that is not gambling promotional content. [...]

5 Geographical link to Australia

(1) For the purposes of this Schedule, a service has a geographical link to Australia if an ordinary reasonable person would conclude that:

(a) the service is targeted at individuals who are physically present in Australia; or

(b) any of the content provided on the service is likely to appeal to the public, or a section of the public, in Australia.

(2) For the purposes of this clause, content is provided on a service if the content is:

(a) delivered by the service; or

(b) accessible to end-users using the service.

6 Online content service provider

(1) For the purposes of this Schedule, a person does not provide an online content service merely because the person supplies an internet carriage service that enables content to be delivered or accessed.

- (2) For the purposes of this Schedule, a person does not provide an online content service merely because the person provides a billing service, or a fee collection service, in relation to an online content service.

[...]

25 Compliance with the online content service provider rules

- (1) An online content service provider must not contravene the online content service provider rules.

[...]

Broadcasting Services (Online Content Service Provider Rules) 2018

10 Scheduled start of a sporting event

For the purposes of these rules, the scheduled start of a sporting event to be provided on an online content service is:

- (a) the specified time of commencement of the live coverage of play of the sporting event, which must be earlier than or at the commencement of actual play, as published or notified in a manner that is clear and prominent to potential end-users of the online content service at least 24 hours before the commencement of the coverage; or
- (b) otherwise, the time the live coverage of the sporting event commences.

Note 1: Paragraph (a) may be satisfied, for example, by including the specified time on the webpage where end-users are likely to access the online content service, by including it in an electronic program guide (if one is available to end-users), or by sending an email or push notification to end-users.

Note 2: For the avoidance of doubt, for the purposes of paragraph (b), any content that is part of the coverage of the sporting event, including, without limitation, content that:

- is hosted at, or takes place at the venue of the live sporting event;
- contains commentary or analysis on the live sporting event;
- contains highlights or replay coverage of the live sporting event; or
- involves or profiles participants in the live sporting event;

which is provided on the service before play has commenced, or during play, is content that consists of live coverage of the sporting event.

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

An online content service provider must not provide gambling promotional content on an online content service in conjunction with live coverage of a sporting event in the period beginning at 5:00 am and ending at 8:30 pm.

Note 1: Gambling promotional content (other than 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, and only if, the content is provided on the service during the period:

- (a) beginning 5 minutes before the scheduled start of the sporting event; and
- (b) ending 5 minutes after the conclusion of the sporting event. (See subclause 21(1) of Schedule 8 to the BSA.)

Note 2: For the avoidance of doubt, promotion of odds is a kind of gambling promotional content to which this section applies. Section 11 deals with commentator betting odds promotions and representative venue-based promotions.

[...]

21 Record of placement of gambling promotional material to be kept

- (1) An online content service provider who provides gambling promotional content on an online content service in conjunction with live coverage of a sporting event must make records sufficient to enable the provider's compliance with these rules to be readily ascertained, including without limitation:
 - (a) written records of the date and duration of the content stream of the live coverage of the sporting event and the location of the relevant end-users where known; and
 - (b) audio or audio-visual records, as the case may be, of the stream of the live coverage of the sporting event.
- (2) A written record, made in accordance with paragraph (1)(a), must be retained in the online content service provider's custody for at least 6 months after the day the live coverage of the sporting event to which the record relates was provided on the online content service.
- (3) An audio or audio-visual record, made in accordance with paragraph (1)(b), must be retained in the online content service provider's custody:
 - (a) for at least 6 weeks after the day the live coverage of the sporting event to which the record relates was provided on the online content service; or
 - (b) if, before the end of those 6 weeks, the provider becomes aware that a complaint has been made about compliance with these rules, in respect of that sporting event—for at least 90 days after the day the live coverage of the sporting event was provided.